

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43757
Docket No. MW- 45067
19-3-NRAB-00003-180562**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn 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 (dismissal) imposed on Mr. I. Loya, by letter dated May 26, 2017, for alleged violation of GCOR 1.11 – Sleeping and GCOR 6.32.1 – Providing Warning Over Road Crossings, in connection with allegations that he allegedly was observed sleeping on April 19, 2017, was without just cause, on the basis of unproven charges and in violation of the Agreement (System File J-1734D-408/USA-BMWED_DM&E-2017-00047 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant I. Loya shall have the charges dismissed and be returned to work and shall be made whole for all loss suffered as a result of the violation, including lost straight time, holiday pay, lump sums and overtime without deduction of outside earnings, health, dental and vision insurance premiums, deductibles and co-pays and all months restored and credited for the purposes of Railroad Retirement and vacation.”**

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 April 19, 2017 the Claimant was assigned to provide flag protection for a crossing under repair. Manager of Welding Matthew Weller, noted that the Claimant failed to respond to a radio call from an incoming train crew, thus the Manager drove the short distance to the crossing under repair where the Claimant was to flag and concluded that the Claimant was sleeping. By letter dated April 20, 2017 the Claimant was given notice of a "formal investigation and hearing" (NOI) to take place at 1300 hours at the Nahant Yard Office, 3420 Miller Ave., Davenport, IA "to determine the facts and circumstances and to place responsibility, if any, in connection with you allegedly sleeping during your work shift on April 19, 2017." The NOI indicated that CGOR 1.11 Sleeping and GCOR 6.32.1 Providing Warning Over Road Crossings were the rules that possibly had been violated. By letter dated May 26, 2017 the Claimant was informed of his dismissal because the Carrier concluded that he had violated the aforementioned rules. On June 16, 2017 the Organization filed a claim on Mr. Loya's behalf. The claim was properly progressed on the property but was not resolved. Thereafter the claim was further progressed to this Board for final adjudication.

The Carrier posits that the Claimant received a fair and impartial hearing, conducted in accordance with industry standards, with his due process rights respected. Rule 34 - Discipline and Investigations does not preclude entering rules at the investigation that were not stated in the NOI, which does not need to list any rules as long as there is specific identification of the incident of concern to the Carrier. The Charging Officer did not need to be at the investigation as the Carrier produced eyewitness testimony. The record contains the required substantial evidence of a violation as Manager Weller testified about his observation of the Claimant "in a kickback position in his personal vehicle with the radio in his lap, windows up, shaded, sunglasses on, mouth open" and unresponsive "to me getting out of my vehicle or hearing me walking up to his vehicle until I knocked on the window" (Transcript, p. 10). The Claimant's contention that he is a diabetic and was suffering from low blood sugar

is neither timely nor compelling as mitigation. The Claimant did not mention his condition to Manager Weller, who did not tell Mr. Loya that he had no time to listen to him. The doctor's note, containing little information, came only during the progressing of the claim, but was not provided during the investigation. The Board should honor the Carrier's conclusion about credibility. The dismissal for what was a serious offense is justified, particularly in view of the four (4) suspensions assessed against the Claimant in the previous eighteen (18) months. The claim is excessive as Rule 34 provides only for all time lost reduced by deductions for outside employment and unemployment compensation.

The Organization contends that Mr. Loya did not receive a fair and impartial investigation because the Carrier introduced rules not listed in the NOI. The Carrier has not provided the required substantial evidence; thus, the factual dispute must be resolved in the Claimant's favor. The Claimant, who was not shown to have been sleeping, was seated and not reclining. He is a diabetic whose appearance was due to his medical condition, including low blood pressure. Once Manager Weller appeared, the Claimant properly flagged the crossing. The dismissal was excessive and unwarranted as it was unmindful of the Claimant's mitigating medical condition and served only to punish rather than to correct behavior.

