

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20348
Docket Number CL-20482

David P. Twomey, Referee

(Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express and Station Employees
((formerly Transportation-Communication Division, BRAC)
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk and Western Railway Company, GL-7397, that:

(1) Claim of the General Committee that the Carrier violated the terms of the Telegraphers' Agreement, when on October 19, 1972, it dismissed Dave Ewton without just reason or cause; and

(2) As a consequence Carrier shall:

- (a) Clear service record of Dave Ewton of the charge and any reference in connection therewith.
- (b) Promptly restore Dave Ewton to duty with seniority, vacation and other rights restored.
- (c) Pay Dave Ewton the amount of wages he would have earned absent the violative act.
- (d) Pay Dave Ewton any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Co., under Group Policy No. GA-23000; and in the event of the death of Dave Ewton pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare and life insurance.
- (e) Pay interest at the statutory rate for the State of Illinois for any amounts due and withheld as a result of the Carrier's action in dismissing claimant.

OPINION OF BOARD: Claimant, a telegrapher, was dismissed from service, after an investigation, on a charge of sleeping while on duty on the 11:00 P.M. to 7:00 A.M. assignment of August 28, 1972.

A review of the entire record, including the transcript of the October 9, 1972 investigation, shows that none of Claimant's substantive procedural rights were violated. The argument of the Organization that Carrier violated Rule 31(a) by not holding the hearing within the ten day limit of that rule was not argued on the property and it is well established that it cannot now be considered by the Board.

Claimant denied that he was asleep. Carrier presented two witnesses that, while not agreeing on all circumstantial points, did agree that Claimant was asleep. It is well settled that this Board shall not attempt to weigh evidence, or resolve conflicts in evidence in its appellate capacity. There is substantial evidence, even though controverted, to support the charge. Accordingly, this Board holds that the Carrier sustained its findings of Claimant's guilt.

This Board has authority to consider whether imposed discipline is reasonable (Dorsey -- Award 13179). In a number of prior Awards rendered by this Board, where a discharge from service for sleeping on duty has been found to be reasonable, there has been another culpability factor present. For example: Second Division -- Award 6459 (Bergman) previous discipline for sleeping on job, Award 6372 (Bergman) previous reprimand for sleeping on job; Third Division -- Award 9863 (Weston) possession of alcohol and four past incidents of sleeping, Award 14865 (Ives) sleeping plus holding a second job without express permission of Carrier in violation of explicit work rule. See also Award 20027 (Blackwell) which involved the same Carrier, the same work rules (427 and 427(a)) and a similar job classification and differing in that in 20027 the Claimant had eight years clear service while in the present case Claimant had been an employee for "just a few months": in 20027 the discipline upheld by this Board was a fifteen day suspension.

Under all the facts and circumstances presented in the record, the Board is of the opinion that a permanent dismissal was not warranted in this case and is excessive.

Based on the entire record the Board finds:

- (1) That discipline was warranted; and
- (2) That permanent dismissal was excessive.

The Board awards that Claimant shall be restored to Carrier's service with seniority, vacation and other rights restored, but without pay for lost time. There is no agreement support for Items 2(d) and 2(e) of the Claim.

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

That the parties waived oral hearing;

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 discipline imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July, 1974.