

**Public Law Board No. 4752
Case No. 2
Award No. 2**

Parties to the Dispute:

The Sheet Metal Worker's International Association
and
Illinois Central Railroad

Statement of the Claim:

1. The Carrier violated the current and controlling agreement when it improperly withheld from service Sheet Metal Worker Phillip Mayne pending an investigation into allegations of sleeping on the job.
2. The Carrier further violated the agreement when it improperly dismissed Sheet Metal Worker Mayne following an investigation held on September 11, 1992.
3. That accordingly, the Carrier be directed to return Mr. Mayne to service with compensation for all time lost, including the time lost prior to the investigation and overtime, Holiday Pay, etc.; restoration of his seniority and vacation rights; compensate Mr. Mayne for any medical or dental benefits for himself or his dependents while improperly dismissed from service; compensate or restore any contractual benefit Mr. Mayne may have been deprived of while out of service.

Opinion of the Board:

Claimant began his service with Carrier on June 15, 1962, as a Water Repairman at Carrier's Paducah, Kentucky facility. As is the case with most railroad employees, Claimant was unable to work continuously due to a variety of reasons (i. e. - military leave of absence from August 16, 1968 to September 15, 1971, and several medical leaves of absence due to various on-

the-job injuries and personal illnesses). Throughout Claimant's employment in Carrier's service, however, he did not have any formal discipline whatsoever assessed against him.

On September 1, 1986, Claimant's position on Gang 2220 at Paducah was abolished due to the P&L Sale, and Claimant marked-up on the Gen. Ofc. WSR Payroll 0947 working at Carbondale, Illinois. In that position, although Claimant was still classified as a Water Repairman, his work duties generally consisted of environmental maintenance.

According to the record which has been presented herein, it appears that on April 16, 1992, Claimant was assigned to perform general, outside clean-up work at the Bluford Fuel Pad at the Fulton Yard. Claimant maintains that while so assigned he injured his back.¹ An accident report was filed by Claimant in that incident; and Claimant received treatment for his injury from a chiropractor who has not been identified in the record.

Claimant maintains that, subsequent to the above described back injury, he was placed in a light duty status. However, according to Claimant, his condition did not improve; and he was advised by Carrier to consult with a neurosurgeon.

Claimant was examined by Dr. Robert Meriwether, M.D., a neurosurgeon, on May 28, 1992. After several treatments from Dr. Meriwether, Claimant's condition apparently still did not improve. Dr. Meriwether advised that Claimant be placed on a medical leave of absence; and Claimant's last day worked was June 15, 1992.

¹ The record which has been presented herein also shows that Claimant was involved in a vehicular accident while on duty on February 5, 1985; and that, as a result, he sustained a "back strain." Further details of said accident/injury and resultant treatment of Claimant, however, are not included in the hearing record.

In addition to regular medical treatments for his back, Claimant also underwent "... a myelogram and a cat scan ...," and it was discovered that Claimant had injured the C-4 and C-6 vertebrae in the cervicothoracic area of his back and neck.

In a letter dated August 4, 1992, Dr. Meriwether released Claimant "... to return to work Monday, August 10, 1992, without restrictions."

Carrier, in a letter to Claimant dated August 6, 1992, confirmed Claimant's return to work on August 10, 1992. Said letter further indicated as follows:

"Since you indicated that medication² prescribed by Dr. Meriwether may affect your performance, you must take your medicine sufficiently prior to or after work in a manner that won't affect your performance on the job."

Claimant received the aforestated letter, but he refused to sign it because, according to Claimant, his back was still painful; he knew that he would have to take the medication in order to perform his work duties; and, therefore, he knew that he would not be able to comply with the terms and conditions of said letter.

² According to Claimant, the two (2) medication which he was taking at the time, which had been prescribed for him by Dr. Meriwether, were: Fioricet Tablets; and Anaprox DS. The pharmacy information sheets for these particular medications, in pertinent part, indicate as follows:

"Fioricet Tablets: This combination pain reliever and relaxant is used to treat tension headaches ... Side Effects - Common side effects of this medication are unsteadiness, dizziness, drowsiness, and a 'hangover' effect.

