

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42907
Docket No. MW-42985
18-3-NRAB-00003-150188**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

- “(1) The discipline (dismissal) imposed upon Mr. R. Pruitt-Arps by letter dated December 23, 2013 for alleged ‘. . . violation of General Code of Operating Rules 1.6 – Conduct and GCOR 1.11 Sleeping.’ In connection with ‘. . . allegedly sleeping while on duty on Tuesday, December 3, 2013, at approximately 11:05 a.m., in the vicinity of the North Belt Industrial Lead, Humboldt Avenue, St. Louis, Missouri ***’ was without just and sufficient cause and on the basis of unproven charges (TRR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Pruitt-Arps shall be reinstated to service with seniority and all rights unimpaired 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 employe 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.

Claimant R. Pruitt-Arps had established and held seniority within the Carrier's Maintenance of Way Department and was employed by the Carrier shy of five years at the time of his dismissal. On December 3, 2013, the Claimant was working as a Machine Operator for the track department with a 7:30 A.M. starting time, Madison Yard. At approximately 11:05 A.M. that morning, the Claimant was sitting in a Frontend Loader at a crossing with engine properly idling waiting for a cell phone call instructing him to begin to load and/or dump rock. At this time, the Claimant and machine were located in the vicinity of the North Belt Industrial Lead, Humboldt Avenue, St. Louis, Missouri.

While in the course of conducting operational rules checks, Matt Whitney, Senior Director of Train Operations and Adam Mahlandt, General Superintendent decided to check on the status of the tie installation and surfacing work being performed by contractor employees of Musselman and Hall (M & H) along with Carrier's Track Department Maintenance employees at the North Belt Industrial Lead. As part of this endeavor, Whitney and Mahlandt decided to drive to and observe if the tie and surfacing crew was clear of the Dial Lead, an Industry Carrier spots on afternoons. Whitney and Mahlandt arrived at Humboldt Avenue at approximately 11:05 A.M., with Mahlandt stopping his vehicle west of the road crossing next to and approximately 15 to 20 feet apart from the Claimant's Frontend Loader parked at the crossing.

While watching the track gang perform work on the mainline, Mahlandt looked to his left and noticed an individual (Claimant, whose identity was unknown to Mahlandt at the time he saw him), sitting in the Frontend Loader and according to Mahlandt, the individual was sleeping. Whitney also observed the individual and described what he saw as the person sitting in the Frontend Loader reclined in the seat with his eyes closed and his head resting on his right hand asleep. According to both Mahlandt and Whitney, while sitting in their car discussing who in the Frontend Loader the person could be, a motorcycle passed by in between their vehicle and the Frontend Loader yet the Claimant did not move notwithstanding the very loud noise of the Harley type motorcycle. Whitney recounted that he and Mahlandt observed the Claimant reclined with his eyes closed and head in his right hand for approximately three minutes. According to Mahlandt, as the Claimant was in a slumped position with his eyes closed, he was completely oblivious to his surroundings. In the approximate two to three minutes the Claimant was observed sleeping by both Mahlandt and Whitney, Mahlandt took a photo of the Claimant with his cell phone after the motorcycle had passed by them. According to both Mahlandt and Whitney, their visual observation of the Claimant was much clearer than the Claimant's photo but both maintained that the photo accurately depicted the Claimant's reclined position and the fact that at the time the photo was taken, the Claimant's eyes were closed and he was asleep. Mahlandt noted it was an overcast day when the photo was taken.

According to Mahlandt, after he took the photo, he and Whitney continued to observe the Claimant from their vehicle, never exiting their vehicle to walk over to the Claimant to observe him from a much closer distance to wake him up and confront him. Mahlandt related that when the Claimant received a phone call, he awoke to the sound of the phone ringing and, as he awoke, he immediately looked at him. Having made eye contact, Mahlandt motioned to the Claimant to exit the Frontend Loader and walk over to talk to him. As the Claimant complied and approached Mahlandt's vehicle, both he and Whitney both recognized the Claimant's identity. Without getting out of their vehicle, Mahlandt asked the Claimant straightaway if he had been sleeping to which the Claimant responded in the negative, denying he had been asleep. Upon the Claimant's denial response, Mahlandt directed the Claimant to return to the Frontend Loader. Whitney then called the Claimant's supervisor, summoned him to remove the Claimant from the job site and take him back to Madison Yard for the Claimant to give a written statement.

