

PUBLIC LAW BOARD NO. 6237

**AWARD No. 10
CASE No. 10**

**PARTIES TO
THE DISPUTE:** Brotherhood of Maintenance of Way Employees

vs.

Union Pacific Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

DATE: August 4, 2002

DESCRIPTION OF CLAIM:

By notice dated July 7, 2000, Claimant M. Gus was dismissed for violating the Rule 1.6 prohibitions against carelessness and negligence. He was found asleep at the controls of a moving ballast regulator on February 23, 2000 at approximately 11:00 a.m. The depth of his sleep was such that he did not respond to a number of radio calls from other employees and supervisors. He awoke only after a supervisor ran some 200 yards across a field, jumped upon the machine, opened the cab and punched him in the shoulder. The regulator was stopped approximately 1/8 mile short of a grade crossing. None of these facts are in dispute.

At the time of his dismissal, Claimant had not quite four years of service. His prior disciplinary record revealed no significant instances of the same or similar misconduct.

The Claim seeks to overturn the discipline.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Our review of the record does not disclose any procedural shortcomings of significance. Although the Organization alleged that Claimant was disciplined in violation of Rule 48(a) as well as Carrier's UPGRADE policy, the record compels us to reject the contention. Claimant's removal from service on the date in question did not constitute discipline without benefit of a fair and impartial investigation. Absent explicit prohibitions in the applicable Agreement, and none have been cited on this record, Carrier's have the right to withhold employees from duty pending formal investigation. This is recognized in prior award precedent (see, for example, Award 21 of Public Law Board 3605) as well as in Rules 48(i)6 and 48(o) of the parties' Agreement.

The Organization also challenges the severity of Claimant's dismissal. It pointed out that Carrier's rule against sleeping on the job provides for much lesser discipline. In addition, the Organization noted that Claimant immediately enrolled with the Employee Assistance Program for alcohol treatment and successfully completed his plan.

After careful review of the investigation transcript, we find substantial evidence in support of Carrier's action. The record shows that Claimant had the opportunity to obtain adequate rest. He

was released from duty not later than 6:00 p.m. on the previous day. Nonetheless, he admitted he stayed up late drinking and had only about three hours of rest before reporting for work at 6:00 a.m. on February 23rd.

Most telling is Claimant's admission that he knew he should not have reported for work. Moreover, he knew he could remove himself from duty rather than compromise safety. Nevertheless, he did report and went to work. The record shows he knew he was overly fatigued and somewhat under the influence of alcohol. He also knew he would be operating his machine around other employees and track equipment.

This was not a case where Claimant's judgment was unduly impaired by the need and desire for alcohol. The record does not show Claimant did any more drinking after awakening for work. Instead, he had the presence of mind to consciously decide to compromise safety and reported for work on time. He also managed to work for approximately five hours without any more drinking and while cognizant of his state of fatigue. Thus, he continued to compromise the safety of himself and others by not removing himself from duty.

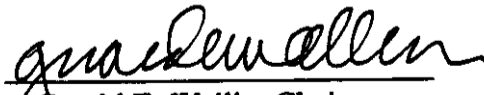
Finally, Claimant's comments during the investigation show that his interest in joining the Employee Assistance Program was as much to escape discipline as it was to deal with an alleged drinking problem. The record shows that he was mentally clear and coherent enough to invoke this tactic less than one hour after being awakened by his supervisor.

Carrier's rules for Rule G violations provide for certain alternatives to dismissal. However, they are not applicable where there are significant rule violations in addition to Rule G. On this record, Claimant's intentional disregard of safety considerations foreclosed his access to such alternatives.

In light of the entire record, the Board finds no proper basis for disturbing the Carrier's disciplinary action.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member