

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43552
Docket No. SG-44666
19-3-NRAB-00003-180063**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Connex Railroad, LLC

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Connex Railroad, LLC:

Claim on behalf of F. Bivins, for reinstatement to service with compensation for all time lost, including overtime, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rules 47 and 48, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on September 21, 2016. Carrier’s File No. SCL-10-25-16D. General Chairman’s File No. SCL-10-25-1 SD. BRS File Case No. 15732-Connex.”

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.

At the time this dispute arose, the Claimant held the position of Signalman in the Carrier's Signal Department. On September 13, 2016, the Claimant was given notice of an investigation in connection with the following charge:

"The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with your failure to carry out your assigned tasks given to you by Signal Manager Rasheed in regards to removing the northbound approach termination shunts for 12 Avenue South and bonding on new pigtails prior to the arrival of the surfacing gang at this location.

In addition, you were observed sleeping in the VTMI company vehicle 1213 by Signal Manager Rasheed while on duty at approximately 01:30am on September 3, 2016."

After a formal investigation on September 21, 2016, the Claimant was found in violation of 104.1, Failure to Devote Himself Exclusively to Service; 104.2, Insubordination; and 111, Sleeping While on Duty, and was dismissed from the Carrier's service.

On September 3, 2016, the Claimant reported to work at 8:26 pm and was instructed to report to 12 Avenue South to remove northbound approach termination shunts and bond new pigtails before the arrival of the surfacing gang. When Signal Manager Rasheed arrived at the location close to midnight, he discovered that none of these tasks had been completed. Furthermore, the Claimant could not be found. Rasheed testified that using GPS monitoring, he located the Claimant's vehicle at approximately 1:25 am, in the brush in a parking lot. The GPS tracker indicated that the Claimant's vehicle had been running idle for nearly one and one-half hours.

Rasheed approached the Claimant's vehicle and observed him in the driver's side seat with his head slumped down, appearing to be asleep. Rasheed unsuccessfully attempted to gain the Claimant's attention and then returned to his own vehicle. Twenty minutes later, Rasheed approached the Claimant's vehicle and saw that he remained slumped in the driver's seat. Rasheed banged on the vehicle's window and asked the Claimant what he was doing. The Claimant jumped out, stating, "I'm not sleeping." At

that point, the Claimant began performing the tasks that he had been assigned earlier that evening.

The Claimant denied that the events transpired in the manner testified to by Rasheed. He said that Rasheed told him to determine whether the termination needed pigtailed. He said that he walked the track and found the termination shunt. He went to get materials and tools to do the work at the shunt. After he returned, he was told to stand down while two trains passed. The Claimant said that he went to his truck to get ice water and Gatorade and waited in his truck for the trains to pass. Then, Rasheed came over and asked him what he was doing and asked if he was sleeping. The Claimant said that he replied, "No." He said he explained that he was waiting for the trains to pass but Rasheed said he was going to write him up for sleeping. The Claimant said that he then performed the tasks that Rasheed had asked of him.

The Carrier contends that it has shown with substantial evidence that the Claimant is guilty of the charges against him. The Carrier contends that Rasheed's testimony that he found the Claimant asleep and that GPS data showed his truck had been idle for some time, was found to be credible, and this Board should not disturb that finding. The Carrier contends that the Claimant failed to perform the tasks that were assigned to him for more than four hours, which is proof of insubordination.

The Carrier also contends that the penalty of dismissal was not harsh or excessive. The Carrier contends that sleeping while on duty and insubordination are both offenses for which dismissal is appropriate for a first offense. In addition, the Carrier contends that in the nine months prior to his dismissal, the Claimant was disciplined several times, including a five-day suspension. Therefore, the Carrier contends, dismissal was appropriate.

The Organization contends that the Carrier did not provide substantial evidence to support the charges against the Claimant. The Organization contends that it was improper to charge the Claimant with insubordination when both Rasheed and he testified that the work was completed by the Claimant. The Organization contends that the amount of time it takes to complete a task should not determine whether an employee is considered insubordinate.

The Organization also contends that there is no evidence that the Claimant was sleeping on duty other than Rasheed's testimony that was contradicted by the Claimant's. The Organization contends that this disputed testimony falls short of the

substantial evidence needed to sustain the charge against the Claimant. Further, the Organization contends that Rasheed's testimony that he believed he previously found the Claimant asleep but said nothing to him or his Union Representative shows that the rule is unenforced by the Carrier. Further, the Organization contends that the penalty of dismissal is harsh, excessive, and punitive rather than rehabilitative.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Rasheed's testimony provided substantial evidence that the Claimant failed to perform his assigned duties for more than four hours and that he was asleep in his vehicle when observed by his supervisor. Given the serious nature of the charges and the Claimant's poor disciplinary record, this Board finds that the penalty of dismissal was neither excessive nor an abuse of the Carrier's discretion.

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 27th day of March 2019.