

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36260
Docket No. MW-36461
02-3-00-3-730

The Third Division consisted of the regular members and in addition Referee Nancy Faircloth Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Flagman G. W. Jarvis for his alleged violation of Rules 1.1, 1.1.2., 1.6 and 1.11 on November 1, 1999 when he was allegedly sleeping was without just and sufficient cause, excessive and undue punishment (System File D-00-04D/1227346).
- (2) Flagman G. W. Jarvis shall now be ‘ . . . restored to active service at first available opportunity; with all time off commencing from November 23, 1999, when Claimant was held out of service pending investigation, being taken into account actual time served against any suspension that might be assessed against him, pursuant to any modification that may be done to the discipline of dismissal.’”

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 November 1, 1999, Claimant G. W. Jarvis was observed sleeping while assigned to work as a Flagman for contractor forces working in the area. The contractor forces were installing concrete piers approximately 25-30 feet from the center of the nearest track.

As a result, the Claimant was directed to attend a December 13, 1999 Investigation. Thereafter, the Claimant was sent a December 30, 1999 Notice of Discipline in which the Carrier informed him that he had been assessed a Level 5 discipline (dismissal) under the Carrier's UPGRADE Discipline Policy.

The Organization protested the discipline maintaining that:

"The Organization does not condone the various rules violations cited by the Carrier and is in agreement that some form of discipline need be assessed against claimant Jarvis to 'get his attention'. However, the discipline of dismissal seems to be mean-spirited, considering claimant's years of service (21 years), his past personnel record, and the facts as brought out in the transcript that claimant Jarvis is on permanent light/restricted duty, and suffers from ongoing health problems that are indicated to be job related. It appears that the application of the CORE program might have proven to be a more effective remedy to claimant Jarvis' conduct, rather than the discipline of dismissal."

The Carrier denied the claim, noting that the Claimant was found sleeping by Manager Track Maintenance O'Kelley, and therefore unaware of his "sole responsibility" as a Flagman whose "overall responsibility" was for the safety of the contractor's employees. According to the Carrier, the Claimant was careless of the safety of others, and in clear violation of Rule 1.6, which requires discipline of Level 5 (dismissal).

The Claimant was cited for violating the following Agreement Rules:

"RULE 1.1 SAFETY

Safety is the most important element in performing duties. Obeying the rule is essential to job safety and continued employment.

RULE 1.1.2 ALERT AND ATTENTIVE

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan work to avoid injury.

RULE 1.6 CONDUCT

Employees must not be:

1. Careless of themselves or others.
2. Negligent

RULE 1.11 SLEEPING

Employees must not sleep while on duty. Employees reclined with their eyes closed will be in violation of this rule."

The Organization submits that while the Claimant's actions "may not have comported with the letter of the rule(s)," there were mitigating circumstances surrounding the occurrence. Specifically, the Organization maintains that while the Claimant may have "nodded off," at no time were contractor employees or Carrier property placed in danger. Secondly, the Organization asserts that the Claimant's conduct was "nothing more than an unusual one-time incident, thereby rendering his dismissal wholly disproportional, arbitrary and excessive. For its part, the Carrier contends that the standard required is "substantial evidence," and that the evidence produced at the formal Investigation clearly established the Claimant's guilt.

There is no dispute that the Claimant violated each of the Rules with which he was cited, and it is clear that discipline was warranted. However, in the circumstances, there are certain factors that mitigate the Claimant's actions on November 1, 1999, and therefore, permanent dismissal was excessive. At the time this dispute arose, the Claimant had been employed by the Carrier, in various capacities, for approximately 21 years with a heretofore satisfactory record. The Carrier did not dispute that this incident constituted the first of its kind during the Claimant's lengthy tenure, and there is nothing on this record that causes us to conclude that this was anything other than an unusual one-time event.

In that connection, it is not contested that the Claimant had been placed on light/restricted duty as the result of an on-the-job injury, and although Manager Track Maintenance O'Kelley stated that the Claimant did not "come to him to show me the prescriptions for the medications he is taking right now," he did not dispute the fact that copies of the Claimant's prescriptions were turned in with his medical release to return to service.

In light of the countervailing factors in mitigation of the Claimant's offense, and without prejudice to future disputes of this nature, the Claimant shall be restored to service with seniority unimpaired, but without pay for time lost.

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 28th day of October 2002.