

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42890
Docket No. MW-43761
18-3-NRAB-00003-160596**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [sixty (60) day suspension] imposed upon Claimant J. Niemiec, III by letter dated October 16, 2015 for alleged violation of Pan Am Safety Rules PGR-C and PGR-L was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier’s File MW-15-42 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Niemiec, III shall have his record cleared of the charges and be compensated for all lost wages and benefits as the result of the Carrier’s improper discipline.”**

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.

The Claimant was a Trackman with eight years' seniority and no prior discipline at the time of the incident noted herein. On August 24, 2015, while waiting in his own vehicle for his Foreman to deliver work instructions, the Claimant fell asleep. He was discovered by Track Supervisor Levasseur, immediately removed from service and thereafter directed to attend an October 2, 2015 Hearing concerned with his sleeping and being "confrontational" when confronted by the supervisor. The Claimant was found to have violated Safety Rules PGR-C and PGR-L and was assessed a 60 calendar day suspension. A timely claim followed.

The Carrier contends that the evidence, including the Claimant's testimony, establishes that he was asleep in his vehicle on August 24, 2015 and that once awake, he signed the STOP form prepared by Superintendent Levasseur. While the Claimant identified Generalized Anxiety Disorder as the reason for sleeping, this is not an adequate defense because the doctor's note was dated after the original hearing date and thus would have been unavailable at the time. Moreover, no such diagnosis previously had been made a part of the Claimant's record. He spoke to Superintendent Levasseur about anxiety generated by working around an employee who was not in the crew the day the Claimant fell asleep. The suspension was appropriate for charges involving sleeping and insubordinate behavior.

The Organization insists that the suspension was completely disproportionate to the circumstances. Rule PGR-L does not specify the discipline for sleeping, let alone severe discipline, thus the Claimant was not forewarned. The Claimant's clean work record, that he was not "nesting," and that the sleeping was unintentional and within the Claimant's stand-by work area are all mitigating circumstances. The sleeping did not threaten safety or deny the Carrier of work already assigned. The Claimant should not have been disciplined at all, but if discipline is warranted, it should for far less than 60 days. In addition, the Carrier has not proven the "confrontational" charge. The term is not in the discipline rules and not defined by the Carrier, thus the Claimant was not forewarned. If the charge is meant to indicate insubordination, this involves moral turpitude that requires a higher level of proof than substantial evidence—rather, clear and convincing evidence. However, the Carrier cannot establish what the Claimant said or what he meant, as there were no witnesses to the exchange with Supervisor Levasseur.

The Claimant has been suspended for 60 days, with the disciplinary letter basing the suspension on a violation of Safety Rules PGR-C and PGR-L, both submitted by the Carrier and appended to the hearing transcript. PGR-L prohibits sleeping while on duty. PGR-C prohibits, among other forms of behavior, the following: "Any act of insubordination, hostility or willful disregard of the Company's interests. . .," with these acts "sufficient cause for dismissal." There is no question that the Claimant was asleep while on duty. In addition to Superintendent Levasseur's testimony that he viewed the Claimant asleep in his vehicle, Foreman Breor and Mr. Kourizhnykh also testified that they viewed the Claimant sleeping. And, there is the Claimant's own testimony that includes: "I woke up and was in a panic. . ."

However, the evidence that the Claimant was "confrontational," the term used in the suspension letter, is less than substantial. While a brief argument may have occurred between the Claimant and Superintendent Levasseur, the Superintendent simply characterized the Claimant as "a little confrontational." Neither the Claimant nor Superintendent Levasseur or any of the other witnesses provided insight into the actual words spoken or the tone of voice(s) used. Moreover, the Board notes that the Claimant ultimately signed the STOP order; thus, he did not refuse his superior's directive.

The Claimant's sleeping cannot be discounted because of his medical condition. He would not have had medical documentation if the hearing had been on the originally-scheduled date and, frankly, the Board does not find the documentation compelling. However, the Board has taken into account that the Claimant slept while waiting for instructions and did not attempt to nest. Moreover, his eight years without prior discipline indicate that he is a conscientious employee who should profit from lesser, constructive discipline. The 60 day suspension is viewed as excessive and therefore is to be reduced to a 10 day suspension in accordance with Articles 26.5 and 26.7. Compensation is to include payment for overtime that the parties believe that the Claimant would likely have worked but for the final 50 days of the original suspension.

Claim partially sustained in accordance with the findings.

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 10th day of January 2018.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42890 - DOCKET NO. MW-43761

(Referee I.B. Helburn)

The Carrier concurs with the Board's ultimate decision to hold the Claimant accountable for violating Safety Rule PGR-L. After all, the Claimant was sleeping and he was on duty at the time. However, due to the Board's misapplication of the Carrier's Safety Rules to the facts of the case, the Board erred in minimizing the Claimant's proven offence and reducing the discipline issued to him.

This Award states, *"The Board has taken into account that the Claimant slept while waiting for instructions and did not attempt to nest."* Safety Rule PGR-L states definitively and unambiguously that *"Sleeping or assuming the attitude of sleep while on duty is prohibited."* (**Carrier's Exhibit A, p.37**) Safety Rule PGR-L provides no exception for sleeping while *"waiting for instructions."* And the concept of *"nesting"* was not raised during the handling of this dispute on the property. The Board has no jurisdiction to redefine the Carrier's Safety Rule PGR-L or to apply its own facts to the case. Accordingly, this Award must not be used to diminish the importance of complying with Safety Rule PGR-L as written, at all times while on duty on this Carrier's property.

As for the Board's findings regarding Carrier Safety Rule PGR-C, the Charging Officer explained on the record that after several minutes of the Claimant arguing with him, the Claimant finally signed for receipt of a S.T.O.P. form for sleeping on duty. (**Carrier's Exhibit A, p.8**) As a follow up to this testimony, the Hearing Officer asked the Charging Officer, *"Okay, so all right, so when you asked him to sign it he got confrontational or but he did eventually sign it after five, ten minutes?"*, and he replied, *"Yes."* (**Carrier's Exhibit A, p.8**) He later added, *"When he started getting confrontational with me I told him that I had had enough and that is when I decided to take him out of service."* (**Carrier's Exhibit A, p.8**) The Claimant did not refute the Charging Officer's testimony. Instead, the Claimant merely testified that he "faintly" remembered signing for a S.T.O.P. form. (**Carrier's Exhibit A, p.26**) And when asked if he knew why he was pulled out of service, he stated, *"Because he said I was arguing I guess."* (**Carrier's Exhibit A, p.26**) The Claimant added, *"I remember going to him. We had words. I don't remember exactly what was said and that's it. I got a S.T.O.P. and he told me I have to go home."* (**Carrier's Exhibit A, p.27**, with emphasis added here.) Thus, the Board inaccurately concluded that *"...the evidence that the Claimant was 'confrontational', the term used in the suspension letter, is less than substantial."*

For the foregoing reasons, the Carrier must concur in part and dissent in part from this Award.

Anthony Lamanta

Carrier Member

Matthew R. Holt

Carrier Member

January 10, 2018