

PUBLIC LAW BOARD NO. 4426

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BROTHERHOOD OF MAINTENANCE OF  
WAY EMPLOYES

"Organization"  
VS.

CENTRAL VERMONT RAILWAY, INC.  
"Carrier"  
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Award No. 6

STATEMENT OF CLAIM:

Claim of the Brotherhood that:

- (a) Carrier's dismissal of Claimant John H. Dion was arbitrary and capricious, in that Carrier failed to meet its burden of proof and denied Claimant a fair and impartial hearing.
- (b) Carrier shall restore Claimant Dion to service, with all seniority, and compensate him for all lost wages, as provided for in Rule 27-A of the Scheduled Agreement.

OPINION OF THE BOARD

Claimant, J. H. Dion, was discharged on November 15, 1985 in connection with the following alleged offenses:

- 1. Sleeping while on duty at Richmond, Vermont, at approximately 1325 hours on November 15, 1985.
- 2. Violation of Rule #111 of Uniform Code of Operating Rules while on duty at Richmond, Vermont, at approximately 1353 hours on November 15, 1985.

Rule #111, cited by the Carrier, states in relevant part:

"When other duties will permit, employees in the vicinity of passing trains must observe the condition of equipment in such trains; trainmen

at the rear of moving trains will be in position, on rear platform where provided, and trainmen of standing trains in best possible position on the ground from which a view of both sides of passing trains can be obtained. If a dangerous condition is apparent, every effort must be made to stop the train."

"Train and engine crews of moving trains must, when practical, be on the lookout for signals given by employees calling attention to conditions on their train."

Upon being notified of his dismissal, the Claimant requested a hearing, which was held on December 3, 1985. The Carrier subsequently informed the Claimant that his dismissal was confirmed. Appeal was made through various levels of the grievance procedure and was declined at all levels. The hearing before this Board took place on February 29, 1988. The Claimant was informed of the hearing before this Board by certified mail, but he did not appear.

The Claimant's discharge resulted from an undercover investigation conducted on November 15, 1985 by the Carrier. The Claimant was part of a three person section gang. After observing the crew's activities throughout the day, the Carrier determined to discharge the Claimant and the other two members of the crew.

The Carrier maintains that substantial evidence in the record establishes that the Claimant committed the above listed alleged offenses, and that such misconduct warrants the penalty of discharge. The Organization maintains that the Carrier has failed to prove the Claimant's guilt, and that the Carrier was guilty of a number of procedural deficiencies that constituted

reversible error.

The Board has determined that the claim must be sustained in part.

While there is substantial evidence in the record establishing that the Claimant, along with other members of his crew, was sleeping on duty on the day in question, the circumstances involved herein do not warrant the penalty of discharge for this offense. There is no evidence that the Carrier has previously discharged other employees for sleeping on duty. Moreover, the Claimant's sleep was openly condoned by the foreman. While this does not excuse the Claimant's sleeping on duty, it is relevant for consideration of penalty. In addition, there is no evidence that the Carrier has discharged other employees for sleeping on duty.

The Board has further concluded that the Claimant's alleged violation of Rule #111 was also not a proper grounds for discharge. While it is true that the Claimant, along with other members of his crew, did not get out of the car when the train in question passed, the Organization correctly notes that the Rule does not expressly require that employees exit their vehicle to be in compliance. Furthermore, to the extent that the Claimant may have violated Rule #111 as interpreted and applied by the Carrier, it is apparent that the Claimant's inaction was patterned after that of his foreman. Finally, there is no evidence that the Carrier ever previously disciplined, let alone discharged, an employee for failing to get out of a vehicle when

a train passed so that he would be in compliance with Rule #111.

In sum, the Board has concluded that the Claimant's discharge was not warranted. It appears that the Claimant's punishment may have been overly severe because his offenses were intertwined by the Carrier with much more serious offenses committed by the other two members of his section gang. After careful consideration of all the arguments placed before us, including the Organization's contentions concerning reversible procedural errors by the Carrier, we have determined that the discipline assessed against the Claimant should be reduced to a ten day suspension for sleeping on duty and a written warning pertaining to Rule #111.

#### AWARD

Claim sustained in part. Claimant shall be reinstated with a ten day suspension for sleeping on duty and a written warning concerning Rule #111. Claimant shall receive full seniority and lost wages for the period of his termination, minus pay lost for the ten day suspension. Pursuant to the parties contractual agreement, outside earnings, if any, shall be credited against lost wages. Monies owed the Claimant, if any, shall be paid within thirty days.

W. E. La Rue  
W. E. LA RUE,  
Organization Member

J. J. Welch  
J. J. WELCH,  
Carrier Member 4/12/88

S. E. Buchheit  
S. E. BUCHHEIT,  
Neutral Member