

SPECIAL BOARD OF ADJUSTMENT NO. 986

Case No. 79

Docket No. NEC-BMWE-SD-1981D

PARTIES: Brotherhood of Maintenance of Way Employees

TO :

DISPUTE: National Railroad Passenger Corporation (Amtrak)

FINDINGS:

Claimant J. Jacobsen was employed as a foreman by Carrier. On June 19, 1987, Claimant was notified to attend a formal investigation in connection with the charge:

In that on June 18, 1987, at F tower area at approximately 11:00 AM you were allegedly in violation of Amtrak General Rule F, Pp 5, which reads "Employees must not sleep on duty and must not be so inattentive to their jobs as to appear to be sleeping." When you were observed assuming the position of sleeping in the F Tower gang headquarters by Assistant Division Engineer McNally and Track Supervisor, J.T. Hoffman, and violation of Amtrak General Rule F Pp3, which reads in part, "Conduct involving dishonesty . . . is prohibited," in that when you were asked to account for the whereabouts of your men, and you responded that you did not know, when in reality you allowed Mr. Brucculeri to go home and attend to personal business.

The hearing took place, after two postponements, on August 13 and August 28, 1987. As a result, Claimant was found not guilty of the first charge, but guilty of the second; Claimant was assessed a one-year disqualification as a foreman and assistant foreman. The Organization then filed a claim on Claimant's behalf, challenging his disqualification.

This Board has reviewed the evidence and testimony in this case, and we find that there is insufficient evidence in the record to support the finding that the Claimant was guilty of conduct involving dishonesty when he responded after being awakened that he did not know where his subordinate employee was. Therefore, the claim must be sustained.

A thorough review of the record reveals that Claimant's

supervisor, Mr. McNally, testified at the hearing that he disqualified the Claimant as foreman prior to discovering that the Claimant had allowed Mr. Brucculeri to return home to deal with a personal problem. The Claimant's supervisor, Mr. McNally was disturbed that he had discovered the Claimant to be sleeping and then was unhappy that he was unable to find Mr. Brucculeri where the Claimant had indicated he might be. Mr. McNally then returned to the F Tower track shanty and disqualified the Claimant. It was only after that that he discovered that the Claimant had allowed Mr. Brucculeri to go home for a short time.

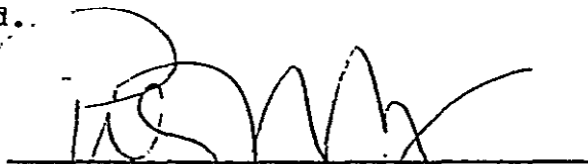
In cases involving charges of dishonesty, the Carrier bears the burden of proof to show that the Claimant intentionally engaged in a dishonest act. The facts revealed that the Claimant was awakened by his supervisor while he was sleeping on his lunch break. Although the Carrier originally charged the Claimant with sleeping on duty, the Claimant was found not guilty of that charge. When he was abruptly awakened by his supervisor, who Claimant contends often makes the Claimant feel intimidated, the Claimant responded that he did not know where Mr. Brucculeri was at the present time. Although it had not been a long time since the Claimant had given Mr. Brucculeri permission to return to his home, the record is clear that the Claimant was fast asleep when he was awakened by his supervisor. Given the nature of the situation and the passage of time, this Board cannot find that the Carrier met its burden of proof that the Claimant was acting in a dishonest fashion when he responded that he did not know the whereabouts of Mr. Brucculeri at the moment that he was questioned by his supervisor. Moreover, since the disqualification

as foreman by his supervisor occurred prior to the discovery of the alleged dishonesty, this Board cannot find any basis for the discipline of the Claimant. The disqualification that was immediately issued by Claimant's supervisor apparently related to the sleeping on the job for which the Claimant has now been found not guilty.

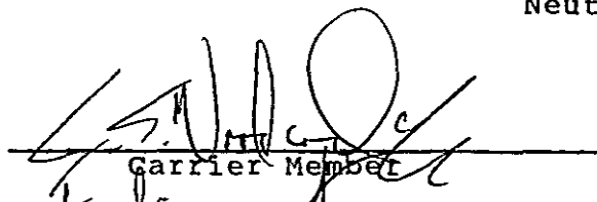
Reviewing the record as a whole, this Board must find that the Carrier did not meet its burden of proof that the Claimant was acting dishonestly on the date in question. Therefore, the claim must be sustained, and the discipline must be removed from the Claimant's record and he must be made whole for all losses resulting from that discipline.

Award:

Claim sustained.



Neutral Member



Carrier Member



Organization Member

Date: 1-26-87