

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CLINCHFIELD RAILROAD COMPANY

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

(1) The Carrier's dismissal of B&B Laborer H. J. Whitson on April 10, 1963 was without just and sufficient cause, was based upon unproven charges and was, therefore, in violation of the Agreement.

(2) B&B Laborer H. J. Whitson be returned to his former position with vacation, seniority and all other rights unimpaired, that he be paid for all time lost and that his record be cleared of the charges.

OPINION OF BOARD: This claim presents three issues of fact:

- (1) Was the Claimant asleep on the job at Bridge 238.67 on April 4, 1963;
- (2) Did Claimant make a false claim of an on the job injury on April 6, 1963;
- (3) Did Claimant habitually sleep on the job?

This Board is fully cognizant of a long line of discipline cases which hold we may not pass upon a conflict of evidence, the credibility of witnesses, nor substitute our judgment for that of the Carrier in the assessment of discipline. In the instant case we find the Carrier failed to establish that Claimant was in fact asleep on April 4, 1963. The witness Canipe testified that the Claimant was **apparently** asleep. The testimony shows that Canipe did in fact lay hands upon the Claimant, and it is uncontroverted that two doctors found Claimant suffering from back sprain. It is not unreasonable that the symptoms of back sprain would not become apparent to the Claimant until evening on the day on which the sprain was inflicted, and it is not unreasonable that Claimant attributed the presence of back sprain to the incident which occurred in the forenoon of April 4, 1963 when Mr. Canipe laid hands on Claimant.

In the matter of the allegation that Claimant made a habit of sleeping on the job, we find no evidence to support this allegation.

In the circumstances we must conclude that the Carrier acted in an arbitrary manner, and we find the Claim must be sustained, the Claimant be returned to his former position with vacation, seniority and all other rights unimpaired, and that he be paid for all time lost, less any earnings he may have made elsewhere during the period commencing April 10, 1963 to the date of his restoration to service.

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 Employee involved in this dispute are respectively Carrier and Employee 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 26th day of February 1965.