

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43522  
Docket No. MW-44837  
19-3-NRAB-00003-180332**

**The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [thirty (30) day suspension] imposed on Mr. S. Medford, by letter dated November 28, 2016, for alleged violation of GCOR 1.11 Sleeping and ES Safety Rule E-23 - Personal Protective Equipment and Clothing in connection with his alleged sleeping at work on October 19, 2016 was excessive, unsupported and in violation of the Agreement (System File J-1634D-412/USA-BMWED\_DM&E-2017-00008 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Medford’s record shall be cleared of the charges leveled against him and he:  
“\*\*\* shall be reimbursed for any days of missed pay as a result of this suspension and any overtime he missed at work as a result of the suspension.  
All notations of the dismissal should be removed from all Carrier records as outlined in Rule 34(6) of the effective Agreement.”**

**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 October 19, 2016, the Claimant was working as a Track Inspector in the Nahant Section Office during a “safety stand down” day. A “safety stand down” day gives employees the opportunity to review their rule books and become familiar with those rules. The Claimant’s manager assigned him rule books to read. At approximately 10:00 a.m., the Claimant’s supervisor noticed the office in which the Claimant was reading was locked. The supervisor opened the locked door and witnessed the Claimant hunched over the table with a hood over his head. The Claimant immediately darted upward and the Manager observed the Claimant was wearing tinted safety glasses.**

**The Carrier issued a Notice of Investigation letter dated October 24, 2016 which stated as follows: “The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged violation of sleeping at work on October 19, 2016. This indicates a possible violation of, but is not limited to, the following rules: GCOR 1.11-Sleeping and ES Safety Rule E-23–Personal Protective Equipment and Clothing.”**

**The investigation hearing was held on November 10, 2016. Following the investigation hearing, the Claimant received a Discipline Notice dated November 28, 2016, finding a violation of GCOR 1.11-Sleeping and ES Safety Rule E-23–Personal Protective Equipment and Clothing and assessed discipline of thirty (30) days served without pay. The Organization appealed the Carrier’s decision by letter dated December 29, 2016 and the Carrier denied the same on January 11, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated February 27, 2017, and the same was denied on April 28, 2017. A formal conference was held with on January 25, 2018 with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.**

**The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:**

- “1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?**
- 2) If so, did the Carrier establish by substantial evidence that the Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?”**

**The Carrier contends that the Claimant was afforded a fair and impartial investigation in accordance with the governing Collective Bargaining Agreement. The Notice of Investigation was issued in compliance with the Agreement. The Carrier contends that substantial probative evidence supports the charges. The observation of his supervisors, including but not limited to the locked door, head darting, tinted sunglass, red mark on his forehead, glossy eyes, hood over his head, all support the conclusion that the Claimant was sleeping. Moreover, the Carrier contends that the charge of sleeping while on duty is considered a serious offense and represents the inappropriate conduct provided by Rule 34(5). The Claimant was thus properly held out of service. The discipline imposed is consistent with the seriousness of the violation and the Claimant’s discipline record. It is the position of the Carrier that the claim should be denied.**

**The Organization contends that the Carrier denied the Claimant his procedural rights and other right to a fair and impartial hearing. The Carrier violated the Claimant’s due process right when it removed him from service without an investigation hearing in blatant disregard of Rule 34 (5). The Organization points out that the Board has consistently held that the Carrier’s option to exercise this right is limited to situations where retaining the employee may endanger himself, other employees, the public, or otherwise may adversely impact the Carrier’s operations. The Organization contends that the Carrier has failed to meet its burden of proof that the Claimant was**

sleeping on duty. The record never showed that the Claimant was sleeping and the charges assessed to the Claimant were based on pure speculation of the manager. The Organization further contends that the discipline imposed on Claimant is excessive. Lastly, it is the position of the Organization that the claim be sustained.

Having reviewed the evidence, the Board finds that the Carrier afforded the Claimant a fair and impartial hearing. The Board has reviewed the procedural objections of the Organization and will address the same below.