The Claimant averred that the interim time between when his work of loading dump trucks was delayed due to the dump trucks having to stop for the tamper to pass by and the call to resume his work amounted to a total of about six minutes. During this six-minute break in working the Claimant maintains he was sitting in the Frontend Loader with his head tilted upward just waiting for the call from Jay Williams to resume loading dump trucks. The Claimant corroborated Mahlandt's and Whitney's account that during the time he was waiting in the truck to resume his work a motorcycle did come by but explained he was not startled by the sound of the motorcycle because he saw it coming. However, the Claimant said at the time that when the motorcycle came by, he was looking out from the machine to his left but the motorcycle approached from the right of the machine. The Claimant further corroborated Mahlandt's account that when he received the call on his cell phone from Williams he did look straight at Mahlandt explaining it is normal practice when starting up a machine (the Frontend Loader) and beginning to move, to look around at your surroundings to make sure everybody's clear so as not to hit them or anything else.

Carrier conducted a formal Investigation on December 18, 2013 into the facts and circumstances surrounding the events witnessed by Carrier officers Mahlandt and Whitney relative to their observation of the Claimant sleeping on the job. By letter dated December 23, 2013, Mechanical Superintendent Joe Bentrup who presided as Conducting Officer of the Investigation informed the Claimant the facts developed at the Investigation proved he violated General Code of Operating Rules (GCOR) 1.11-Sleeping and 1.6-Conduct, Item 1 & 2, thereby resulting in his dismissal from service. These rules read as follows:

“GCOR Rule 1.11

Employees must not sleep while on duty, except as outlined under Rule 1.11.1 (Napping). Employees reclined with their eyes closed will be in violation of this rule.”

“GCOR Rule 1.6

Employees must not be: 1. Careless of the safety of themselves or others; 2. Negligent”

“Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”

Carrier relies on the photograph taken of the Claimant by Mahlandt in support of Mahlandt's and Whitney's testimony that it depicts exactly what they saw when they first observed the Claimant sitting in a slumped position with his head resting on his right arm and eyes closed as he sat in the cab of the Frontend Loader. On the other hand, the Organization argues that although the only real substantive evidence Carrier has advanced to justify dismissing the Claimant from service is the photograph, it characterizes the photograph as more of an impressionistic silhouette picture of the Claimant than a fine portrait of the Claimant. The Organization notes that even Mahlandt himself impeached the quality of the photograph in his testimony at the Investigation stating the photograph was a 100% less clear than what could be observed in person even from afar. The Organization submits it is well nigh impossible to discern any detail pertaining to the Claimant's eyes either being closed or open and therefore argues it is equally possible to support the Claimant's position that he was not sleeping as it is to accept Mahlandt's and Whitney's testimony to the contrary. However, the Organization also disputes Mahlandt's and Whitney's testimony noting the following two inconsistencies, to wit: 1) each proffered a different reason for not exiting their vehicle to walk over to the Frontend Loader to verify close up that the Claimant was asleep and to wake him up and confront him. Whitney's reason was one of not having access to the proper safety gear to don to go outside the vehicle whereas, Mahlandt admitted that even though there was time to exit the vehicle and confront the Claimant, he simply chose not to do that and remain in the vehicle; and 2) their expressed difference with each other as to how far apart in distance their vehicle was from the Claimant's parked Frontend Loader when they both observed the Claimant sitting in the cab of the machine with Whitney maintaining the distance was 10 to 15 feet away whereas, Mahlandt testified he

was 20 feet away; The Organization asserts that neither the photograph taken by Mahlandt nor the testimony proffered by Mahlandt and Whitney unequivocally prove the Claimant guilty of having violated either of the two GCOR rules Carrier charged him with having violated.

