

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38957
Docket No. MW-39215
08-3-NRAB-00003-050727
(05-3-727)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S Record Suspension of thirty (30) days and probation period of three (3) years] imposed upon Mr. T. L. Sibley for Maintenance of Way Operating Rules 1.1.2, Alert and Attentive, and 1.11, Sleeping, while on TP02 Gang Bus parked in Ft. Madison Yard, Iowa on August 11, 2003 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-03-S090-2/10-03-0453(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall now be set aside and removed from Mr. T. L. Sibley's record and he shall be compensated for any and all wage loss.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was employed as a Laborer at the time of the incident and has worked for the railroad since 1990. He was assigned to the TP02 gang on February 24, 2003. According to the testimony of both the Foreman and the Assistant Foreman of gang TP02, the Claimant was seen stretched across two bus seats and asleep on the morning of August 11, 2003 in the gang bus. The Claimant denied that he was asleep. At the time that the Claimant was allegedly asleep, the other members of his gang had already exited the bus and begun to unchain and get machines off cars to go to work.

By letter dated August 14, 2003, the Claimant was directed to attend an Investigation at the Carrier's conference room in Ft. Madison, Iowa, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive on Monday, August 11, 2003, when you were allegedly found sleeping while on TP02 Gang Bus which was parked in Ft. Madison Yard, Iowa, at approximately 7:20 AM."

Following the Investigation the Claimant was notified by letter dated August 29, 2003, that as a result of the Investigation, he was "found sleeping while on TP02 Gang Bus which was parked" in the Fort Madison yard at approximately 7:20 A.M. and that he was being "issued a Level S Record Suspension of thirty (30) days for violation of Maintenance of Way Operating Rules 1.1.2 Alert and Attentive, and 1.11, Sleeping." The letter added that the Claimant had been "assigned a probation period of three (3) years from the date of this letter."

The two Operating Rules cited provide respectively as follows:

“1.0 General Responsibilities

1.1 Safety

* * *

1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

* * *

1.11 Sleeping

Employees must not sleep while on duty, except as outlined under Rule 1.11.1 (Napping).

Employees reclined with their eyes closed will be in violation of this rule.”

In processing its appeal on behalf of the Claimant the Organization made three arguments as to why the discipline should be set aside or reduced: 1) the Hearing Officer was prejudiced and had prior involvement in the Investigation; 2) the Foreman and the Assistant Foreman each gave testimony that contradicted the other's testimony and therefore each gave false testimony; 3) the discipline was excessive.

It is true that the Hearing Officer had prior knowledge of the matter being investigated. He provided advice to the Roadmaster regarding what action to take after the Claimant was allegedly found sleeping on the gang bus while other members of his gang were working. In addition, at the Hearing, one of the

questions he asked showed knowledge of the case from a source other than evidence given at the Hearing.

There is nothing in the Agreement which prohibits a Carrier official with prior knowledge of the case from serving as Hearing Officer in the Investigation. Nor is there anything inherently unfair for someone with some knowledge of the facts to conduct the Investigation so long as that person does not give evidence as a witness in the case or make a determination of a fact or an issue based on personal knowledge instead of evidence adduced in the Investigation.

What is essential is that the Claimant and the Organization be given every reasonable opportunity to present relevant evidence through witnesses who have knowledge of the facts, to freely cross-examine the Carrier's witnesses in accordance with commonly accepted Rules of procedure, and to introduce relevant documentary evidence. They must be allowed to present a defense and rebuttal. The Organization must be permitted to object to any evidence offered and to have its objection noted in the record. In addition, before the conclusion of the Investigation the Claimant and the Organization should be allowed to make a statement or argument in support of their position regarding the issue or issues under investigation. If all of these procedural safeguards are followed, the Board will then have a full and complete record before it in deciding the case, which is the best protection for a fair decision in the case.

It would also be expected that neither the Hearing Officer nor the decision-maker for the Carrier be someone who is biased or prejudiced against the Claimant or have a conflict of interest regarding the outcome of the Investigation. Either situation could produce a tainted result in the Investigation.

