

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43990
Docket No. MW-45281
20-3-NRAB-00003-190121**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when the 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 upon Mr. J. King, by letter dated February 5, 2018, for his alleged violation of GCOR Rules 1.11 and 1.1.2 in connection with his alleged sleeping while on duty on January 4, 2018 was on the basis of unproven charges, without just and sufficient cause and excessive (System File RI-1834D-801/USA-BMWED_DM&E-2018-001147 DME).

(2)As a consequence of the violation referred to in Part (1) above, Claimant J. King shall now:

‘...be made whole for all financial losses as a result of the violation, including compensation for:

- 1) straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service [this about (sic) is not reduced by earnings from alternative employment obtained by the Claimant while wrongfully removed from service];**
- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant not been removed from service;**

- 3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any Junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;
- 4) health, dental and vision care insurance premium, deductibles and co-pays that he would not have paid had he not been unjustly removed from service;
- 5) also, all months of service credit with the Railroad Retirement Board he would have accumulated had he not been unjustly removed from service.

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.

The incident giving rise to this claim occurred on January 4, 2018. On that date, the Claimant was assigned as a Speed Swing Operator at the Carrier's Nahant Yard. In the process of conducting an efficiency test, Carrier management observed the Claimant apparently sleeping in the cab of his machine.

As a consequence of their observation, in a letter dated January 5, 2018, the Carrier sent the Claimant a notice to attend a formal investigation for the following purpose:

“... to determine the facts and circumstances and place responsibility, if any in connection with you alleged sleeping while on duty on January 4th, 2018...”

A formal Investigation was held on January 18, 2018. Following the investigation, the Carrier notified Claimant on February 5, 2018 that he had been found guilty as charged and was dismissed from Carrier's service as of that date. The Organization filed a claim on Mr. King's behalf on February 15, 2018. That claim was denied by the Carrier on March 28, 2018. The Organization appealed the denial on April 19, 2018, and the appeal was also denied. The matter was progressed in accordance with the Parties' Agreement and is properly before this Board.

The Carrier asserts that the Claimant received a fair and impartial hearing, and that sufficient evidence presented at the hearing confirmed that the Claimant was guilty as charged. It points out that the Carrier witness testified persuasively that management had approached the Claimant's machine, attempted to get his attention, but found that the Claimant had his “sunglasses on, [his] mouth gaping open, and appear[ed] to be sleeping” on the date in question. (Tp. p. 12) It also notes that the transcript record contains a photograph of the Claimant in his cab, apparently in a sleeping position. The Carrier concludes that, given the Claimant's short tenure with the Carrier and his two previous admitted violations, the ultimate penalty of dismissal was warranted, and the claim should be denied.

The Organization disputes the Carrier witness's testimony on the record and asserts that there is no proof that the Claimant was actually sleeping as the Carrier witness claimed. It notes that the Claimant testified without contradiction that his eyes were not closed, and he had not placed his seat in a reclining position. The Organization also points out that the Claimant's machine was in park, the boom was down, and he was simply waiting for instructions to start work, in what was extremely cold weather. Finally, the Organization protests that the Claimant's discipline is predicated on pure speculation from Carrier's officers and not based upon the facts of the case. (Tp. Exs. 4 & 9). It asks that the instant claim be sustained in full.

The Board has reviewed the documentary, testimonial and photographic evidence in this case with care. While we agree with the Organization that the photograph offered in evidence is not sufficient evidence that the Claimant was, in fact, sleeping on duty, the first-hand testimony of the Carrier witness is compelling and offers sufficient detail on the managers' attempts to gain the Claimant's attention – to no avail – that we cannot quarrel with the Carrier's finding of guilt in this case. Moreover, in light of the Claimant's discipline record in his short time with the Carrier, we do not find that the penalty of dismissal was either unwarranted or excessive. Accordingly, the claim is denied in its entirety.

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 5th day of March 2020.