As noted by the Carrier, this Referee in Public Law Board 5048, Award No. 2 stated the following with regard to the commission by an employee of sleeping on the job, to wit:

“In our view, sleeping on the job is an egregious offense worthy of severe discipline because it is akin to a theft of Carrier’s resources specifically taking money from Carrier in the form of wages for time not worked.”

Given the egregious nature of the offense of sleeping on the job and because the quantum of discipline assessed for commission of this offense is so severe, oftentimes resulting in dismissal even for a first time offense dependent on whether one’s past work record is evaluated as a factor in aggravation or a factor in mitigation, the carrier charging an employee with sleeping on the job has the burden of proof to establish through substantial evidence that GCOR Rule 1.11 barring sleeping on the job was, in fact, infringed by the employee.

In this instant case we have devoted substantial time in evaluating the major piece of evidence submitted by Carrier, the cell phone photo taken by Mahlandt of the Claimant sitting in the cab and have determined that the photo substantiates Mahlandt’s and Whitney’s eyewitness testimony describing the Claimant’s posture of being slumped down while seated in the cab of the Frontend Loader with his head resting on his right arm. The photo however, as asserted by the Organization does not substantiate Mahlandt’s and Whitney’s testimony that the Claimant’s eyes were closed given the photo’s very poor quality, no doubt due to a lack of good lighting as it was taken on an overcast day from a distance of 20 feet away and through the passenger window of the Frontend Loader.

Absent other documentary evidence beside the photo, and the fact that at the scene of the incident neither Mahlandt nor Whitney or both of them together confronted the Claimant to confirm their observation of him, we find the resolution of this claim is solely dependent on a determination of the credibility of witness testimony elicited at the formal Investigation pertaining to two discrepancies extant in the record proceedings before us. The major discrepancy in witness testimony is whether the Claimant’s eyes were open or closed. The Claimant testified his eyes were open whereas Mahlandt and Whitney testified his eyes were closed. While the photo taken of the Claimant is not definitive to

answer this discrepancy examination of the photo in its entirety is highly suggestive that the Claimant, shown in a reclined position with his head resting on his right arm was in a sleeping state. The second discrepancy in witness testimony pertains to whether or not the Claimant reacted to the loud sound of a motorcycle as it passed by in between the Frontend Loader and Mahlandt's vehicle at the time the Claimant was in the reclined posture depicted by the photo. Mahlandt and Whitney both testified that the Claimant remained in the posture shown by the photo without moving during the time the motorcycle passed by whereas, the Claimant testified that as he saw the motorcycle approaching he did not react to its loud sound as it passed by in between the Frontend Loader and Mahlandt's vehicle. The Board finds this discrepancy in testimony to be determinative in support of Mahlandt's and Whitney's testimony and to discredit the Claimant's testimony. According to the undisputed testimony rendered by Mahlandt, the Claimant could not have seen the motorcycle approaching as Mahlandt did not take the photo until after the motorcycle had passed them by. Thus, the Claimant remained in the posture of a person sleeping and because he was unfazed by the noise of the motorcycle and did not move, we are persuaded to accept Mahlandt's and Whitney's testimony that the Claimant was in fact asleep on the job as representing the truth of the matter.

We further find to credit Mahlandt's and Whitney's testimony over that of the Claimant's in that there is absolutely no evidence in this record proceeding showing that neither Mahlandt nor Whitney harbored any animus or malice toward the Claimant noting neither had any idea at the time they observed the Claimant sleeping his identity until after Mahlandt motioned for him to exit the Frontend Loader and approach his vehicle. Additionally, we take judicial notice that in such cases as this, there is a motivation on the part of a dismissed employee desirous of regaining their employment not to render truthful testimony. We find the Claimant's testimony in this regard to be no exception.

Additionally, we find that the Claimant's very poor work record over his employment with Carrier over four and a half years of incurring three serious rules violations over ten months of active employment serves as an aggravating factor in support of Carrier's decision to assess the Claimant the ultimate discipline of dismissal.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of February 2018.