

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 13088
Docket No. 12977
96-2-94-2-130

The Second Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

- "1. That the former Chesapeake and Ohio Railway Company now CSX Transportation, Inc., violated Rule No. 37 by unjustly dismissing Electrician G. L. Hensley from service as a result of the unfair hearing on August 26, 1993, and;
2. That the Chesapeake and Ohio Railway Company return Electrician Hensley to service with all seniority rights unimpaired, and;
3. That the Chesapeake and Ohio Railway Company compensate Electrician Hensley for all time lost as a result of this unfair dismissal, and;
4. That the Chesapeake and Ohio Railway Company make Electrician Hensley whole for all fringe benefits, including but not limited to, health, dental and life insurance, vacation and retirement credits to which he would be entitled by virtue of his continued employment."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time this dispute arose, Claimant was employed as an Electrician in Carrier's Huntington, West Virginia, Locomotive Repair Shop. On August 26, 1993, an investigation was held concerning charges that Claimant was "sleeping on duty at approximately 1:35 A.M. on August 12, 1993." Following the Hearing, Claimant was notified of his dismissal from Carrier's service. The Organization appealed that discipline, and the claim was subsequently progressed in the usual manner.

The Organization raised a procedural objection regarding the conduct of the investigatory Hearing. Specifically, the Organization alleges that the Carrier's Hearing Officer prevented Claimant from receiving a fair and impartial investigation. A careful review of the transcript of the Investigation fails to support the Organization's position.

With respect to the merits of the case, the Carrier maintains that Claimant was observed sleeping while on duty, and that the penalty of dismissal is entirely warranted in view of Claimant's prior discipline record. The Organization contends that Carrier has not met its burden of persuasion in this case and, therefore, Claimant should be returned to service.

It is well established on this and other Boards that the Carrier bears a heavy burden of persuasion when exacting the ultimate penalty of dismissal. In the present case, Carrier failed to meet that burden. The General Foreman who allegedly found Claimant asleep, for reasons not clear on the record, declined to contact a second Carrier officer to confirm his observations. Rather, he approached Claimant in the engine cab alone, accused him of sleeping, and wrote a statement confirming his observation. Among other notations in that statement were the Foreman's assertion that it was the squeaking of a battery compartment door, external to the cab, that woke Claimant out of his sleep. As the Organization pointed out, an employee asleep in a working locomotive shop is unlikely to be awakened by the squeak of a battery cover outside the closed door of the locomotive cab.

Claimant did not deny that he was not actually working at the time the General Foreman confronted him. However, he explained (as was confirmed by his co-worker) that he was awaiting his co-worker's return with a "bell set," which the latter went to get from elsewhere in the shop, so they could both continue the tasks in which they were engaged. Claimant's co-worker, sequestered prior to his testimony, credibly confirmed Claimant's explanation of why he was sitting in the engine cab and not performing any work.

More significant, a third employee, working in the same general area on the night in question, directly and credibly contradicted key elements of the General Foreman's testimony. While the Foreman testified that he opened the door to confront Claimant, the observing employee testified that he saw the Foreman "tiptoe" up the ladder to the engine cab, and saw Claimant open the door to let him in. In this instance, as well, the co-worker's description of the incident confirms Claimant's version.

In view of the inconsistencies in the General Foreman's testimony, and the direct contradiction of that testimony by two credible witnesses, the Board does not find that the Carrier met its burden of persuasion (See Second Division Award 10698).

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1996.