Anaprox DS: This medicine is used to relieve symptoms caused by arthritis (rheumatism), such as inflammation, swelling, stiffness, and joint pain. It can also be used to relieve pain from bursitis, gout, menstrual cramps, sprains, strains, or tendonitis, and other kinds of pain ... Side Effects - common side effects include stomach cramps, diarrhea, dizziness, drowsiness, headache, heartburn, indigestion, nausea, vomiting."

Claimant, apparently, did report for duty on August 10, 1992 as directed. It appears that Claimant performed his regular work duties that day without incident.

In another letter from Dr. Meriwether dated August 11, 1992, which apparently was given to Carrier by Claimant on the following day, August 12, 1992, Dr. Meriwether requested that Claimant "... avoid elevated work as well as lifting over 25 pounds on a regular basis and 50 pounds on an occasional basis ... (and) ... (H)e will be seen back in the office on Tuesday, September 22, 1992 at which time his light duty status will be evaluated."

Now to the specific incident(s) which led to Claimant's dismissal which is the focus of the instant proceeding.

On Tuesday, August 18, 1992, Claimant was assigned to do lawn mowing and weed trimming work at Carrier's Carbondale, Illinois facility. Claimant had ridden to work that day (as was his usual procedure) with his Leadman, D. Kirk. Mr. Kirk apparently dropped Claimant off at his (Claimant's) work location in the Yard, and he (Kirk) was to return later to pick-up Claimant at lunch time and at quitting time in order to transport Claimant home after work.

According to Mr. Kirk, at approximately 10 AM on the day in question, he (Kirk) was with a Road Electrician from Centralia, Illinois, and the two (2) men observed Claimant lying on the ground on his back when he (Claimant) was supposed to be working. Mr. Kirk maintains that he did not discuss this matter with Claimant at anytime that day; nor did he (Kirk) report the incident to Carrier.

On the following day, Wednesday, August 19, 1992, Claimant was assigned to perform mowing/weed cutting duties at Carrier's Fulton Yard in Fulton, Kentucky. Claimant was again driven to work that day and dropped

off at the location of his assignment by Leadman Kirk. According to Mr. Kirk, on this particular day, he observed Claimant lying on the ground on his back on three (3) separate occasions -- once at approximately 9:30 AM, once at approximately 11:30 AM, and then again at approximately 1:10 PM. On two (2) of these three (3) occasions that day, Mr. Kirk maintains that he took several photographs of Claimant, unbeknownst to Claimant, while he (Claimant) was lying on the ground. Once again, however, Mr. Kirk did not discuss this matter with Claimant when he returned to pick-up Claimant at lunch or at the end of the shift that day.

On Friday, August 21, 1992, Claimant was again assigned to perform the same type of outside maintenance work at the Fulton Yard near the Pollution Plant; and once again, at approximately 9:15 AM, Leadman Kirk allegedly observed Claimant in a prone position lying on the ground on top of a concrete platform which covered the lagoon salvage oil tank. Also sometime that same morning, Claimant was observed in that same prone position by another Leadman, F. Ellis. According to Mr. Ellis, he was approximately twenty-five (25) to thirty (30) feet away from Claimant at the time; he (Ellis) did not approach or speak to Claimant; he observed Claimant "... for just a few minutes"; Claimant "... did not move and ... he had his arm positioned over his face"; and Mr. Ellis could not say for sure if Claimant was asleep.

Still yet again on that same morning, at the same approximate time, Claimant was also observed by three (3) supervisors in that same prone position lying on the concrete platform on top of the lagoon salvage oil tank. One of the supervisors, R. Strong, who is the Manager of Environmental Operations at the Fulton Yard, observed Claimant for approximately three (3) or four (4) minutes, and he then approached Claimant and asked him why he was lying down. Claimant responded that his back hurt. At the formal

investigation which was held in this matter, Mr. Strong testified that Claimant was not moving when he (Strong) approached, but he wasn't snoring; that when first questioned by Supervisor Strong, it took Claimant "... a few seconds to regain his composure"; and that he (Strong) could not say for sure if Claimant was actually sleeping at that time.

