SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 217

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The dismissal of Bridge Tender W.H. Smith for violation of Norfolk Southern Safety and General Conduct Rule GR-26 in connection with sleeping on duty while assigned as drawbridge tender at Seabrook Drawbridge in New Orleans, Louisiana on Monday, July 19, 2010 is unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-BHAM-10-13-BB-269).

2. As a consequence of the violation referenced in Part 1 above, Mr. Smith shall be granted the remedy in accordance with Rule 40(d) of the Agreement."

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 1, 1988 as a Bridge Tender and was working in that position on the date of the incident which led to this case. On July 19, 2010 the Claimant was assigned as the Seabrook Drawbridge Tender in New Orleans, Louisiana. On that day, he was observed sleeping by Assistant Trainmaster Atkins. Mr. Atkins had been sent to check on the Claimant after Bridge Supervisor Nichols was not able to reach him by radio or phone. When Mr. Atkins arrived at the Bridge he honked the horn of his vehicle to rouse the Claimant. When that did not appear to work, Mr. Atkins climbed up on the bridge and peered into the window and observed

the Claimant with his feet propped up and sleeping. Mr. Atkins would later testify that at the time he could hear the dispatcher trying to get the Claimant to respond via the radio. The Claimant finally responded when Atkins pounded on the door and stated that he was alright. Overall, it took almost an hour for the three above individuals (the Dispatcher, Mr. Atkins, and Mr. Nicols) to wake up the Claimant. Later that same day Supervisor Nichols went to check on the Claimant, who admitted to falling asleep. At the time, the Claimant also mentioned that he had been to a doctor on July 13, 2010 because of fatigue and he had scheduled a follow up appointment on July 20, 2010 to be tested for sleep apnea.

As a result of the above events, the Claimant was removed from service on July 19, 2010 pending a formal investigation. The Carrier charged the Claimant with a violation of General Rule 26 and conducted an investigation including a hearing on August 17, 2010. The Claimant was informed via letter on August 26, 2010 that he was considered guilty of the charges and dismissed from service.

The Carrier maintains that Bridge Tender is an important position and that two trains had been held up for approximately an hour while they were waiting for the Claimant to lower the Seabrook drawbridge. The Carrier notes there is undisputed proof that the Claimant was sleeping on the job, which is an obvious violation of General Rule 26. Even though the Claimant had states his sleeping was not "intentional" in that it was related to a medical matter, the Carrier notes that the Claimant had failed to notify the company of his medical condition. In and of itself that is another rule violation, Rule U, which states in part: "employees must notify the company medical officer of any condition which could impair their ability to perform their duties." A final argument by the Carrier concerns the appropriateness of the punishment, discharge. The Carrier maintains that sleeping is a very serious offense which merits serious discipline, both because of the costs that were incurred (in this case) as well as the safety implications.

The Organization argues the Claimant was working another employee's shift the night and early morning in question. In other words, the Claimant was pulling a double shift, a difficult task even without a sleep apnea condition (a condition for which the Claimant was later diagnosed after the events in this case, see Transcript pages 37-39). At the time of the events in this case the Claimant had a different diagnosis of pervasive fatigue. As such, the Organization maintains the sleeping was not "voluntary" but was induced by the medical condition (see Transcript, page 4). The Organization points out that Claimant was never charged, investigated, or found in violation of failure to report his medical conditions. The Organization proffers Third Division Awards 20348, 24780, 31009, and 36260 in support of their argument that an exemplary long –term employee should not be dismissed for a first time offense, particularly since there was a mitigating factor of a medical condition.

In coming to its conclusion, the Board notes both aggravating and mitigating factors on behalf of the Claimant. We agree with the Carrier that this particular job assignment is highly important due to its function, and that the events came at a notable cost as well as involved obvious safety hazards. The Claimant should have known, given

his job function, that his specific medical conditions could become issues that needed to be reported to the Carrier. He may not have been diagnosed with sleep apnea at the time, but the pervasive fatigue condition clearly should have been reported. Concurrently, the Claimant is a long-term employee with a flawless work record. Dismissal of an employee with this much seniority represents a loss of institutional knowledge and should be reserved for only the most severe infractions. On balance, we find the discipline in this case is too severe for the infraction. The Claimant should be reinstated with no back pay, but only after treatment for sleep apnea is underway and after a satisfactory Return to Work evaluation is complete.

The claim is sustained in part.

M.M. Hoyman
Chairperson and Neutral Member

T. Kreke
Employee Member

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on February 10, 2012.