The Organization's contention that the Claimant did not receive a fair and impartial investigation is absolutely unpersuasive. There is no language in Rule 34 that prohibits the Carrier from introducing rules not listed in the NOI. Moreover, detail in the NOI met the requirements of Rule 34 and only the GCORs included in the NOI were listed in the dismissal letter. GCOR 1.11 Sleeping states that "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 6.32.1 – Providing Warning Over Road Crossings was never entered into the record during the investigation and has not been considered by this Board. If the Carrier expects this Board to find a violation of a particular rule, that rule must become a part of the record so that the Board, and indeed the Claimant and his representative, are aware of the relevant language allegedly governing the Claimant's actions. And, while the Carrier has the right to introduce during the investigation rules not set forth in the NOI, if violation of those rules are not thereafter listed as bases for discipline, they become irrelevant to the Board's consideration. Therefore, the only rule of concern to the Board in this case is Rule 1.11 Sleeping.

The Board finds substantial evidence that the Claimant violated GCOR 1.11. Manager of Welding Matthew Eller testified credibly that he heard on his radio a train make multiple unsuccessful attempts to contact the Claimant for permission to go through his crossing at 15 MPH. That caused Manager Weller to drive the very short distance to the crossing where he saw the Claimant “in a kickback position in his personal vehicle with the radio on his lap, windows up, shaded, sunglasses on, mouth open did not respond to me getting out of my vehicle or hear me walking up to his vehicle until I knocked on the window” (TR-10). The Manager estimated that he observed the Claimant for 5-10 seconds. Despite the Claimant’s testimony that he was reclining but not sleeping and Manager Weller’s testimony that he could not tell whether Claimant Loya’s eyes were closed, on balance the Board finds the credible evidence that the Claimant was sleeping to be compelling.

For several reasons the Claimant’s testimony and related evidence about his diabetes do not alter the Board’s conclusion. He testified that he has been a diabetic for twelve (12) years and that his blood sugar is under control, but also testified that his blood sugar level can create problems in a matter of minutes. Despite the fact that the Claimant may be assigned to safety sensitive positions in an inherently dangerous industry, no evidence indicates that he has ever informed the Carrier of this medical condition. Moreover, since there is no evidence that in the past twelve (12) years he has informed the Carrier, his assertion that he attempted to explain the situation to Manager Weller but was stopped from doing so is viewed with skepticism. The Board further notes the discrepancy in the Claimant’s testimony that he was not sleeping but was disoriented due to “a very severe low sugar withdrawal that was bringing me down to my knees” (TR-21) and the fact that after Manager Weller confronted him, he was able to flag the crossing and drive his personal vehicle. Yet there is no testimony from the Claimant about what he did to confront the low blood sugar problem so that he was once again alert. The brief letter dated June 29, 2017, two (2) months after the investigation, over the signature of the Claimant’s treating physician, provides no real insight to this Board, as the letter simply states “The above mentioned is a patient of mine. I am currently treating him for Diabetes Mellitus. If you need any further information please contact my office at” (phone number supplied). The letter provides nothing specific that would explain the Claimant’s behavior on April 19, 2017.

The Carrier has met the burden of proof with regard to the allegation that the Claimant was asleep on April 19, 2017 but for reasons stated above, it has not met the burden of proving that the Claimant violated GCOR 6.32.1 – Providing Warning Over

Road Crossings or any other GCOR entered into the record. Because only one of the two charges has been proven, the dismissal is deemed too severe, even considering that the Claimant incurred four (4) suspensions between November 2, 2015 and his May 26, 2017 dismissal. The Claimant is to be returned to work without pay for any lost time, with the time off to be considered an actual suspension. Seniority is to be restored and credited for the purposes of Railroad Retirement and vacation. The Claimant is to be compensated for all health care insurance premiums, deductibles and co-pays in excess of those like expenses that he would have incurred had he not been removed.

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 16th day of July 2019.