The other two (2) supervisors who accompanied Mr. Strong at the time of his confrontation with Claimant on the morning in question were: David Wallis, the Assistant Trainmaster at the Fulton Yard; and John Smith, the Engineer of Facilities and Environment at the Fulton Yard. According to Mr. Wallis, when confronted by the three (3) supervisors, Claimant stated that he was not asleep; he (Wallis) responded, "... well you appeared to be asleep to me, laying (sic) down with your eyes covered up ..."; and, at that point, Mr. Wallis maintains that he informed Claimant that he (Claimant) was "... pulled out of service at this time ..." Claimant immediately left the property as he was instructed to do.

As a result of the aforesaid incident(s) in a letter dated August 25, 1992, Claimant was advised by Carrier that he was to attend a formal investigation on August 28, 1992, which was to be held in order to investigate the following charge:

"... to determine whether or not you were observed sleeping at the following dates and times: approximately 9:30 AM, Tuesday, August 18, 1992 at Carbondale, Illinois; at approximately 9:00 AM, Noon and 2:00 PM, Wednesday, August 19, 1992 at Fulton, Kentucky and again at approximately 9:30 AM, Friday, August 21, 1992 at Fulton, Kentucky while you were on duty."

Said formal investigation was postponed one time at Organization's request; and was finally held and concluded on September 11, 1992, with Claimant present and offering testimony. As a result of said formal investigation, in a letter dated September 18, 1992, Claimant was advised by

Carrier that he had been found guilty of sleeping while on duty which was a violation of Item #15 of the General Rules of the Superintendent's Bulletin Notice No. 1 dated January 1, 1992; and that, as a result, he (Claimant) was to be dismissed from Carrier's service effective immediately. The cited Item #15, in pertinent part, reads as follows:

"Bulletin Notice No. 1 - Southern Region

All Concerned:

Effective immediately, all non-operating employees who are not covered by the Operating Department Rules must read and be conversant with the contents of the Bulletin Board provided by their craft. In addition to rules and instructions now in effect, all non-operating employees will be governed by the following GENERAL RULES:

15. Employees will not, while on duty, play games or read magazines, newspapers, or other literature not concerned with their duties, or use radios, tape recorders, tape players, or television sets other than those provided by the railroad.

Employees must not sleep while on duty - lying down or being in a slouched position with eyes closed or with eyes covered or concealed will be considered sleeping."

Claimant/Organization filed a grievance in protest of Carrier's dismissal of Claimant. Said grievance, for reasons which will be discussed more fully hereinafter, was denied by Carrier; and the matter was appealed unsuccessfully by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, the matter was appealed to arbitration by Organization; the undersigned Board was duly constituted and designated to hear and decide this matter; and pursuant to hearing, the matter is now properly before this Board for resolution.

Organization protests Claimant's dismissal based upon both procedural and merits reasons.

Procedurally, Organization initially contends that Claimant was improperly removed from service by Carrier on August 21, 1992 prior to an investigation being held in the matter. In this regard, Organization contends that Claimant's alleged violation clearly was not of a serious enough nature which would otherwise necessitate his immediate removal from service.

Continuing, Organization also contends that Claimant's formal investigative hearing was not conducted in a fair and impartial manner as is required by Rule 38 of the parties' current schedule agreement. In support of this particular assertion, Organization maintains that the Hearing Officer who conducted the hearing in this matter on September 11, 1992, also preferred the charges against Claimant, and assessed discipline against him as well. Such a multiplicity of roles, Organization maintains, is totally improper; and is indicative of the Hearing Officer's/Carrier's prejudice against Claimant in the instant case, thus denying Claimant of a fair and impartial hearing.

Further evidence of the Hearing Officer's bias in this matter, Organization contends, is that at the hearing itself, the Hearing Officer repeatedly directed leading questions to Carrier's witnesses; he permitted hearsay testimony to be entered into the hearing record; and he also allowed photographic evidence to be entered into the record without providing Organization with copies of said photographs twenty-four (24) hours prior to said hearing as is required.