The Carrier charged the Claimant with violation of GCOR 1.11-Sleeping and ES Safety Rule E-23–Personal Protective Equipment and Clothing. GCOR Rule 1.11 – Sleeping, states: “Employees must not sleep while on duty. Employees reclined with their eyes closed will be in violation of this rule.” This rule provides for a presumption of sleeping when an employee is reclined with their eyes closed. The Carrier must show by substantial evidence that the Claimant committed the rule violation as alleged. The Manager denied that the Claimant was in a reclined position when he entered the room. The Manager observed the Claimant seated at the table in a hunched position. The Manager could not see if the Claimant’s eyes were closed. That being said, the given provision of the rule is not applicable.

The first sentence of the rule, “employees must not sleep while on duty,” is at issue. The charge of sleeping is established through circumstantial evidence, witness observations of alleged behavior that is commonly and reasonably associated with sleeping. Such circumstantial evidence reasonably supports a logical conclusion that the observed employee was sleeping. Evidence of sleeping, i.e. snoring, rapid eye movements, or deep rhythmic breathing, supports a strong, logical conclusion that an individual is sleeping. The Manager did not observe any of these signs; he expressly denied hearing any snoring sounds.

Notwithstanding, substantial probative circumstantial evidence of signs of sleeping may combine to support a logical conclusion of sleeping. The Manager testified that the Claimant told him that he was tired from moving to a new house that weekend. The Manager observed the Claimant drinking a Red Bull. The Claimant denies making that statement but admits he drinks Red Bulls daily. The Manager admitted on cross examination that the Claimant frequently drinks Red Bulls. The Manager states that he found the door locked which is not usual; the door locks automatically. The Claimant

**explained that he shut the door to avoid the disturbances, such as people talking in the hallway. When the Manager opened the door, the Manager observed the Claimant with the hood on his head and wearing his tinted safety glasses. The Claimant had eye surgery when he was in the Army and now experiences sensitivity to light. The Manager observed the Claimant seated in a seat at a table and his head ‘popping up’; he describes the Claimant as “halfway up” to an upright position at the point in time when he saw him. The Manager did not observe the Claimant’s head down on the table or on his arm. The Claimant explained that he had his elbow propped on the table with his hand on his forehead while he was reading, which explains the red mark on his forehead. The Manager observed glossy wide eyes and opined that the wide glossy eyes are consistent with waking up. The Claimant denied that he was asleep. The Board finds that the combination of the circumstantial evidence herein does not support the conclusion that the Claimant was sleeping on duty. The Board finds that there was insufficient evidence to establish a violation of GCOR Rule 1.11.**

**The Carrier charged the Claimant with violation of E-23 #6 Bullet 5 which reads:**

**“Safety eyewear used on CP or customer property as a minimum must:  
Not be tinted when worn at night, in buildings/tunnels or when visibility is  
reduced due to low light and/or weather conditions...”**

**The Manager observed the Claimant wearing the glasses inside the room and the Claimant did not deny wearing the glasses inside the building. The Board finds that there is substantial evidence in the record that the Claimant violated E-23 #6 Bullet 5.**

**After reviewing all the testimony and evidence in this case, the Board finds that there is insufficient evidence that the Claimant violated GCOR Rule 1.11. The Carrier has, however, established that the Claimant violated E-23#6 Bullet 5 and has met its burden of proof. The disciplined is modified to a five (5) day suspension in consideration of the Claimant’s discipline record.**

**Lastly, it is the position of the Organization that Claimant was improperly withheld from service contrary to his rights under the controlling Agreement. Rule 34, Paragraph 5 reads:**

**"Employees may, in cases management determines to be serious (such as, but not limited to, use of intoxicants, misappropriation of Company property, insubordination, unsafe, inappropriate or violent conduct, etc.), be held out of service, without pay, pending such Admission of Responsibility or hearing."**

**Rule 34.5 limits the right of the Carrier to remove an employee from service to serious offenses. Arbitral precedent has permitted "such action when the nature of the offense is such that allowing the employee to continue working might endanger his safety or that of his fellow employees or the public, or would interfere with the orderly performance of work." The conduct of the Claimant, the alleged sleeping instead of reading during a stand down day, and wearing tinted safety glass inside the building, did not pose a safety risk or would interfere with the operations of the Carrier. The Claimant's removal from service in this case was a violation of Article 34.5. The Claimant should be compensated for time lost from the date of removal from service to the date of the hearing.**

**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 27th day of March 2019.**