The Board carefully perused the record and is satisfied that the Claimant and the Organization were able to present all relevant evidence they desired to, to cross-examine the witnesses, and to voice objections to hearsay evidence they felt to be improper. Objections were duly noted in the record. As another example of the fairness of the proceeding, the Board notes that the Hearing Officer was solicitous of the Organization's needs and saw to it that witnesses requested by the Organization were brought to the Hearing to testify even though, so far as the record indicates,

the Carrier had no intention of its own to call those witnesses and had not been apprised beforehand that the Organization wanted them to testify.

There is no evidence or indication in the record that either the Hearing Officer or the decision maker (who was someone other than the Hearing Officer) was biased or prejudiced against the Claimant. Prior knowledge of certain facts may not be equated with bias or prejudice against the Claimant. There is no indication of a conflict of interest on the part of either the Hearing Officer or the decision-maker. The Board has a full and complete record before it and is able to make a reasoned judgment regarding the Carrier's disciplinary action in this case.

It is true that there is a discrepancy between the testimony of the Foreman and the Assistant Foreman regarding certain details of the circumstances under which they identified the Claimant as being asleep on the bus. On the basic facts, however, the testimonies are in harmony. Both testimonies agree that the Claimant was lying on two seats in the back of the bus stretched out with his legs across the center aisle and that he was asleep. "The amount of detail remembered drops off sharply in the first few hours and days after the event and then decreases only insignificantly thereafter." Brown, Legal Psychology 88-89 (1926) cited in Morgan, Maguire, and Weinstein, Evidence Cases and Materials 169 (1957).

That the Foreman and the Assistant Foreman testified truthfully on the basic factual issue of whether the Claimant was asleep on the bus is supported both by the Claimant's own statement at the conclusion of the Hearing and in the testimony of his own witness. In his statement the Claimant asserted, in criticism of his Foreman, that "She seen me on the bus, but made no effort to wake me up or to see if I was okay." In addition, a coworker of the Claimant's called to testify at the Organization's request, testified that he saw the Claimant on the back of the bus being spoken to by the Roadmaster, "and a little bit later he comes up to me while we were unloading machines and said they, said they caught him sleeping on the bus or something of that nature." The Board finds the Claimant's admission and the coworker's testimony to be cogent corroboration of the Foreman and Assistant Foreman's testimonies that the Claimant was asleep on the bus.

The Board finds that the Carrier established by substantial evidence that the Claimant was asleep on the TPO2 gang bus on the morning of August 11, 2003, when other members of his gang were unloading machines and he should have been working together with them instead of being asleep on the bus. The Claimant's conduct, the Board finds, constituted a violation of Maintenance of Way Operating Rule 1.11, Sleeping.

With regard to the alleged violation of Maintenance of Way Operating Rule 1.1.2 Alert and Attentive, the precedents cited by the Carrier show that Rule 1.1.2 has also been found to have been violated when a violation is found of the Rule against sleeping on duty. See, for example, Award 40, Public Law Board No. 6407; Case 38, Public Law Board No. 4104; Award 48, Public Law Board No. 2406; and Award 14, Public Law Board No. 6522. The rationale for finding a violation of a Safety Rule when an employee is sleeping on duty is found in Award 50, Public Law Board No. 3445: "It is well established that in an industrial atmosphere, the interests of safety are best served when all employees on duty are alert and at their stations." The Board finds that by being asleep during duty hours instead of working together with his gang on his assigned tasks the Claimant also violated Rule 1.1.2 Alert and Attentive.

On the issue of whether the penalty assessed was excessive, the Board notes that the decision letter assessing discipline included the statement that in assessing discipline consideration was given to the Claimant's personal record. Based on the seriousness of the violations found and review of the Claimant's disciplinary record with the Carrier, the Board is unable to find that the discipline assessed in this case was excessive.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 2008.