

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 242**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

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

1. The Carrier's discipline (dismissed from all services with Norfolk Southern Railway) of Mr. R. Dalton issued by letter dated March 12, 2013 in connection with allegedly sleeping on duty on February 6, 2013 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File DALTON-R-02-013/MW-CN-13-02-SG-043).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Dalton shall be immediately made whole exonerated of all charges, restored to the service of the Carrier and paid for all time lost with seniority, qualifications, vacation and all rights unimpaired."

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 November 10, 2008 as a Track Laborer and was working in that position during the events which led to this case. On February 6, 2013 Supervisor Evans noticed that the Claimant was not present anywhere around the work area. Supervisor Evans requested that the gang Foreman Armstrong assist in helping him find the Claimant. Foreman Armstrong began looking in the woods around the work site and found him sleeping. After finding the Claimant, Foreman Armstrong waited for Supervisor Evans to arrive at the location in the woods. They began to approach the Claimant, who awakened when Armstrong and Evans were about

15 feet away, apparently because of the sound of crunching leaves beneath their feet. Due to these events, the Carrier charged the Claimant with sleeping while on duty and conducted an investigation including a hearing on February 28, 2013. The Carrier found the Claimant guilty of the charge and dismissed him from service via a letter on February 28, 2013.

As this case involves sleeping on duty, a serious offense because of its implications for safety, the Carrier believes dismissal is appropriate. The Carrier's position is that the testimony of Supervisor Evans and Foreman Armstrong clearly established the Claimant was sleeping on duty (see Transcript, pages 17-18). At the time the Claimant was found in the woods, he had had been observed by Foreman Armstrong for about 10 minutes. This is a violation of Carrier rule GR-26(c) which specifically prohibits sleeping. At the hearing, the Claimant denied being asleep and said he had gone to lie down during the lunch break because of a headache. However, the Carrier notes that even if true, GR-26(c) specifically states employees found lying down with their eyes closed are considered as sleeping. Although the time frame is in dispute in terms of whether the Claimant was observed sleeping during or after lunch, the Carrier contends that the Claimant was found by Foreman Armstrong approximately 30 minutes after the lunch break had ended. Even if the Claimant had been found during the lunch break, Supervisor Evans testified that employees are not allowed to sleep during meal periods (see Transcript, page 28). The Carrier finds no merit in the procedural objections raised by the Organization. The Organization argues that the introduction of rule GR-26(c) at the hearing created a second charge which was not present in the original charging letter. The Carrier contends that it is not required to list specific rule violations in the charging letter and that the rule was appropriately introduced at the hearing.

The Organization's position is that the Carrier has failed to meet its burden of proof in this case and has not established that the Claimant was sleeping. The Organization characterizes the testimony of Supervisor Evans and Foreman Armstrong as having "major credibility issues" (see Organization Brief, page 7). Specifically, it notes that Foreman Armstrong testified he could not see whether the Claimant's eyes were actually closed (see Transcript, pages 24-25) and also testified that employees at lunch are on their own time (see Transcript, page 27). Even if the Claimant was found to be sleeping, the Organization contends that dismissal is not appropriate. In support of this point it relies on the analysis of Norman Brand (*Discipline and Discharge in Arbitration*, 1998<sup>1</sup>) and states this Board should consider (1) whether the rules against sleeping have been consistently applied, (2) mitigating factors including the Claimant's work record and reasons for sleeping, and (3) the impact on the safety of other workers and the Carrier's business interests (see Organization Brief, page 8). On point (1), the Organization argues GR-26(c) makes no specific prescriptions for punishment. For point (2), the Organization notes the Claimant had 4 years of service and no previous discipline record and that the Claimant's reason for lying down was due to illness – a headache.

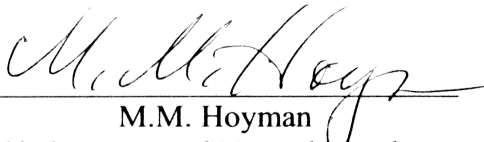
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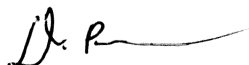
<sup>1</sup> The Carrier's position on the standard set in *Discipline and Discharge in Arbitration* is that it does not apply here. It argues that the standard does not concern railroad arbitration.

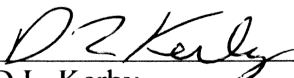
Finally, on point (3) the Organization contends the Claimant's actions did not present an actual threat to safety as he was lying down in an area away from the work site. Concurrently, the Claimant's actions did not harm the Carrier's operations because he was lying down for a total of 5-10 minutes (see Transcript, pages 19-20).

On the procedural issue in this case, this Board does not believe the Carrier created a "second charge" by introducing rule GR-26(c) at the hearing. The Carrier's introduction of the specific rule that is violated when an employee is sleeping while on duty is clearly related to the charging letter language and thus does not constitute a "second charge." On the substantive issue of the case, the Board finds sufficient evidence in the record that the Claimant was sleeping and thus violated Carrier Rule GR-26(c). The Board notes in particular the corroborating testimony of Foreman Armstrong and Supervisor Evans, who both testified that they believed the Claimant to be sleeping when he was found in the woods. We do not concur with the Organization's argument that there were no real safety concerns in this case, as even if the Claimant were sleeping in the woods and away from the work site the incident still required the Claimant's supervisors to look for him as they were not aware of his location. This type of charge is an extremely serious offense. On the other hand, the record suggests the Claimant was only known to be sleeping for about 10 minutes. Overall, the Board finds that dismissal in this case is not appropriate. The Claimant shall be restored to service with the Carrier, but without back pay.

The claim is partially sustained.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
D. Pascarella  
Employee Member

  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on May 9, 2014.