

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6394

Brotherhood of Maintenance of Way Employees)	
Division – IBT Rail Conference)	
)	Case No. 82
And)	
)	Award No. 82
Norfolk Southern Railway Company)	
(Former Norfolk & Western Railway Company))	
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Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. D. Higginbotham, issued by letter dated May 6, 2016, in connection with his alleged violation of Operating Rule 2(b) in that he was observed by a Carrier supervisor sitting in a company truck in a slouched position with eyes covered at approximately 3:00 P.M. on March 21, 2016 at Hobson Yard was arbitrary, capricious and unwarranted (Carrier's file MW-ITW-16-104-IM-336 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Higginbotham shall be reinstated immediately, exonerated of all charges and compensated all lost wages, including overtime, credits and overtime denied to him, commencing March 21, 2016 until he is placed back in service or until this matter is resolved."

FINDINGS:

Public Law Board 6349, upon the whole record and all of 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.

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

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, D. Higginbotham, was a twelve (12) year veteran of the Carrier and working as a foreman at the time this dispute arose.

The record evidence reveals that on March 21, 2016 the Assistant District Engineer ("ADE") had reason to be at the Hobson Yard Office. He recalled that as he was leaving the Yard Office, he heard a truck running and investigated. The ADE testified that he spotted the Smoothing Gang's company truck and walked over to investigate. As he neared the truck, he related, he saw Claimant reclined in the front seat with his eyes covered. The ADE took pictures and Claimant began stirring. The ADE asked him if he was having a nice nap and Claimant replied that he had. The ADE's testimony was not disputed at the Investigation on the property.

As a result of being caught sleeping on duty, Claimant was removed from service. An investigation was held on April 25, 2016 and after review of the evidence, the hearing officer found Claimant guilty as charged and he was dismissed.

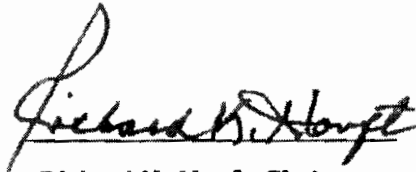
On the day following being caught sleeping by the ADE, Claimant visited a medical doctor and after testing, was diagnosed with Obstructive Sleep Apnea. The Organization submits that Claimant's falling asleep while on duty was due to his then undiscovered and untreated condition and that no employee should be disciplined for suffering from a medical condition.

The Board is aware that sleeping on duty is well recognized as a severe offense warranting dismissal in the railroad industry. However, we consider also whether the reason that very well may have led to Claimant's rule violation, an undiagnosed medical condition, mitigates against dismissal due to the unique circumstances involved in this case.

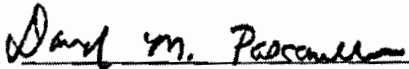
The Board determines that the Claimant shall be reinstated without compensation for time out of service provided he is able to pass a return to work physical and follows his physician's prescribed course of treatment for his disorder.

Award:

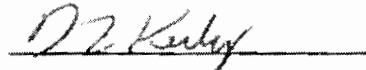
Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty (30) days following the date that two members of this Board affix their signatures thereto.

A handwritten signature in cursive script, reading "Richard K. Hanft", written over a horizontal line.

Richard K. Hanft, Chairman

A handwritten signature in cursive script, reading "D. M. Pascarella", written over a horizontal line.

D. M. Pascarella, Employee Member

A handwritten signature in cursive script, reading "D. L. Kerby", written over a horizontal line.

D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, January 10, 2018