

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43627  
Docket No. MW-44776  
19-3-NRAB-00003-180305**

**The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(National Railroad Passenger Corporation (AMTRAK)**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. A. Gullo by letter dated August 28, 2017, was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File NEC-BMWE-SD-5532D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Gullo shall be reinstated to service 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 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 Carrier has employed the Claimant, Anthony Gullo since January 20, 2014. At the time of the dispute he held the title of Track Foreman. On August 1, 2017, the Claimant was charged with violating the Carrier's Standards of Excellence pertaining to Safety, Attending to Duties and Professional and Personal Conduct, as well as NORAC General Rule E2 (a) and the Roadway Protection Manual Rule 527(a). The charges are based on allegations that on July 20, 2017, the Claimant was observed sleeping on duty and/or assuming the position of sleep while at the controls of the tie handler machine, failing to complete the required Work Equipment Daily Maintenance and Inspection Logbook ("RMM Logbook"), and insubordination for refusing to follow a direct order to provide a written statement regarding the events of July 20, 2017.

A hearing and investigation was held on August 17, 2017. The Claimant did not testify on his own behalf. On August 28, 2017, the Claimant was notified that the Carrier found him guilty of the charges and was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on October 18, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division on January 12, 2018. The claim is now properly before the Board for adjudication.

The Board finds that the Carrier has presented documentary evidence and witness testimony to satisfy its burden of proof that the Claimant violated its rules when he was asleep, or assuming the position of sleep, while on duty and failed to complete the required RMM logbooks on a daily basis. We do not find that the Carrier has provided reliable and substantial evidence that the Claimant was insubordinate.

Three employees testified that the Claimant was sleeping or assumed the position of sleep while sitting at the controls of the tie handler machine. Their testimony is consistent with their written statements, submitted contemporaneous with the events of July 20, 2017. Track Supervisor Scott Barbera testified that the Claimant admitted to him that he was seen sleeping. The evidence sufficiently establishes that the Claimant was asleep while sitting at the controls of a tie handler machine located adjacent to a "live" track and employees working in the vicinity of the equipment. There is no reason to doubt the Carrier's conclusion that such conduct creates a serious safety hazard and violates its rules.

Other written statements were corroborated by witness testimony that the Claimant failed to fill out the daily RMM logbook. One of the purposes of completing the logbook is to insure the machine is in good repair and safe for operation. Similarly,

the Claimant's failure to complete the logbooks is in violation of several rules and can create an unsafe condition.

The Board finds that the Claimant was not insubordinate in failing to provide the Carrier with a written statement where there is no evidence that he was asked or ordered to complete such a statement. The Claimant's supervisors presented him with a printed questionnaire and asked him to answer the questions. The Claimant refused. None of the witnesses testified that he was asked to submit a handwritten statement regarding the events of July 20, 2017. All other witnesses provided handwritten statements regarding their version of the events. We find the Carrier's request to fill out a questionnaire and not a handwritten statement, and entering the document into the record, created a bias toward the Claimant that potentially prejudiced a fair assessment of the insubordination charge by the hearing officer. Had the Claimant complied and filled out the questionnaire and raised the same objection related to the format of the document, our finding would have been the same. Asking the Claimant to complete a questionnaire instead of a handwritten statement was improper and entering it into the record after the he refused to complete it had a prejudicial effect on the assessment of guilt.

Our finding regarding the alleged insubordination does not impact our findings regarding the other charges. There is ample arbitral support for imposing severe discipline, up to and including dismissal for sleeping while on duty, even in cases where the employee was found to be sleeping in secluded areas and not endangering anyone. Here, the Claimant was sleeping, or assumed the position of sleep, while sitting in the track maintenance equipment with work going on around him. The Carrier is justified in considering such conduct a disregard for the well-being and safety of employees, particularly where as a track foreman the Claimant supervised employees and was expected to deter others from engaging in such activity. We also find that the Claimant's failure to complete the RMM logs shows his inability to follow the Carrier's rules and his disregard for insuring the safety of the equipment and employees.

Moving to the penalty imposed, it is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. The record regarding the charges of sleeping on duty and failure to complete the required maintenance records does not contain any evidence that the Carrier was biased in dismissing the Claimant. Our findings regarding the charge of insubordination does not affect the significance of the other charges nor is there any basis to find that the dismissal by the

Carrier was limited to any one charge. The Hearing Officer's decision, dated August 24, 2017, relies primarily on the charges related to sleeping on duty and failing to complete the RMM logbooks.

Moreover, the Claimant has been employed for a short period of time and amassed a poor disciplinary record involving a suspension for a safety violation, which occurred approximately one year before the events of July 20, 2017. Arbitral precedent in the industry has consistently upheld dismissals where recidivism occurred with unsafe work practices. There is no basis to set aside the penalty imposed.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has established with substantial evidence that the Claimant was sleeping or assuming the position of sleep and failed to fill out the required RMM logbooks, thereby violating the Carrier's rules.

**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 17th day of May 2019.

**CARRIER MEMBERS' DISSENT**

**to**

**THIRD DIVISION AWARD 43627 – DOCKET 44776**

**(Referee Michael Capone)**

**The Board dismissed the propriety of the questionnaire statement that required yes or no answers to two straightforward questions, and provided for an unstructured explanation for either or both “yes” answers. The Board found bias and prejudice where only efficiency and clarity was sought. To the extent this opinion promotes form over substance and discourages deviation from unstructured hand written statements the Board has erred.**

*Sharon Jindal*

**Katherine N. Novak**

*Jeanie L. Arnold*

**Jeanie L. Arnold**

**May 17, 2019**