Turning next to the merits portion of this case, Organization cites the hearing testimony of Claimant as proper justification for his admitted actions on the three (3) days in question. Accordingly, Organization notes that

Claimant testified at his formal investigation that, with respect to all of the alleged sleeping incidents, he was not sleeping; but rather, he was resting his sore back after performing vigorous work for an hour or an hour and one-half. Claimant further testified that Dr. Meriwether, his personal physician, had prescribed medication for him which could cause drowsiness; and since he (Claimant) was aware that the taking of such medication was not permitted while he was on duty or subject to duty, and further since he could not relieve his pain by means of medication while at work, then he unilaterally took the opportunity and laid down on a hard surface in order to relieve his back pain.

In addition to Claimant's persuasive and unrefuted testimony, Organization also contends that Carrier has failed its requisite burden of proving that Claimant, in fact, was asleep on August 18, 19 and 21, 1992 as charged. In this regard, Organization questions the credibility of all of Carrier's witnesses who testified at Claimant's formal investigation. Accordingly, Organization questions the credibility of Leadman Kirk's testimony because Mr. Kirk never spoke to Claimant about his (Claimant's) alleged sleeping on the job -- even when the two (2) men drove to and from work together on each day -- but instead, for some unknown reason, Mr. Kirk took photographs of Claimant lying in a prone position on the ground on two (2) occasions, and he (Kirk) gave these photographs to Carrier.

Organization further questions the credibility of Mr. Kirk's testimony because Carrier failed to produce a corroborating witness, the Road Electrician from Centralia, Illinois, who allegedly also observed Claimant lying on the ground in a prone position on August 18, 1992. Such a failure on Carrier's part, Organization contends, is a tacit admission that Mr. Kirk's observations and conclusions are erroneous.

Continuing, Organization also challenges the testimony of Leadman Frank Ellis who stated that he also observed Claimant lying on the ground in a prone position on Friday, August 21, 1992; however, Mr. Ellis further admitted that he was approximately twenty-five (25) to thirty (30) feet away from the Claimant at the time; he only observed Claimant for a short period of time; and he (Ellis) could not verify that Claimant was asleep at that time.

Still yet further concerning this same point, Organization also notes the hearing testimony of Robert Strong, the Manager of Environmental Operations at the Fulton Yard, who testified that upon observing Claimant lying on the cement slab at the lagoon salvage oil tank on Friday, August 21, 1992, he (Strong) asked Claimant what he was doing; and Claimant's response was that he was "... lying down, resting his back because it hurt." Organization maintains that Claimant's response was truthful, and was substantiated by Claimant's known history of back problems. Furthermore, according to Organization, none of Carrier's witnesses could conclusively state that Claimant was, in fact, asleep on any of the cited occasions.

Organization's final significant area of argumentation herein is that Claimant was unaware of Carrier's January 1, 1992 General Rules of the Superintendent's Bulletin Notice No. 1, because Claimant never received a copy of that document; and furthermore, said document was not posted on a bulletin board which was accessible to Claimant due to the itinerant nature of Claimant's job assignment.

In summary of its position concerning the merits portion of the dispute, Organization contends that the record which has been presented herein does not support Carrier's basic conclusion that Claimant was guilty of sleeping while on duty on any of the dates as charged. Moreover, according to Organization, even if it had been proved that Claimant was guilty as charged

-- which Organization vehemently denies -- the discipline of dismissal was entirely too harsh in light of Claimant's twenty-four (24) years of discipline free service to Carrier.

As counterpoint to Organization's procedural objections in this matter, Carrier maintains that Claimant's investigative hearing was conducted in a fair and impartial manner as is required by Rule 38. In this regard, Carrier contends that the Hearing Officer's conduct at the hearing was proper, and was not in violation of any of Claimant's due process rights. Additionally, Carrier further asserts that the customary practice on this particular railroad is to have the hearing officer prepare the notice of hearing, conduct the hearing, and to apprise Claimant of the disposition thereof.

