

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31146  
Docket No. MW-31833  
95-3-94-3-136

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Elgin, Joliet and Eastern Railway Company

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

- (1) The dismissal of Track Foreman V. Dickerson for allegedly assuming the attitude of sleep at about 11:30 A.M. on March 1, 1993, alleged falsification of Foreman's Field Labor Information Report and for assuming responsibility for damage to Air Compressor No. 223 and an EJ&E utility pole and electrical service contained thereon at Hartsdale Interlocking at approximately 8:20 A.M. on March 11, 1993 was harsh, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File SAC-10 & 11-93/UM-17-93).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority unimpaired, his record shall be cleared of the charges leveled against him, including (10) demerits assessed for assumption of responsibility rendered under false pretenses, and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was charged with and dismissed for assuming "\*\*\*\* the attitude of sleep\*\*\*\*" and falsifying "\*\*\*\*the Foreman's Field Labor Information Report\*\*\*\*", i.e., the payroll.

There is no question that Claimant was culpable of the charges. He admitted same during the Investigation. It is his contention that because he is diabetic, the usual insulin shot lasts four hours which is sufficient to cover the morning, he naps during the lunch hour and is then able to finish the day. But in this instance he did work gauging track that must have caused an imbalance quicker than usual and that he did doze off earlier than usual.

Regarding the falsified report of claiming 8 hours work when he was asleep for at least 20 minutes of the eight hours, Claimant attempted to shift the responsibility to his Supervisor contending if he had questioned it, he would immediately have changed it. That's begging the point, Claimant is a Foreman, enjoying Foreman's pay and perks. Part of that responsibility is preparing honest reports, including payrolls and when he does not, he suffers.

Regarding the reason for sleeping - the diabetic condition, this may be a matter for another forum or for the medical experts, but it is an admitted fact Claimant was indeed sleeping on the job and while asleep he did not and could not function as a Foreman.

Claimant is guilty as charged.

The Employee's, however, have challenged the amount of discipline because of the peculiarity of Rule 57(b) - wherein the parties have agreed that:

"\*\*\*\* No evidence or statement made will be used in considering the discipline administered except such as may be introduced at the hearing and subject to cross-examination"

When handling the dispute on the property, the Carrier stated that:

"The degree of discipline was determined upon consideration of the circumstances involved, the gravity of the offense, and Claimant's prior record."  
(underscoring added)

Because of the aforequoted, strengthened by Third Division Awards 30116 and 30117, the Employees have challenged the forty demerits assessed Claimant which when added to the 88 demerits Claimant had accumulated, made him a candidate for dismissal.

The charges of sleeping on duty, falsification of reports, are serious charges, either of which could be cause for dismissal, as others no longer in the Industry are aware. In this case we have both indiscretions admitted to.

In Third Division Awards 30116 and 30117 it was found that unless the Carrier included a recitation of the employees work record in the Investigation itself, based upon the language of Rule 57(b) it was improper to consider the past record in assessing discipline.

This Board has no quarrel with the previous Awards. The conclusions in both is achieved through sound reasoning based upon the language of the discipline Rule and how it was presented in the on property handling. But we are here concerned with a demerit system where clearly spelled out is a dismissal after the accumulation of 100 demerits. In keeping with Third Division Awards 30116 and 30117 this Board could reduce the demerits to 30 or 35, but even then, it would not reduce the accumulated demerits below 100.

Furthermore, 30 or 35 demerits are not out of line for sleeping on duty and fudging on the payroll. Under these circumstances the Board passes no judgement on the argument advanced that disputes the ten demerits assessed Claimant when he agreed to waive an Investigation scheduled the same day as the dispute here concerned for an entirely different matter as Claimant, even with the removal of those ten demerits and reducing the disputed forty to thirty would still leave a total in excess of 100. Enough to dismiss.

The claim before the Board is denied.

#### AWARD

Claim denied.

#### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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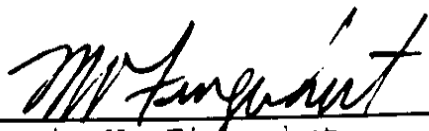
NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

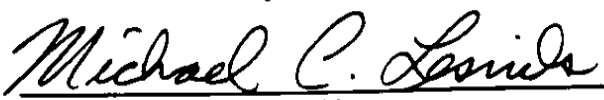
Dated at Chicago, Illinois, this 26th day of September 1995.

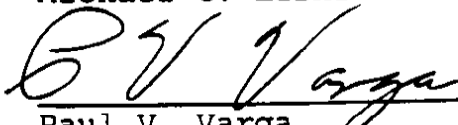
CARRIER MEMBERS' DISSENT  
TO A PORTION OF  
THIRD DIVISION AWARD 31146, DOCKET MW-31833  
(Referee Hicks)

Beginning at the bottom of page 2 of the Award, the Referee engages in a discussion of the applicability of Rule 57(b) of the Agreement. The Organization did not raise the issue on the property, and the Board should have ignored it as new material. The citation of Awards 30116 and 30117 appeared for the first time in the Organization's Submission; the Organization did not attach copies of the Dissent filed to those Awards. The Dissent is attached hereto and made a part hereof. It appears from the Award that since Awards 30116 and 30117 were irrelevant to the determination, the Referee believed it would do no harm to state that he "has no quarrel with the previous Awards."

The fact, however, is that several other Referees, including the same Referee who decided Awards 30116 and 30117, do quarrel with the conclusions reached in those Awards. While the Referee's conclusions with respect to Rule 57(b) is dicta, and of no authority in future disputes, the Referee would have been better advised not to get into a subject that was not raised on the property, especially if he was going to get it wrong.

  
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Martin W. Fingerhut

  
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Michael C. Lesnik

  
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Paul V. Varga