

PUBLIC LAW BOARD NUMBER 3530

Award Number: 116

Case Number: 116

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, L.J. Stewart, P.O. Box 57, Pembroke, VA 24136 was assessed a 30 day suspension for alleged violation of Safety Rules No. 1713, 1041 and 1002. Claim was filed by the Employees in accordance with the Railway Labor Act and agreement provisions. Employees request he be paid for the lost time and the suspension removed from his record.

FINDINGS

Claimant entered the Carrier's service on October 24, 1978.

By letter dated June 16, 1986, Claimant was notified to attend a formal investigation on charges that he violated the Carrier's Safety Rules 1713, 1041 and 1002. The investigation was held on August 15, 1986, at which time evidence was adduced which led to Claimant's suspension for 30 days.

The issue to be decided in this dispute is whether Claimant was suspended for just cause under the Agreement; and if not, what should the remedy be.

On June 5, 1986, Claimant was assigned as a Scarifier Operator installing ties at the West End of Roanoke Terminal. The day was extremely hot and a substantial amount of coal dust was in the air. The machine in front of

Claimant's stopped because it had caught up to where the spike pullers were working. Yard Tie Gang Supervisor R. L. Zehringer noticed that Claimant's machine was not operating. Zehringer came to Claimant's machine and noticed Claimant slouched with his eyes closed. Claimant's hard hat was off, his shirt unbuttoned and rolled up past his abdomen. Zehringer determined that Claimant was asleep by waving his hand in front of Claimant's face and looking at Claimant from as close as one foot. Zehringer then woke Claimant by shaking him and calling his name.

At the formal investigation, Claimant testified that his hard hat was off, his shirt rolled up, he was "laying back" and had a cold rag over his eyes trying to clean the dust out and cool off. Claimant denied being asleep.

In relevant portion, Rules 1713, 1041 and 1002 provide:

1713:

*** sleeping on duty, *** is sufficient cause for dismissal.

An employee lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered sleeping.

1041:

Safety equipment; such as hard hats, ***, prescribed by instructions from employing departments to be worn in specified areas or for specified jobs, must be used by all persons affected by these instructions.

1002:

Employees must be suitably clothed to perform all duties safety and will be governed by the following regulations:

(a) Working in shorts is prohibited. Shirts must cover shoulders, back and abdomen.

The position of the Carrier is that Claimant was suspended for just cause under the Agreement because he clearly violated the cited rules. The

Carrier contends that Claimant admits to being improperly dressed and without his hard hat. Moreover, Claimant's admission to "laying back" with the rag over his eyes satisfies the definition of the act prohibited under the rule regarding sleeping on duty. Finally, the Carrier contends that the suspension is warranted citing the overall circumstances and the provision that sleeping on duty is, by itself, a dismissable offense.

The position of the Organization is that Claimant was unjustly suspended. The Organization contends that Claimant was not asleep as charged. It cites testimony that Claimant was seen active outside his machine as little as 45 seconds prior to the time Zehringer found him "asleep." The Organization also cites Claimant's negative urinalysis as evidence he was not asleep. And it points out that only one witness found Claimant asleep, arguing, by implication, that that is insufficient evidence of sleep. Finally, the Organization maintains that the discipline is too harsh.

After review of the entire record, the Board finds that Claimant's suspension was for just cause under the Agreement.

The Carrier has sustained its burden of showing that it established by substantive credible evidence in the record that Claimant was asleep on duty, with his shirt in a configuration prohibited by the rules and with his hard hat off. Claimant admitted as much and that was supported by Zehringer's credible testimony in the record. The fact that there was only one Carrier witness does not, by itself, render that evidence unpersuasive. Whatever else Claimant may or may not have been doing just before the time

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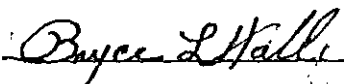
in question, the persuasive evidence in the record supports the finding that Zehringer found Claimant asleep and improperly dressed for duty. Finally, the suspension is not too harsh; but rather, is in keeping with the offense. There is no indication of arbitrariness, caprice or discrimination.

AWARD

Claim denied.


Neutral Member


Carrier Member


Organization Member

Date: FEB. 22, 1990