

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21377
Docket Number CL-21315

Dana E. Eischen, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7942)
that:

(a) The Southern Pacific Transportation Company violated the current Clerks' Agreement when it dismissed Mr. L. A. Gales from service following investigation at which the evidence adduced failed to sustain the charges; and

(b) The Southern Pacific Transportation Company shall now be required to reinstate Mr. Gales with full seniority rights, all hospital and insurance benefits unimpaired, full back pay and allowances for each day held out of service, and with all other rights and benefits unimpaired.

OPINION OF BOARD: Claimant, Mr. L. A. Gales, at the time this claim arose was employed as second-shift clerk at Carrier's Homestead Yard, Oakland Terminal. Following a hearing and investigation into an incident of August 1, 1974 Claimant was dismissed from all service by letter dated August 28, 1974 reading as follows:

"Evidence adduced at formal investigation held at Oakland, California, on August 20, 1974, established your responsibility for failure to properly discharge your duties and for sleeping during your tour of duty the morning of August 1, 1974.

"Your actions in this case constitute violation of that portion of Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company, reading:

'Employees must report for duty at the prescribed time and place, remain at their post of duty and devote themselves exclusively to their duties during their tour of duty.....'

'Employees must not sleep while on duty. Lying down or assuming a reclining position with eyes closed, or eyes covered or concealed, will be considered sleeping.'

"For reasons stated you are hereby dismissed from the service of the Southern Pacific Transportation Company.

"Acknowledge receipt of this letter on duplicate copy and arrange to turn in any Company equipment and passes in your possession."

The basis for the charges against Claimant were that on August 1, 1974 he allegedly was caught sleeping on the job by the Assistant Trainmaster and also he allegedly failed to roll or check two trains that night, the BAX and the RGSFF before they departed the yard.

Review of the record reveals an absolute conflict in testimony regarding the question of whether Mr. Gales was sleeping on duty on August 1, 1974. The Assistant Trainmaster D. J. Payne, was in the yard office on August 1, 1974 and testified at the hearing to the following: 1) The Yardmaster tried twice to reach Claimant by intercom without success about 2:45 A.M.; 2) Payne went to Gales' office and found the latter in his desk chair, feet on the desk, eyes closed and dozing; 3) Payne called Gales' name loudly twice without receiving a response; on the third yell Gales awoke; 4) Payne admonished Gales for sleeping and told him; the Yardmaster was trying to reach him; 5) Gales apologized for sleeping and told Payne he had heard nothing from the Yardmaster; 6) The Yardmaster called Gales again regarding the RGSFF train for 3:00 A.M. departure; 7) The Yardmaster called Payne about 3:45 A.M. to complain that Gales had checked neither the RGSFF nor the BAX which had departed about 2:00 A.M.; 8) Payne confronted Gales at about 4:00 A.M. regarding failure to check the trains, Gales confirmed he had not done so but stated this was because the Yardmaster had not told him they were made up. The testimony of Claimant Gales contradicts that of Payne on every material point, to wit: 1) He was not sleeping at any time while on duty and that when Payne came into his office he was not at the desk but sitting at a chair behind the door; 2) That his feet were on the floor, his eyes open and that Payne did not call his name at all but began immediately to talk with him; 3) That he did not apologize for sleeping and that he denied sleeping and told Payne he had not checked RGSFF and BAX because no one told him to.

We have analyzed the evidence in this case carefully, confining our consideration to the points raised and argued on the property. Several interesting arguments were raised de novo at the Board level but we cannot consider them herein. Rather, the discipline of Mr. Gales has been appealed by the Organization as stated supra in the claim on the sole question of "evidence adduced failed to sustain the charges." We do note that Claimant was not informed by the Yardmaster to check BAX on August 1, 1974 and, if this were the only charge herein, the Organization might have prevailed on appeal. But the other two charges, viz., sleeping on duty and failure to check RGSFF are supported amply if the testimony of Assistant Trainmaster Payne is believed rather

than Claimant's flat denial. The testimony is directly contradictory on the central determinative fact of this case. To sustain this claim we would have to determine the credibility of the two conflicting uncorroborated witnesses.

It is well established that this appellate tribunal does not assess de novo the veracity of witnesses. Nor as a practical matter is it possible to do so absent opportunity to observe demeanor and testimonial capacity first hand.

Rather, our review in discipline cases is restricted to determining:

- 1) Whether Claimant was afforded a fair and impartial investigation;
 - 2) Whether the charges are supported by substantial record evidence; and
 - 3) Whether, in all of the circumstances, the penalty assessed was so disproportionate to the offense as to be arbitrary, unreasonable or capricious.
- When an employe or his representative alleges contractual violations in a discipline discharge case it is our responsibility to focus on these three areas of appellate review and determine if the managerial action is supported by the record. Notwithstanding our limited appellate scope, the employer in our discipline cases, as in all of American labor-management arbitration both private and public section, bears the burden of persuasion when challenged under the contract with disciplining an employe on insufficient evidence.

We have reviewed carefully the record before us in light of the foregoing elementary and well established principles. There is no indication in the record developed on the property that the hearing and investigation was other than fair and impartial. The record evidence, if believed, is substantially supportive of the charges against Claimant. We do not resolve credibility issues per se but we can and do determine if evidence is so wholly inadequate that its acceptance by Carrier officials as a sole basis for discipline is palpably unreasonable. We are unable to so conclude with respect to the testimony of the Assistant Trainmaster herein. Finally, in light of the proven charges against Claimant and his overall personnel record, we cannot say that discharge is arbitrary, unreasonable or capricious. Accordingly, we are constrained 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 Employes involved in this dispute are respectively Carrier and Employes 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

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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. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

