

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24316
Docket Number CL-23977

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
{ Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9405)
that:

1. Carrier violated the Agreement between the parties when it arbitrarily, capriciously and with abuse of discretion assessed Clerk G. Medlock 60 days actual suspension, on September 1, 1979 and dismissed him from service, October 12, 1979, for attempting to defend himself from the charge in the initial hearing.

2. Mr. Medlock shall be returned to service with all rights and privileges unimpaired and compensated for all lost time.

OPINION OF BOARD: This case involves two separate disciplinary actions. The first one involves a 60-day suspension which was comprised of a 30-day actual suspension for sleeping on the job and a 30-day deferred suspension which was then activated. The second involves dismissal for alleged misconduct during the investigation into the charges regarding sleeping on the job. We will consider each incident separately.

Regarding the portion of the 60-day suspension related to the 30-day deferred suspension, the Board notes that it was considered by Public Law Board 1790 and it was denied in Award No. 122 of that Board. Thus, this Board has no jurisdiction and will consider the 30-day actual suspension only.

On August 21, 1979, the Claimant was directed to attend an investigation scheduled for August 24, 1979. The letter of charge read in pertinent part as follows:

"You are hereby charged with sleeping while on duty and under pay in the Yard Office Building, North Kansas City, Missouri, at approximately 6:20 a.m., August 13, 1979, during the assigned hours of your regular position #108 MBY&T Clerk MO - 11:00 p.m. to 7:00 a.m."

The investigation was held as scheduled and as previously noted, the Claimant received a 30-day suspension.

In considering the evidence on the 30-day suspension, the Board concludes that there is substantial evidence to support the charge. Mr. J. O. Clements testified as follows:

"Yes, sir, at 6:05 a.m. the Yardmaster Osborn called down to the Chief Clerk in the IBM room to carry the KCS bills to the light tower. There was no answer at that time. I left the tower and went down to the Operator's room and I noticed that the KN operator and KN helper were in the operator's room. I walked into the IBM Chief Clerk's room and the only person that was in there was Mr. Medlock sitting at the keypunch machine on the north wall with his eyes closed, arms crossed, head bowed, snoring."

"As I was stating, when I walked into the room I saw Mr. Medlock at the machine with his arms crossed with his head bowed, snoring. I stood by the keypunch at the door and I looked at my watch. It was 6:17 a.m. and then I walked over to the FYCLE clerk's desk and I was looking at him straight towards him and noticed that there was still bills to be worked up and I sat in the Chief Clerk's chair. At 6:27 a.m. Mr. Medlock raised up and looked up and saw me sitting by him. At that time I asked him if he had a nice nap. He said 'I must have.' While he was saying that he picked up his watch and was looking at the time. I went over to the IBM copier and made of copy of the list and I came back and asked what I must do and he said, 'Do what you have to do.' I looked at my watch at this time, which was 6:40 a.m. At this time I relieved Mr. Medlock of his duties."

The Claimant denies being asleep and having said anything to Clements except that he was not sleeping. He admits to not performing his duties during this period of time and to having his glasses off, but contends that he was not in a slouched position. It is noted that he did not deny that he remained in the same position during this period. The Claimant accounts for the ten-minute period as follows:

- "Q. Mr. Medlock, Mr. Clements stated that he observed you from 6:17 a.m. to 6:27 a.m., a period of ten minutes, a time at which time your position did not change in the chair. How do you account for these ten minutes?
- A. The ten minutes that he observed me I don't know about. The position he is talking about, being in a slouched position, that is not true, however, I did sit in the chair for ten minutes and he did observe me for ten minutes as I observed him for ten minutes."

While the evidence conflicts, it is not our function due to the appellate nature of the Board, to resolve conflicts in evidence or to assess credibility. We are limited in reviewing the evidence as a whole to determine that there is substantial evidence to support the hearing officer's findings including credibility and conflicts in evidence. It is the Board's conclusion that there is substantial evidence to support the hearing officer's decision to believe Mr. Clements. Mr. Clement's testimony was clear and specific in comparison with the Claimant's which failed to adequately explain the ten-minute interval. The Claimant does not deny that Mr. Clement sat in the chief clerk's chair and observed him but says only

that he wasn't asleep and that he was watching Mr. Clements in return. There is a substantial basis not to believe this as it is not reasonable to believe that anyone would remain in the same position for ten minutes if they were aware (thus not sleeping) that they were being observed by a supervisor. A person who was in fact not asleep and who noticed that they were being observed by a supervisor in most probability would have brought immediately to the attention of the supervisor that they were not asleep.

The second charge relates to the Claimant's behavior during the first investigation. He was charged with "... unbecoming and disrespectful conduct ...". The investigation was held on October 3, 1979, and the Claimant failed to appear after proper notice. The Board should first note that in similar circumstances, the Board has held the failure to appear at the hearing, places the employe in peril. For instance, see Second Division Award 6499, Third Division Award 13127 and Third Division Award 20113. Thus, we conclude that the hearing was conducted in a fair and impartial manner. It is also the conclusion of the Board that the facts disclose that the hearing established that the Claimant was guilty as charged.

Regarding whether discharge would be appropriate for such behavior, the Board finds that it is, when viewed in light of the Claimant's past record which includes a deferred suspension for a very similar behavior. The past record indicates that the cause of the discipline was "harrassing, using verbal slurs and insinuations, engaging in horseplay, and interfferring with Clerk Nels in the performance of work." He also had in addition to the 30-day suspension for sleeping, a deferred suspension for playing cards on duty. The Carrier's decision not to tolerate an employe with the Claimant's record and attitude is not arbitrary or capricious.

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

That the Agreement was not violated.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April 1983.