As for Organization's contentions regarding the removing of Claimant from service prior to the holding of the investigation, and Carrier's failure to provide Organization with copies of photographs prior to their being offered as evidence at the hearing, Carrier simply contends that such actions were not violations of any of the applicable rules.

Regarding the merits portion of this case, Carrier argues that four (4) reliable witnesses provided corroborating testimony substantiating the fact that Claimant was sleeping, or in a position assuming sleep, while on duty on August 18, 19 and 21, 1992. In support of this contention, Carrier cites the hearing testimony of these four (4) witnesses which, according to Carrier, establishes that Claimant was, in fact, sleeping on the job as charged; and that if he was not, then he at least met the definition of sleeping at that time, which is contained in Item #15 of the January 1, 1992 General Rules of the Superintendent's Bulletin Notice No. 1.

Carrier also argues that the discipline of dismissal for sleeping on the job is warranted -- even for the first offense. Accordingly, in this regard, Carrier

cites a number of National Railroad Adjustment Board and Public Law Board arbitration awards which support Carrier's contention that sleeping while on duty is a summary discharge offense. Given that sleeping while on duty is a summary discharge offense, therefore, Carrier maintains that the disciplinary assessment of dismissal in the instant case was proper; was not an abuse of Carrier's managerial discretion; and thus should remain undisturbed.

Before reviewing the specific rationale which forms the basis for the Board's decision in this matter, the Board believes that it is appropriate to remind the parties that this particular Public Law Board, and all such Boards constituted under the Railroad Labor Act, sits as an appellate body to review the record which was developed on the property in such matters; and to determine whether substantial evidence exists to support Carrier's contention that a particular claimant was guilty of the charged offense(s). If it is determined that substantial evidence does, in fact, exist to support Carrier's determination to assess discipline, then the Board must next review the amount of discipline assessed by Carrier in order to determine whether said discipline was arbitrary, capricious or unduly harsh.

In carrying out the above described functions, it is not the role of this Public Law Board, or any other similarly constituted tribunal, to make findings of fact or credibility determinations since we do not sit as a trial judge capable of assessing the demeanor and presentations of the respective witnesses. Though this be so, however, such a Board is also charged with the responsibility of determining the reliability of the evidence proffered, since unreliable evidence, if accepted by a Carrier and utilized in its decision to discipline, could lead a Board to conclude that substantial evidence does not

exist to support either a finding of guilt or the appropriateness of the particular amount of discipline assessed.

Upon a complete and careful review of the record which has been presented herein, the undersigned Board is led to conclude that Carrier did not have substantial evidence to support its determination that Claimant was guilty of the offense of sleeping on the job as charged. Essentially, we predicate this conclusion upon the same general line of argumentation which has been proffered by Organization herein. In this regard, we find the testimony of Leadman Kirk to be unreliable since his apparent role in this entire incident was limited to observing and photographing Claimant lying down upon the ground on four (4) or perhaps five (5) occasions from a great distance away. Moreover, on one of these occasions, another employee, the Road Electrician from Centralia, was allegedly present with Mr. Kirk at the time and observed Claimant, but at the investigative hearing which was held in this matter, Carrier failed to elicit the testimony of the Road Electrician to corroborate Mr. Kirk's testimony. The inference to be drawn by such a failure is that the Road Electrician's testimony would not have supported Carrier's contention that Claimant was sleeping while on duty on that particular day as alleged.

Continuing, we also find it questionable that Mr. Kirk, who apparently was assigned as Claimant's Leadman on the days in question, did not discuss Claimant's behavior with him (Claimant) on any of those days, even though he (Kirk) had several opportunities to do so.

Likewise, the testimony of Leadman F. Ellis is also perceived to be equally unreliable since his perceptions/recollections of the incident are "vague" at best. In this regard, Mr. Ellis testified at the formal investigation that he observed Claimant lying on the ground in a prone position at a

distance of approximately twenty-five (25) to thirty (30) feet away; that his observation of Claimant was "... for just a few minutes"; and that he (Ellis) drew no conclusion as to whether or not Claimant was, in fact, resting his back, or was engaged in the prohibited act of sleeping while on duty.

