

Award No. 12988

Docket No. MW-13279

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The discharge of Crossing Watchman H. D. Ferrell was unjust, unfair and on the basis of improper and unproven charges.

(2) Crossing Watchman H. D. Ferrell be reinstated, with seniority, vacation and other rights unimpaired and that he be allowed eight (8) hours' pay for each day that a junior employe works as a crossing watchman.

OPINION OF BOARD: In a letter dated September 11, 1961, Carrier notified Crossing Watchman H. D. Ferrell assigned to the third shift at Market Street Crossing, Chattanooga, Tennessee, that he was charged with being asleep during his tour of duty 11:00 P.M., September 7, 1961 to 7:00 A.M., September 8, 1961. After a hearing on September 18th, Mr. Ferrell was notified on October 9, 1961, that he was discharged from service.

Watchman Ferrell makes claim that his dismissal was unjust, unfair, and based upon unproven charges. Carrier denies the claim with the assertion that the evidence presented at the investigation of September 18, 1961, supports the charge and warranted the penalty. It contends from the testimony presented by Sergeant of Police Sullins and Yardmaster Jones, it is apparent that the Claimant was asleep on duty. In the course of their checks, they observed him with his head inclined to one side, his eyes closed, his mouth wide open, and his feet propped up on the shelf across from the chair in which he was reclining. Furthermore, it points out that Claimant on August 9, 1961, a short time previous to this charge, had been cautioned by the Assistant Trainmaster about sleeping on duty.

In our study of the transcript of the investigation, we find that Sergeant of Police Sullins and Yardmaster Jones based their opinion that Mr. Ferrell was asleep on appearances rather than on conclusive proof. They stated they did not touch or shake him to awaken him. Moreover, they admitted that they observed him get up from his chair without being roused by them to perform properly his duties of operating the lights and bells for the protection of street traffic upon the approach of trains.

His brief delay in responding to their appearance and conversation outside of his shack may be attributed to the fact that he considered them as conversing passers-by, a common occurrence on Market Street during the night hours. He became aware of who they were and addressed them before they spoke directly to him.

His reclining position with his leg elevated may have given him the appearance of being asleep, but this posture is not necessarily a proof of actual sleep. In view of his medical history of phlebitis, it is understandable why he took the precaution of keeping his leg propped up wherever possible.

We have considered Carrier's evidence in its most favorable light, but we find that it fails to substantiate the charge that Mr. Ferrell was asleep on duty. We, therefore, hold that the disciplinary action was improper; and accordingly, the claim is allowed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1964.

CARRIER MEMBERS' DISSENT TO AWARD NO. 12988, DOCKET NO. MW-13279

This Board has, through the years, adhered to the well-established principle that, in cases involving discipline, it will not attempt to pass upon the credibility of witnesses, or to weigh the evidence, but if the evidence is such that, if believed, it supports the findings of the Carrier, the Carrier's action will not be disturbed. (Awards 11531, 1124, 11324, 10791, 10642, 10571, 9494, 9493, 9322, 9046, among others.) There is no reason why this basic principle should not have been adhered to by the Referee in Award 12988. If it had been adhered to, the claim could only properly have been denied because there was substantial evidence in the investigation to support the finding of the Carrier that the Claimant was asleep during his tour of duty.

The record also shows, and is not disputed, that a short while previous to the occurrence on September 7, 1961, the Claimant had been warned about sleeping on duty.

The Award is erroneous and we dissent.

P. C. Carter
D. S. Dugan
R. E. Black
T. F. Strunck
G. C. White