

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21054
Docket Number MW-20866

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company

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

(1) The discipline of Drawtender C. A. Moss on the unfounded, unsupported and unsupportable charge that he was "asleep on duty at approximately 4:25 a.m. August 9, 1973" shall be rescinded and the claimant shall be favored with the remedy prescribed within Rule 32(c).

OPINION OF BOARD: Claimant C. A. Moss was employed as a drawbridge tender by Carrier on the Eastern Branch Drawbridge, regular hours 11:00 p.m. to 7:00 a.m. On August 9, 1973 Claimant was removed from service for a 60-day actual suspension on the following charge:

" . . . for your responsibility in connection with violation of Rule 427-A, Operating Book of Rules, while asleep on duty at approximately 4:25 A.M., August 9, 1973, while assigned to the 11:00 P.M. Eastern Branch Bridge assignment of August 8, 1973."

For the record, Rule 427-(a) of the Operating Book of Rules reads as follows:

"Lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered as sleeping."

The record reveals that on January 25, 1973 a deferred suspension of 30 days was entered against Claimant's record when he was discovered sleeping on duty in violation of Rule 427(a) on January 25, 1973. Therefore, the net effect of the 60-day August 9, 1973 suspension was to activate that earlier deferred suspension and create a total of 90 days actual suspension from service from August 9, 1973 to November 4, 1973. Claimant requested a hearing and investigation in this matter and, accordingly, a formal hearing was held on August 24, 1973. Following the investigation Claimant was informed by letter dated September 6, 1973 as follows:

"Norfolk, Va., September 6, 1973
File: Record

Mr. C. A. Moss
106 Nicholson Street
Portsmouth, Virginia 23702

"Dear Mr. Moss:

As a result of formal investigation conducted on August 24, 1973, by Trainmaster R. W. Parham to determine your responsibility in connection with violation of Rule 427-A, Operating Book of Rules, while asleep on duty at approximately 4:25 A.M., August 9, 1973, while assigned to the 11:00 P.M. Eastern Branch Bridge assignment of August 8, 1973, the application of discipline rendered in my letter of August 9, 1973, to you remains unchanged.

Yours very truly,

R. T. Goode
Terminal Supervisor B&B

cc: Mr. J. H. Bowen, General Chairman
Brotherhood of Maintenance of Way Employees
Roanoke, Virginia - with copy of transcript of
investigation

Received by CHARLES A. MOSS /s/

Date & Time Sept. 6, 1973 6:00 P.M.

Witness W. W. Fuller /s/ "

By letter dated September 25, 1973 the Organization filed the instant claim challenging the discipline on several grounds, to wit: lack of evidence; partiality of the Hearing Officer and indifference, arrogance and hostility of the Carrier witness toward Claimant. Later in handling on the property the Organization raised other procedural objections relative to lack of a fair and impartial investigation. Carrier declined the various appeals of the claim, essentially positing that Claimant had a fair hearing, the evidence clearly supported the charge of violating Rule 427(a) and the penalty was not arbitrary and capricious under the circumstances.

Review of the hearing transcript reveals a diametric and dramatic conflict of testimony between the only two witnesses to the events of August 9, 1973. The Assistant Superintendent stated that he approached Claimant's control tower and stood at the window for five minutes before knocking. He asserted that the window was clean and the room was illuminated and that he observed the following:

"At 4:25 a.m. I observed Bridgetender C. A. Moss seated in at chair, tilted back, with his feet propped on a stove, his chin resting on his chest and cheek on right shoulder with eyes closed. I made this observation while standing on the catwalk of the control shack of the Bridge looking through a clear window into a lighted room. I observed Mr. Moss in this condition from 4:25 a.m. until 4:30 a.m., by my watch. I had previously tried the door to the shack and found it locked. While making this observation, I observed what appeared to be a pistol in a holster lying on the table. There was a door at the opposite end of the shack and I didn't know whether it was opened or closed, and I didn't want to walk into this building with this man asleep and the pistol lying there. I tapped on the window. When I did, Mr. Moss bolted from the chair. He did not just stand up. He jumped out of his chair, approximately 5 feet with a wild stare at the window in my direction. He was totally unaware of my presence. The loud tapping on the window outside aroused him and startled him very, very much. I told him to unlock the door, which he did."

Glass also testified that he accused Claimant of sleeping per Rule 427(a), that Claimant denied same, and that he thereupon contacted Claimant's supervisor for a relief for Claimant and relieved Claimant from duty.

When Claimant testified he stated that he was sitting upright in his chair, did not have his feet on the stove, had his head up and eyes open at all times and was neither sleeping nor in the position described in Rule 427(a). He testified that he opened the door for the Assistant Superintendent as soon as the latter knocked. The balance of his testimony relative to the confrontation over the sleeping charge and his relief from duty is in all material respects the same as the Assistant Superintendent's.

The limited scope of our review in discipline cases is well known. It is also abundantly established that we do not resolve at this appellate level pure conflicts of testimony or credibility. See Awards 9322, 19487, 19786, et al. The Organization herein argued, and we do not disagree, that the word of a supervisor is entitled to no greater credibility per se than the conflicting story of an employee. But that is not the issue herein nor our basis for review. Rather, we must inquire as to whether the evidence adduced at the hearing reasonably supports a finding of Claimant's culpability. Where the determination of the hearing officer is unsupported by believable evidence or so contrary and unrelated to probative evidence as to be unreasonable we have not been remiss in our obligation to reverse the disciplinary decision. But such is not the case here. In our judgment there is no showing of unreasonableness, bias, prejudice or predetermination shown on this record to impeach the determination of the hearing officer that events transpired essentially as described by the Assistant Superin-

tendent. That being the case, there is substantial evidence, albeit the contradicted testimony of Carrier's witness, to support findings of actual sleeping on duty or violation of Rule 427(a). Contrary to the Organization's contentions we can perceive no prejudicial procedural flaw on this record. Nor, in consideration of the nature of the misconduct and the past record of Claimant can we deem a 90 day actual suspension excessive discipline for sleeping on the job. Accordingly, we have no alternative but to deny 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.