In a similar manner, neither Manager Strong nor Assistant Trainmaster Wallis presented information which would establish that Claimant was, in fact, sleeping while on duty as charged. Accordingly, both of these Carrier supervisors testified that when Mr. Strong asked Claimant why he was lying on the ground, Claimant responded that he was resting his sore back. This particular explanation has been consistently presented by Claimant/Organization throughout this entire case; and said explanation also appears to be supported by circumstantial evidence -- which was known to Carrier at that time. In this regard, the undisputed facts of record herein establish that Claimant did, in fact, claim to have injured his back while on duty on April 16, 1992; that Claimant was treated for said alleged back injury and, as a result, he was placed on medical leave of absence for several weeks; and that he was released to return to work by his personal physician just a few days before the occurrence of the alleged sleeping incidents which are the focus of the instant proceeding. Consequently, the Board finds that no Carrier witness testified conclusively that Claimant was, in fact, asleep while on duty.

Turning next to Carrier's case citations which, according to Carrier, are applicable in the instant case and establish that sleeping while on duty is a summary dismissable offense, the Board concludes that said awards are not applicable herein. In support of this particular conclusion, the Board notes that a review of the factual situations involved in each of the cited cases demonstrate that numerous witnesses therein testified that the involved

claimants were, in fact, sleeping, and that those same witnesses were unable to awaken the respective claimants. Furthermore, in various of those same cited cases, the claimant(s) even admitted to sleeping on the job. In the instant case, however, none of these factual situations are operative. Accordingly, in the instant case, we have Claimant's unimpeached account of the incident(s) which is consistent with circumstantial evidence that Claimant, an apparently exemplary employee for twenty-four (24) years, was merely resting his back on a hard surface on the ground after performing his duties. While we cannot condone an employee's unilateral decision to lie down on the ground while on duty, the fact is that Carrier charged Claimant with sleeping on the job; and Carrier has failed in its burden of proving that particular charged offense with a preponderance of evidence.

Nor does the Board find persuasive Carrier's argument that Claimant fit the Item #15, January 1, 1992 General Rules of the Superintendent's Bulletin Notice No. 1 definition of sleeping, that being "... lying prone and covering one's eyes." In this regard, it is perceived by the Board to be fundamentally unfair to hold an employee accountable for obeying a particular standard, without the proponent of that standard establishing that the employee was, in fact, on notice of the existence of that particular standard or that s/he could be disciplined for violations thereof under the particular circumstances such as those which are involved in the instant case.

Given the above rationale, the Board must conclude that Carrier has failed to produce a sufficient quantum of probative evidence with which to support its decision to dismiss Claimant for allegedly sleeping while on duty as charged. In remedy of the aforestated violation on Carrier's part, therefore, we will direct that Claimant be reinstated to his previous position

of employment with Carrier with full back pay, full seniority, and all other normally prescribed contractual rights and benefits restored to him. Claimant's record shall also be expunged of any reference to this matter. The amount of back pay which is to be awarded to Claimant, however, shall be subject to mitigation by Claimant. Furthermore, the application of back pay in this matter shall apply only to those days on which Claimant was ready and able to perform service. Since the record which has been presented herein indicates that a surgery may have been performed upon Claimant for his back condition, and he would not have been available for service during that period, then, of course, the time which Claimant would have been out of service in preparation for said surgery, during, and in convalescence thereafter, should be deducted from the total amount of backpay which is otherwise due Claimant.

Having resolved this case in the above manner, there is no good or compelling reason for the Board to comment upon the several procedural issues which have been raised by Organization in its argumentation herein.

Award:

Claim sustained; and remedy directed in accordance with the above findings and conclusions.


John J. Mikrut, Jr.

Chairman and Neutral Member

I DISSENT


J. S. Gibbins

Carrier Member


Richard S. Bauman

Richard S. Bauman
Organization Member

Issued in Columbia, Missouri on January 13, 1994.