Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43348
Docket No. MW-44210
19-3-NRAB-00003-170260

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference**
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(BNSF Railway Company (Former Burlington Northern (Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Machine Operator D. Baranyai by letter dated November 2, 2015 for alleged violation of MWOR 1.11 Sleeping and MWOR 1.6 Conduct in connection with his alleged sleeping while operating a machine resulting in striking a frog was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4805-E/11-16-0101 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Baranyai shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered including any and all overtime paid to the position he was assigned to work and any expenses lost."

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.

This case involves the dismissal of the Claimant, Machine Operator Daniel J. Baranyai, for sleeping while operating machine X0500088 and X8600054, failing to lock up/pin up resulting in striking a frog on September 28, 2015. The notice of Investigation issued the following day stated that the Claimant was being withheld from service. After a timely, October 8, 2015 Investigation, dismissal letter was issued on November 2, 2015 over the signature of Joseph L. Randish, Conducting Officer. The Claimant was charged with a violation of MWOR 1.11 Sleeping and MWOR 1.6 Conduct (Carelessness). When the ensuing claim was not resolved on the property, the matter was referred to the Board.

The Carrier avers that the Investigation was fair and impartial, that the Foreman found the Claimant asleep in the machine and shook him awake, that during the Investigation the Claimant admitted falling asleep, with the admission providing the necessary substantial evidence to prove the charge. While the Claimant may have had little sleep the night before, he had been off for four (4) days preceding the incident. He had been careless in not promptly having the air conditioning unit in the machine repaired. The rules violation was a stand-alone offense in accordance with the Policy for Employee Performance Accountability (PEPA). The Organization now asks for leniency, which is for the Carrier, not the Board, to decide, nor should the Board substitute its judgment for that of Carrier management. Should the claim be sustained, the Claimant should be treated in accordance with Rule 40.G., but the make-whole remedy should not include overtime pay or compensation for health care premiums and expenses, but it should include an offset for outside earnings.

The Organization insists that the Claimant did not receive the fair and impartial Investigation required by Rule 40.A because he was prejudged when withheld from service, the Conducting Officer said that the Investigation resulted from a rules violation, also showing prejudgment, and a Carrier witness denied the Claimant's representative's request for a recess. The Carrier did not meet its burden of proof as it has not established carelessness in violation of MWOR 1.6

Conduct. The Claimant did not receive timely notice of the Investigation and was never given the reasons for his being withheld from service. He should not have been withheld because sleeping was not a serious infraction. The dismissal was excessive because the Claimant was working on an extremely warm day in a closed cab with defective air conditioning, thus creating conditions for falling asleep. There was no injury or damage to the machine as a result of the minor incident. This was not a stand-alone violation. The Claimant should be reinstated with the remedy to include reasonable overtime pay, compensation for health insurance premiums and related expenses, but without an offset for outside income.

The Claimant is a Machine Operator with an April 11, 2011 date of hire. His Employee Transcript shows that prior to his dismissal, on July 7, 2015 he had been assessed a Level S 30-day record suspension with a 36-month review period. On July 21, 2015 he had been assessed a Level S 45-day actual suspension with a 36-month review period. During the Investigation, the Claimant admitted that he had been sleeping. This admission plus Gang/Section Foreman Orndoff's undisputed testimony that he woke the Claimant by shaking him provides more than the required substantial evidence necessary to prove the charge. The only questions for the Board are whether there were mitigating circumstances and whether the dismissal was consistent with PEPA.

The Organization claims that the Investigation was not fair and impartial because guilt was prejudged when the Claimant was withheld from service. This is an oft-made contention that seemingly ignores the parties' agreement, set forth in Rule 40.B, that the Carrier may withhold an employee from service for an alleged serious violation. The contention that sleeping while operating machinery as did the Claimant is not a serious violation is grasping at straws, to put it nicely. We agree with Second Division Award 9474 that "Sleeping is a serious offense, a violation of the agreement worthy of dismissal."

The Board finds no problems with the notice provided to the Claimant or the timeliness of the Investigation. The incident occurred on September 28, 2015. The NOI, stating that the Claimant was being withheld from service and detailing the reason for the Investigation was issued the following day. Surely this was sufficient information for the Claimant to understand why he was being withheld from

service. Moreover, the Investigation was scheduled for the tenth (10th) day after the sleeping incident, as is required by Rule 40.B.

The Organization's contention that a witness denied the Claimant's representative's request for a recess is understandable but erroneous when the Investigation transcript is read carefully. The relevant dialog from page 17, lines 13-23 appears below.

> **ROD ENGLESON: . . . Um, I'd like to enter these two as, uh, exhibits, two pages, I can make copies at this time. It might take a minute to copy them. I just haven't actually printed them, so. These are a list of things that were wrong with the machine when Mr. Baranyai took over, uh, being on the machine.**
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> **LAURA HUNTON CALDWELL: Uh, Mr. Engleson, I guess we are in the middle of testimony. We're not to take recesses during testimony. So if we can make copies of these and once we excuse Ms. Caldwell and we can either call her back or you can-**

Clearly this shows that Conducting Officer Randish spoke the words erroneously attributed to Assistant Roadmaster Caldwell. The lines that follow do not indicate that a recess was taken, but do indicate that Vice General Chairman Engleson was able to proceed to his satisfaction. He did not indicate any concern over this exchange in his closing statement in support of the Claimant.

The Board does not find the closed cab, faulty air conditioning and outside temperature as mitigating. While a lack of sleep the night before may have contributed to the Claimant's sleeping on the job, absent an emergency he had an obligation to come to work prepared to be alert throughout his tour of duty or alternatively, to call in and remove himself from duty. That no harm came to the Claimant or the machine also is not viewed as mitigation. That surely is fortunate, but sleeping could and has resulted in disastrous consequences.

PEPA is clear on what constitutes a stand alone, dismissible offense. The Carrier cites the following provisions from Appendix B:

"6) Conscious or reckless indifference to the safety of themselves, others or the public; indifference to duty; intentional destruction of company property; malicious rule violation; insubordination

7) Rule violation that could result in serious collision and/or derailment, serious injury to another employee or the general public, fatality, or extensive damage to company or public property"

Number 6 above is deemed inapplicable, as the Board views the Claimant's sleeping as unplanned, unintentional and not an indication of indifference to safety or duty. However, the Claimant has violated Rule 1.11 Sleeping and Rule 1.6 Conduct – 1. Carelessness of the safety of themselves or others. A stand alone, dismissible offense has been committed.

The Board notes that the Claimant has been assessed Level S suspensions with 36-month review period on July 7 and 21, 2015. The Organization has stated that these suspensions have been contested. The outcome of the claims lodged against the two Level S suspensions is irrelevant since the Board found the conduct under review herein to involve a stand-alone dismissible offense there is no basis for disturbing the Carrier's disciplinary response to sleeping on the job.

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 December 2018.