

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5905**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

)

) Case No. 11

)

) Award No. 10

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. M. Gevaudan, Carrier Member

Hearing Date: September 29, 2000

**STATEMENT OF CLAIM:**

1. The assessment of sixty (60) demerits and consequent dismissal of Trackman R. R. Rash for his alleged violation of Maintenance of Way Rules 1.19 on March 7, 2000, when he allegedly was found assuming the attitude of sleep was without just and sufficient cause.
2. As a consequence of the violation referred to in Part (1) above, the sixty (60) demerits shall be stricken from Claimant's record and he shall be allowed to return to work immediately

**FINDINGS:**

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On March 13, 2000, Carrier notified Claimant to report for an investigation on March 17, 2000, concerning "the charge that you allegedly violated Maintenance of Way Rule 1.19 when you were found assuming the attitude of sleep at 3:05 p.m. on March 7, 2000, in a company vehicle parked at the west end of the Camp Building, Gary Indiana." The hearing was held as scheduled. On March 27, 2000, Carrier advised Claimant that he had been found guilty of the charge and had been assessed sixty demerits which, when combined with demerits already on Claimant's discipline record, brought his total to 125 demerits. Pursuant to Carrier's policy that

an employee who accumulates 100 demerits is dismissed from service, Carrier dismissed Claimant.

The Organization argues that Carrier failed to prove the charge. The Organization further contends that the hearing officer prejudged Claimant's guilt, as reflected in his questioning of Carrier's witnesses. Carrier maintains that it afforded Claimant a fair and impartial hearing and that it proved the charge by substantial evidence.

The Board has reviewed the record carefully. We find no impropriety in the hearing officer's conduct of the hearing and no evidence of prejudgment or other bias. We conclude that Carrier afforded Claimant a fair and impartial investigation.

We further find that Carrier proved Claimant's guilt by substantial evidence. The Maintenance Supervisor testified that he saw Claimant in the front seat of the truck with his head leaning on the head rest and his eyes closed, apparently asleep. The Supervisor further testified that he alerted the Engineer Track and Structures who returned to the truck with the Supervisor. Claimant had not moved and again appeared to be asleep. After about two minutes, the Engineer shouted through the truck window and awoke Claimant. Approximately five minutes elapsed from the Supervisor's initial observation of Claimant and the time the Engineer awoke him.

Claimant testified and denied the charge. However, as an appellate body that does not observe the demeanor of the witnesses, we are unable to resolve conflicts in witness credibility. Rather, as a general rule, we defer to the credibility determinations made on the property. In the instant case, we see no reason to depart from the general rule. Therefore, we defer to the finding on the property that credited the testimony of the Supervisor and the Engineer over that of the Claimant.

We now turn to the penalty imposed. The offense of sleeping or giving the appearance of sleep is a very serious one. Furthermore, our role is not to substitute our judgment for that of the Carrier with respect to penalty. We overturn a penalty only if it is arbitrary, capricious or excessive.


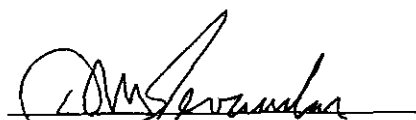
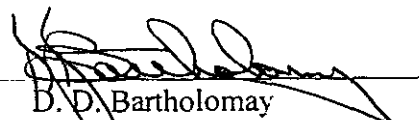
However, in the instant case, based on the peculiar facts and circumstance presented, including the fact that Claimant had served the Carrier since 1974, we find that Claimant should be given one last chance to demonstrate that he is and can be a productive employee who complies with all of Carrier's rules. Accordingly, we shall sustain the claim but only to the following extent. We shall order Carrier to reinstate Claimant with seniority unimpaired but without compensation for time held out of service. Reinstatement shall be on a last chance basis. Any subsequent rule violation or other act of misfeasance or malfeasance, no matter how minor, shall be cause for Claimant's permanent dismissal. Claimant is admonished that this award does not diminish the seriousness of his violation and is further admonished of the need to correct his conduct immediately. Claimant shall have this one last chance but if he squanders it, Carrier will have the right to terminate his employment permanently.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

  
Martin H. Malin, Chairman  
D. M. Gévaudan  
Carrier Member  
D. D. Bartholomay  
Employee Member

Dated at Chicago, Illinois, October 6, 2000.