

PUBLIC LAW BOARD NO. 3460

Award No. 35
Case No. 35

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Railway Company

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of B&B Helper D. L. Bandemer dated November 26, 1980, was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) B&B Helper D. L. Bandemer be reinstated with all seniority and other rights unimpaired and compensated for all time lost."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

On the date involved in this matter, October 14, 1980, claimant was assigned as a helper on a gang living in camp cars. At the time of the incident the Foreman and the Truckdriver were away from the gang on business. At approximately 9:30 A.M. that morning a co-worker of claimant noted that he was absent from the worksite. He inquired as to claimant's whereabouts and found him in the bunk car lying on his bed. The co-worker felt that he was sleeping and left and called upon two other gang members to accompany him back to the bunk room. When the three employees entered the bunk room, claimant was observed either standing up or getting up from a prone position onto the floor. Thereafter claimant returned to his duties and worked the balance of his shift. He was away from work approximately 35 minutes to one hour. He was docked one hour's pay subsequently.

Based on this incident, claimant was charged with sleeping on duty and, following and investigation, was dismissed on November 26, 1980, for being found sleeping

on duty while assigned to work.

In this case, as in the prior dispute of this Board, Carrier notes the time lapse from the time of the filing of the claim to the matter being processed to this Board. The argument of Laches again is asserted. In addition, with respect to the merits, Carrier insists that the evidence is clear, including the testimony of claimant, that he was indeed asleep on the morning in question while supposedly at work.

The Organization in its argument indicates that the transcript of the investigation reveals that claimant was ill after reporting to work on the morning in question. He went to the bunk car to go to the rest room and upon becoming nauseated and dizzy, lay down on his bed after taking some medicine. After 45 minutes he got up and at that time the three employees entered the bunk car, according to the testimony, and claimant went to work. The fact that he was ill is attested to by the fact that he later refused to have lunch even though involved in physical labor. The Organization indicates, additionally, that the charging individual in this instance who initiated the entire matter was a fellow employee who stood to benefit by seniority if claimant were dismissed. Thus, the Organization maintains that this other employee was intentionally making trouble for claimant in this case while the Foreman saw no reason for the investigation.

This dispute has some extremely unique circumstances as the Board views it. First, with respect to the argument on Laches as indicated above, that matter has been disposed of by Award No. 34 of this Board. In this case, on the facts the uniqueness of the circumstances includes primarily the fact that the individual who had created the incident was a fellow employee and not a Carrier officer. Additionally, the circumstances which are undenied with respect to claimant's reasons for going back to his bunk car are that he was ill. The Organization has argued reasonably that from a safety standpoint Carrier would not want him performing his functions while dizzy and unable to work in a safe condition. Furthermore, for the hour of work which he missed, he was docked and did not receive a full day's pay for the day in question. The issue boils down to the question of whether an employee who feels ill while working is entitled to leave his job for purposes of resting and recovering in order to return to work. Claimant's testimony on this score was forthright and undenied in that he was away from work for 45 minutes to a maximum of an hour for the purpose of taking care of his illness and dizzy spells.

He returned to work voluntarily with no Carrier official admonishing him and proceeded to work for the remainder of the day. On balance, as the Board views it, there was not substantial evidence adduced at the hearing to indicate the transgression alleged. There is no evidence whatever to establish, based on the standards normally applied by Carrier, that he was sleeping while supposedly working. One individual came into the bunk car, namely the employee who intended to make problems, according to the Organization, and when other employees returned with him, claimant was not asleep but either standing or in the process of standing. While this Board recognizes that it cannot substitute its judgment for that of the hearing officer with respect to credibility, even assuming the credibility findings made, the evidence simply does not support the conclusion that claimant was sleeping on the job and, thus, his conduct warranted dismissal.

There is no ready explanation for the length of time required by the parties to bring this matter to a head. Furthermore, there are some unanswered questions with respect to claimant not reporting the fact that he was leaving work to anyone at the time that he went to the bunk car to go to the rest room. Based on the entire matter and the peculiar circumstances, the Board feels that claimant was wronged by Carrier's conclusion. He shall be offered reinstatement to his former position with all rights unimpaired and his record cleared. Furthermore, he shall receive pay for losses sustained for a six-month period. To recover his position, however, he must respond to Carrier's offer to return to work within thirty days from the time it is received by him.

AWARD

Claim sustained; claimant shall be reinstated to his former position with all rights unimpaired and his record cleared of all charges. He shall receive compensation for six months' pay for the time out of work in accordance with the findings above.

ORDER

Carrier will comply with the award herein within thirty (30) days from the date hereof.