

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 188

Parties to Dispute:

BROTHERHOOD OF MAINTENCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator D. Anspach for violation of Safety and General Conduct Rule GR-26 in connection with sleeping on duty is arbitrary, capricious and an abuse of Carrier discretion (Carrier's File MW-DECR-09-23-SG-442).
2. As a consequence of the violation referred to in Part 1 above, Mr. Anspach shall be granted the remedy in accordance with Rule 30 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:

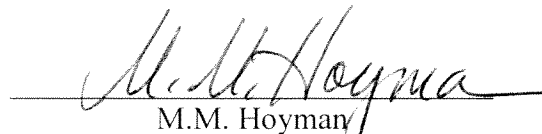
On September 21, 2009 the Claimant was observed on his machine with his hard hat on and his head down to the left. He was not performing his assigned duties. At the time, the Claimant was supposed to be performing the job of spike feeder. The initiating event was that a passerby observed the Claimant and said to a supervisor words to this effect: "Is he paid to sleep?" At the time he was observed, all activity on the machines that he was to feed was stopped. His posture and non-responsiveness was observed by one passerby and by three supervisors. The Claimant had to be called three times before he responded. When he did respond, the supervisor said "Are you ok?" To which the Claimant responded "I am feeding spikes." Later he admitted being asleep. The Carrier

determined that the Claimant was in violation of Norfolk Southern Safety and General Conduct Rule GR-26, which states: "Sleeping on duty is prohibited. An employee lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered sleeping." There was some discrepancy in the record about whether the Claimant's blood pressure medicine caused him drowsiness. The Board, based this finding on a careful reading of the record for two reasons 1) the Claimant had been on the medication for a year; and 2) the wording on the doctor's note said words to this effect the patient reports that the blood pressure makes him drowsy, rather than the medicine is proven to cause drowsiness.

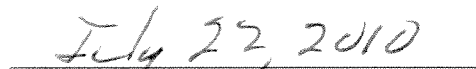
The Board finds that there is no evidence to suggest that the Claimant was intentionally hiding from or shirking work. Sleeping is a serious offense and there is clear evidence that he was sleeping. However, in considering the appropriate action the Board considers three factors commonly used in sleeping cases: (1) there was a clear work rule and no evidence that it was inconsistently applied; (2) there was no safety risk to other workers or to the property and business interests of the employer; and (3) there were mitigating circumstances in the case, because it involves an employee who has 27 years of service and who has an otherwise good employment record. In addition, the Board considers the fact that work was stopped when the Claimant was observed sleeping as a mitigating factor in the case; the grievant's sleeping did not result in lost productivity.

Considering all the circumstances, including the Claimant's 27 years seniority, the Board finds that the Carrier had cause to discipline the Claimant. However, dismissal is too severe for the circumstances surrounding the infraction. Given the Claimant's unsullied record and long service, neither his seniority nor benefits should be penalized. Therefore, the Carrier shall reinstate the Claimant without back pay, but with preservation of all seniority and benefits.

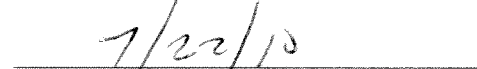
The claim is sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date two members of this Board affix their signatures thereto.


M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


Date Signed


D.L. Kerby
Carrier Member


Date Signed

Issued at Chicago, Illinois on May 28, 2010.