

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31805
Docket No. MW-32330
96-3-95-3-165**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

- (1) The dismissal of Repairman R. Rossiter for violation of General Rule E, Paragraph 3, in connection with the charge that he assumed the position of sleep at approximately 8:00 a.m. on December 28, 1993, was arbitrary, capricious, excessive and in violation of the Carrier's disciplinary guidelines effective September 1, 1993 (System Docket MW-3229D).**
- (2) As a result of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy stipulated in Section 4 of Rule 27 and the previous discipline stricken from his records."**

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 were given due notice of hearing thereon.

On January 4, 1994, Claimant was notified to report for an Investigation on January 7, 1994. The notice charged Claimant with violating Rule E, which, in relevant part, prohibits sleeping or assuming the attitude of sleep while on duty. The Hearing was conducted as scheduled and on January 26, 1994, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization contends that Carrier failed to prove the alleged violation. The Organization argues that the windows on the machine in which Claimant was found allegedly asleep were tinted a dark green and that the front windshield was covered with paper. In the Organization's view, these conditions cast considerable doubt on the veracity of testimony from Carrier's witnesses that they observed Claimant asleep.

The Organization further argues that Claimant's dismissal was improper. The Organization maintains that at the time of the incident, Claimant was recovering from an on-duty injury to his knee and should not have been working at all. Claimant's physical condition was complicated further because he was suffering from the flu. Finally, the Organization argues that Claimant should have received the benefit of progressive discipline.

Carrier argues that it proved the charges by substantial evidence. Carrier contends that two witnesses observed the Claimant asleep over a period totalling ten minutes. Carrier further contends that the offense proven was a serious one and that dismissal was warranted.

The Board reviewed the record carefully. We find that there is substantial evidence to support the finding made on the property that Claimant was guilty of the offense charged. Specifically, the Shop Engineer testified that he observed Claimant seated in the cab of a torsion beam tamper, beginning at 7:50 A.M. Claimant was sitting in the cab of the tamper, his head cocked to one side resting on his right hand, his right elbow resting on the right arm of the operator's seat, his glasses cocked, and his eyes closed. According to the Shop Engineer, Claimant remained in this position until the Engineer opened the door to the cab at 8:00 A.M. The Shop Engineer's observation was corroborated by the testimony from the Equipment Engineer who personally observed the same thing after being summoned to the scene by the Shop Engineer. Both witnesses testified that they were able to see Claimant clearly and both were sure that his eyes were closed.

Both on the property and before this Board, the Organization attacked the accuracy of the testimony from Carrier's witnesses. The visibility of the Claimant was disputed by Organization witnesses who testified to the tint on the windows and to paper covering the front windshield. However, as an appellate body, we are not in a position to resolve such credibility disputes. We defer to the reasonable resolution of such factual disputes made on the property, provided that the on-property resolution is supported by substantial evidence. In the instant case, the on-property findings clearly are supported by substantial evidence.

Next, we must consider the propriety of the penalty. It is not our function to review the penalty *de novo*. Our review is confined to consideration of whether the penalty imposed was arbitrary, capricious or excessive. We agree with Carrier that the instant offense is a serious one and that the usual steps of Carrier's progressive discipline policy for minor offenses did not apply. We also are mindful of the Awards cited by Carrier upholding dismissal of long-term employees for sleeping on the job, particularly when coupled with records containing significant prior discipline. We are also mindful that Claimant previously had received a 60 day suspension for a Rule E violation, but note that that discipline occurred more than seven years before the instant offense. There is no evidence of any other discipline in the following seven years.

We note that in the instant case, Claimant, who had 15 years of service, was recovering from an on-duty injury to his knee. As a result, he was under doctor's restrictions in lifting and was not allowed to walk or stand for prolonged periods of time. Furthermore, on the date in question, Claimant was suffering from the flu. Claimant's physical condition does not excuse his violation of Rule E. If Claimant was too ill to work, he should have marked off sick. Claimant testified that he did not mark off sick because he was unable to take a sick day, could not afford to lose the day's pay, and feared a bad mark on his record. Such concerns are beside the point. Claimant, having made the decision to report for work, was obligated to work, not to sleep on the job.

Nevertheless, Claimant's physical condition should be considered as a relevant circumstance in deciding what measure of discipline should be imposed. The extenuating circumstances suggest that the incident was not typical of Claimant's recent experience and that, if restored to service, Claimant will likely be a productive employee. Claimant's misconduct certainly deserved a lengthy suspension to impress upon him the seriousness of the offense. However, considering all circumstances, we find the penalty of dismissal to be excessive. Claimant will be restored to service on a last chance basis with seniority and benefits unimpaired, but without any compensation for time held out of service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.