

**PUBLIC LAW BOARD NO. 6394**

**AWARD NO. 57**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Corporation) of Mr. J. Novak, issued by letter dated April 19, 2012 in connection with alleged violation of Safety and General Conduct Rule GR-26 in that Greg Andrews, Track Supervisor, observed him sitting in Truck #705504 in a slouched position with eyes covered on March 22, 2012 at approximately 9:55 A.M. at CP 285 in Toledo, Ohio was arbitrary and excessive (Carrier's File MW-DEAR-12-14-LM-083).
2. As a consequence of the violation referred to in Part 1 above, Mr. Novak shall be returned to service."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on September 9, 1976 as a Track Laborer. During the events that lead to this case, the Claimant was assigned to the position of Assistant Foreman in the Track Sub-department. On March 22, 2012 the Claimant was ordered to provide flagging protection for contract workers at CP 285 near Toledo, Ohio. At 9:55AM that day, the supervisors who had assigned this task went to the work site to discuss instructions they had previously given to the Claimant.

Upon arrival to the work site that day, the supervisors found the Claimant inside a Carrier vehicle in a slouched position with his eyes closed and snoring. The supervisors took photographs of the Claimant while he was in this position (see Carrier Brief, Exhibit 3). Afterwards, they alerted the Claimant to their presence and questioned him about his activities. The supervisors (Mr. Andrews and Mr. Pries) testified that the Claimant appeared to be disoriented and incoherent, which required them to repeat their questions. They also testified the Claimant could not offer an explanation for being found in this position, other than stating “this job is boring” in reference to his assigned task that day (see Transcript, pages 3-4, 8-9).

As a result of these events the Claimant was removed from service pending a formal investigation by the Carrier, which included a hearing on April 13, 2012. The Carrier found that the Claimant was guilty of violating general conduct rule GR-26 and notified the Claimant of his dismissal from service on April 19, 2012.

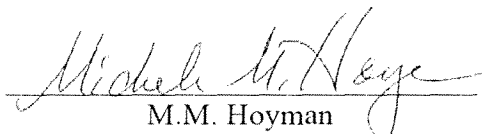
The Carrier argues that the Claimant is clearly guilty of violating GR-26 because (1) of the testimony of Mr. Andrews and Mr. Pries and (2) because the Claimant himself admitted to being asleep at the investigation (see Transcript, page 9). The Carrier notes GR-26 specifically bans sleeping, and that the Carrier’s supervisor, Mr. Andrews, testified that the Claimant was specifically aware of this rule (see Transcript, pages 6-7). The Carrier argues that dismissal is warranted in this case because by sleeping the Claimant failed to perform a “critical task of protecting contractors working around live tracks” (see Carrier Brief, page 6). The Claimant’s work record also shows formal discipline actions for multiple previous rule violations which received Letters of Counsel and suspensions, so dismissal in this case is in line with progressive discipline. Finally, while the Claimant is a very senior employee, the Carrier cites cases like NRAB Third Division Award 21835, which stated “It has been held that an employee’s length of service cannot be the basis for mitigation of penalty unless some doubt exists as to the proof of guilt....” (see Carrier Brief, Exhibit H).

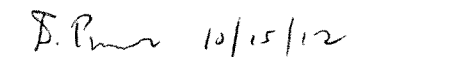
The Organization’s position is that as the Claimant admitted his guilt in this case, the only matter of dispute is whether dismissal was appropriate. The Organization argues that the Claimant’s actions are mitigated by several notable factors. First, it argues the Claimant is a long term employee with a exemplary work record (see Organization Brief, pages 7-8). Second, the circumstances surrounding the events show the Claimant while sleeping did not endanger the safety of anyone else (see Organization Brief, page 14). Finally, the Organization cites a series of previous awards, including notably NRAB Third Division, Award 24977, where an employee in a situation that had more aggravating factors than the instant case was dismissed and later reinstated for reasons in line with the Organization’s arguments (see Organization Brief, page 17).


The Board finds there is no dispute that the Claimant was sleeping in direct violation of GR-26. Aggravating factors in this case are that the Claimant does possess a work record with multiple infractions for previous rule violations. Concurrently, we consider as a mitigating factor the Claimant’s long history of service with the Carrier. In

coming to its decision, the Board has carefully weighed the seriousness of this infraction along with the claimant's seniority, the fact that he took responsibility for his actions by admitting his misconduct, and his work record. The Board finds that the penalty of dismissal was inappropriate in this case. The Claimant shall be reinstated, but he will forfeit his seniority as assistant foreman and will not be awarded any back pay.

The claim is partially sustained.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
D. Pascarella  
Employee Member

  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.