PUBLIC LAW BOARD NO. 3558

AWARD NO. 15
Case No. 15

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TO )
DISPUTE ) SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)

STATEMENT OF CLAIM:

"Claim on behalf of Houston Division Machine Operator L. D. Busby for pay for all time lost and the charges of violation of Company Rule M810 removed from his record account of his unjust suspension from April 9, 1984 through April 22, 1984."
(MW-84-73)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee respectively within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The issue here in dispute concerns a question as to whether Claimant was found to be sleeping on the job in violation of Rule M810 of the general rules and regulations of the Carrier, that Rule reading in part as follows:

"M810...Employees must not sleep while on duty. Lying down or assuming a reclining position, with eyes closed or eyes covered or concealed, will be considered sleeping."

The Carrier maintains that a complete review of the transcript of hearing accorded Claimant fully supports a holding that Claimant was found to have been sleeping on the job at approximately 6:00 PM on April 3, 1984 while at the scene of a derailment in South Yard of Carrier's Englewood Yard.

It is the position of the Carrier that Claimant had effectively admitted to having been asleep on the job. In this respect, it says testimony of its Manager Maintenance of Way shows that when he confronted the Claimant the day after the incident regarding what the Manager said was his observation of Claimant having been in "a sloped position and sleeping on his speed swing while on duty," that Claimant had told him, "[T]hat he was...taking medication for his sinuses and had occassion to doze off." Carrier thus maintains that Claimant was properly suspended from service, without pay, for the period April 9 through April 24, 1984, this period of time being said to represent a 10 working days' suspension.

Petitioner urges that Claimant was not sleeping on the job. It states Claimant had been instructed by his foreman to park the speed swing he was operating over by the road as the gang was working on a stripped joint and there was no need for the speed swing, and that at the time in question Claimant was working on the cab heater of the speed swing while waiting for the gang to move to another location. In this same respect, Petitioner states that due to the small confines of the speed swing cab, Claimant was bent over in the operator's seat, trying to attach the heater to the side of the cab when the Manager Maintenance of Way passed his speed swing some five or six feet away in his automobile or pickup.

The foregoing explanation notwithstanding, Petitioner states that if in fact it was to be believed that the Manager did see Claimant with his eyes closed at all, it was only for a few seconds, asserting that the Carrier official testified at the company hearing that he only observed Claimant in the position of sleep for "a few seconds." In this regard, Petitioner argues that if the Carrier official was of the belief Claimant was asleep he should have confronted Claimant at that time.

As concerns the question of Claimant having taken medication, which the Petitioner asserts was Dristan, the Petitioner directs attention to testimony at the company hearing whereby the Manager had stated he was unsure of the date of his conversation with Claimant, and that he had not in fact discussed Claimant's suspension with him on April 4, 1984, or the day after the alleged incident. Petitioner states the discussion took place about a week later and it was not in connection with the suspension at all.

The Board has carefully reviewed the record. In regard to the testimony of the Manager, the Board would read the transcript as revealing the Manager to have stated he had observed Claimant to be in a "reclined position" for "a couple of minutes" and that after he had reportedly observed him asleep and before he could get to the foreman, Claimant was "aroused and raised his head and looked at him in his rear-view mirror," and that he had observed Claimant to be in this latter position of looking into the rear view mirror for only a few seconds. Such differences notwithstanding, the Board does not find from its complete and studied review of the record as developed and presented that Carrier has met the burden of proof of its charges. It has not successfully refuted the contentions of the Claimant or Petitioner as to the possibility of Claimant having been working on the heater or established sufficient support as to why the Manager or a foreman had not approached Claimant relative to the Manager's concern and observations at the time in question.

This Board certainly does not condone sleeping on the job, even if it be while waiting for orders or directions to move a machine to another work location. However, in the instant case we have no reason

to hold that Claimant was in fact guilty of such an infraction of rules and must, therefore, sustain the claim.

AWARD:

Claim sustained.

ORDER:

The Carrier is directed to make this Award effective within 30 calendar days of the date set forth below.

Robert E. Peterson, Chairman
and Neutral Member

C. B. Goyne, Carrier Member

M. A. Christie, Employee Member

San Antonio, TX
June 4, 1985