

PUBLIC LAW BOARD NUMBER 3530

Award Number: 35

Case Number: 35

PARTIES TO DISPUTE

NORFOLK AND WESTERN RAILWAY COMPANY

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of J.M. Barnes for reinstatement, for pay for all time lost with vacation and seniority rights unimpaired.

FINDINGS

This dispute involves the conduct of the Claimant, a Painter in the Bridge and Building Department, on September 12, 1983. The Claimant was dismissed on that day for allegedly being asleep while on duty at Slab Fork. The Organization requested a hearing, which was held on September 26, 1983.

At the hearing he was aware that a hearing was going to be held, he was not informed that it had been scheduled for September 26th, until Ms. Wray, a Clerk, verbally informed him that morning. Ms. Wray, and Mr. Shaver, a

Supervisor, both testified that a certified letter had been sent to the Claimant's last known address. The hearing was then conducted over the objections of the Claimant and his representative.

The Claimant testified that he was not sleeping while on duty on September 12th. He stated that he was sitting on a cross brace beneath the bridge at the Slab Fork, waiting for his turn to use the spray painter. Mr. Davis was using the only one available at that time. The Claimant testified that he was sitting with his chin on his chest because he was not feeling well. He testified that he had seen a doctor several days earlier and that he had a virus, which left him weak and tired.

Mr. Davis, also a Painter, was spraying the underside of the bridge at the time. He testified that the Claimant was sitting some 10 to 15 feet away, with his head down. In a statement, written on September 14, Mr. Davis stated that he heard Mr. Allen call the Claimant three times, but that the Claimant did not answer. Mr. Davis stated that Mr. Allen instructed him to wake the Claimant and tell him (the Claimant) to see Mr. McGuire. Mr. Davis said he did this. Mr. Davis stated that he later heard Mr. McGuire order the Claimant to come down from the bridge.

Both Mr. Allen, and Mr. McGuire, Paint Foreman, testified at the hearing and wrote statements on September 13. Mr. Allen stated that he saw the Claimant sleeping in a sitting position at 1:30 PM. At that point, he instructed Mr. Davis to wake the Claimant. Both Mr. Allen and Mr. McGuire stated that they saw the Claimant sleeping in the same position at 1:55 PM. The two men wrote that they then telephoned Mr. Shaver to notify him of the situation. Both men went back to the bridge at 2:30 PM and saw that the Claimant was sleeping in a different location. Mr. McGuire stated that he instructed the Claimant to come down. Mr. Allen and Mr. McGuire both testified that the Claimant said nothing about feeling sick.

There was some ~~discouragement~~ ^{disagreement} concerning whether the Claimant had any duties at the time he was observed to be sitting down. The Claimant and Mr. Davis both stated that he had no duties because Mr. Davis was using the only available painter. Mr. Allen and Mr. McGuire both stated that the Claimant should have been using the air hose to remove dust from the bridge.

On October 14, 1983, the Carrier upheld the Claimant's dismissal. The Organization argues that because of that, he did not receive a fair and impartial hearing.

The position of the Carrier is that the Claimant received a fair hearing, during which it was shown that he violated Safety Rule 1713. The Carrier

maintains that dismissal is permitted by the rule in this situation.

Rule 1713 provides: "Negligence in handling Company business, sleeping on duty, willful neglect of duty ... are 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".

Mr. Shaver and Ms. Wray both testified that the Claimant was sent a certified letter on September 21, notifying him that the hearing would be held on September 26th. Apparently, Mr. McCoy of the Organization received a copy. However, the Carrier did not receive a return receipt that the Claimant would have signed had the letter been delivered. It seems clear that the Claimant did not receive the letter.

The Claimant stated that he was aware a hearing would be held. But he was not told when it would be held until the morning of September 26th. It seems fortunate that he happened to see Ms. Wray that morning and was even aware that the hearing was being held that afternoon.

Therefore, the Claimant only had several hours to prepare for the hearing. The fact that Mr. Hill, the Hearing Officer, was prepared to postpone the hearing for one hour does not alleviate the problem. The fact remains that the Claimant did not have adequate time to prepare a defense.

Without an adequate amount of time to prepare, it may not be said that the Claimant received a fair hearing. The Claimant had little time to obtain any documents he may have needed. He had little time to speak to his representative. Although he did not desire any witnesses to testify on his behalf, if he had wanted them, he would have no time to contact them and to prepare for them to appear. Several hours does not give the Claimant enough time to ensure that he would be prepared for a hearing.

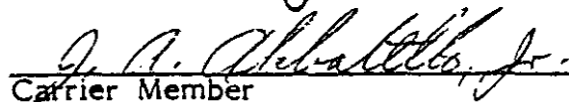
It is the opinion of this Board that, without an adequate length of time to prepare, the Claimant did not receive a fair hearing. Since he did not receive a fair hearing, his dismissal was not justified. He shall be reinstated.

AWARD

The Claimant shall be reinstated to his position as a Painter, with seniority unimpaired but with no pay for time lost.



Neutral Member



Carrier Member



Organization Member

DATE:

1/13/86