

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45091
Docket No. MW-47266
24-3-NRAB-00003-220327**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Ms. S. Palombo, by undated letter (following a ‘Decision Letter’ dated May 13, 2021), for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of the Rules, Rule 2 - Courtesy and Professional Conduct, Rule 4 - Absence from Duty, Rule 8 - Behavioral Expectations for KeolisCS Employees and Prohibited Behaviors, Rule 9- Safety, Rule 17 - Attending to Duties and for alleged violation of NORAC Rules in connection with her allegedly being found sleeping in the Crew Truck at various times throughout the day on April 25, 2021 (at times when she should have been protecting a crossing for a logging truck to make its moves through the crossing) and in connection with her alleged failure to report any damage or incidents involving the company vehicle she was utilizing since April 11, 2021, when damage to the vehicle was discovered on April 25, 2021, was completely unsupported, arbitrary and excessive (Carrier’s File BMW 21.128 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Palombo shall now ‘* be placed back into service effective immediately, with all lost straight time, overtime, double-time wages, safety pay, per diems, credits for vacation, credits for retirement, and any other benefits that are applicable to her under our Collective Bargaining Agreement with all charges fully withdrawn. ***’”**

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.

Factual Background:

The Carrier alleges that on April 25, 2021 at Maplewood Ave. on the Gloucester Branch, Claimant, the crew foreman, was sleeping in a crew truck at various times throughout the day when she should have been protecting the crossing. It additionally contends that she failed to report damage or incidents involving the company vehicle she had been utilizing since April 11, 2021. The Carrier concluded she was in violation of its disciplinary policy and dismissed her from service. The Organization protested this decision, and the resulting claim was processed through the grievance procedure to consideration by this Board.

Position of Carrier:

On April 25th at 11:25 A.M., an employee on Claimant's crew called his supervisor, J. Walsh, and reported that Claimant was parked in her truck alongside the tracks at Maplewood Ave. in Gloucester, asleep and apparently unresponsive. Claimant's duty that day was to protect the right of way and grade crossing, and to ensure that the trucks coming and going did so safely. Walsh drove to Maplewood Ave., arriving roughly ten minutes later. He found Claimant hunched over, with her head down on her chest, and with the truck running.

Walsh beeped his horn twice to try and wake her up, with no response. He got out of his truck, went to Claimant's window and knocked for about ten seconds. She woke up, got out of the truck and was unsteady on her feet. Walsh inquired and Claimant said she was extremely tired and out of it because she had worked the day before. Her

speech was very slow and slurred. Walsh asked if she was feeling okay. She answered that she was tired and in a lot of pain due to her hip injury.

Walsh contacted Senior Engineer Joe Neves, and asked for a second opinion on her state. After conversing with Claimant, they set up a reasonable suspicion drug and alcohol test. Neves had previously warned Claimant about sleeping on the job.

In addition to her sleeping on the job, when the vehicle she was using was examined, Walsh concluded it had been in accidents between the time she received the vehicle and when she was discovered sleeping inside. While Claimant alleged that she had assumed the vehicle with the damage and had filed a truck report regarding the damage, the Carrier maintains there was no such report on file and the hearing officer rightly found her self-serving allegations to lack credibility.

Position of Organization:

The record evidence never substantially showed that the Claimant was actually sleeping on duty or that she failed to report alleged vehicle damages. The Organization notes that she was wearing shaded safety glasses, so Walsh would not have been able to see whether her eyes were open.

The photographs submitted by the Carrier do not show a truck number, dates or times of the photographs, or that the vehicle photographed was even the vehicle assigned to Claimant. In its assessment, the Carrier failed to meet its burden and relied solely on unsupported and unproven contentions.

The Organization further argues that the discipline assessed against Claimant was clearly excessive. Preceding Awards have consistently held that when a Claimant is disciplined under multiple rules, but the Carrier only carries its burden as to one of the rules, the discipline should be reduced.

Analysis:

Walsh had no reason to fabricate or exaggerate his testimony. He was called because Claimant appeared to be sleeping. She apparently did not get out of her vehicle or show signs of wakefulness between the time an employee reported her asleep and Walsh's arrival. This was a period of ten minutes, during which time the protection she was responsible for was abandoned. Walsh honked his horn twice with no response, then tapped on her window until she responded and admitted she was very tired and in pain.

We understand that Claimant was awaiting a hip replacement and in pain. That said, it remained her responsibility to notify supervision when and if she was unable to fulfill her job duties. The facts of record adequately support a finding that Claimant was in violation of the rule prohibiting sleeping on the job or was assuming an attitude of sleep. She was not at her job post, and was not responsive to the passage of time, a honking horn or the initial tapping on her window. This is a serious offense; her job as flagger made her responsible to protect the right of way. When walking to her truck to rest, she should have realized she was leaving her post and had to rest, yet she told no one. Passing on this opportunity to at least try to get alternative protection was a volitional act of negligence. She knew she was leaving the track unprotected and did nothing about it. This was not her first sleeping offense, though she only received a verbal warning in the past.

She is also accused of failing to report damage to her Company vehicle. The Carrier maintains it was given to her on April 11 undamaged and the damage was found on April 25, the day of the sleeping incident.

The Organization has rebutted this allegation by submitting a copy of her April 8 report describing damage to the vehicle which matches that shown in the photographs submitted by the Carrier. As a result, she was not reasonably found guilty of both charges against her.

The volitional nature of her abandonment of her post to sleep in her vehicle is an aggravating circumstance; it left people and property unprotected against oncoming trains. Further it was a volitional act, consciously elected despite prior warning. As such, the sleeping incident is severe enough to justify treatment as an egregious offense.

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 31st day of October 2023.