

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

NMB Case No. 57

**Claim of J. J. Olsen**

and

Dismissal: Sleeping on  
Duty

UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Request on behalf of California Division Conductor, J. J. Olsen for reinstatement to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of rule 1.1.2, 1.6, 1.11, and 1.11.1 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 as supplemented or amended from his personal record.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on June 14, 2007, at Kansas City, Missouri. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Conductor. At the time of the incident in question, Claimant had approximately three years' service with the Carrier.

On March 3, 2006, Claimant was working as a Conduction on H-TULBAR1-28A as part of a two-man crew. At 0825 hours, the train was stopped in the Barstow yard at the high lead where the crew awaited instructions. During the next 15 minutes, Trainmaster Bas made an unsuccessful effort to contact the crew by radio. At 0850 hours, when the crew responded, Claimant indicated that both members of the crew had been asleep. Claimant's incident report indicated that the crew had been asleep for 10 minutes and that the time of the incident was 0840 hours.

Carrier Rule General Code of Operating Rules ("GCOR") 1.11.1 provides, in relevant part:

Napping is permitted by train crews, except in passenger, commuter or yard service, under the following conditions:

- The crew is waiting for the departure of their train.

or

- The train is stopped enroute [sic] waiting to be met or passed by a train, waiting for track work, waiting for helper locomotive, or similar conditions.

Restrictions are as follows:

- A job briefing must be conducted, with agreement as to who will nap and who must remain awake. Each crew member has the right and responsibility to refuse to allow another crew member to take a nap if doing so could jeopardize the personal safety of employees, the train, or the public.
- One crew member must remain awake at all times.

Trainmaster Bas testified that yard operations - specifically another hump cut that was prepared to come down the track - were delayed due to his inability to contact the Claimant and the rest of the napping crew.

The Carrier maintains an Employer-established Policy for Employee Performance Accountability ("PEPA"). It provides, in relevant part:

#### Dismissable Violations

\* \* \* Dismissal also may be imposed in response to a series of rule violations, coupled with no sign of significant improvement in employee's behavior. [One of the four] combinations of events that may result in dismissal [is]:

- Two serious violations (see Appendix B) within 36 months (or within 12 months, if the employee's record review period was reduced to recognize five years of

injury- and discipline-free service),

The Carrier asserted, without rebuttal, that record indicates that at the time of the March 3<sup>rd</sup> incident, Claimant was on probation from an earlier Level S (serious) violation within the applicable time period.

On March 20, 2006, the Carrier issued a notice to Claimant to attend a hearing concerning "your alleged sleeping while on duty" aboard the above-referenced train on March 3<sup>rd</sup>. That hearing was conducted on March 30, 2006, at which the foregoing evidence was adduced.

Based on the evidence adduced at the March 30<sup>th</sup> investigation, the Carrier dismissed Claimant from service on April 28, 2006.

The instant claim was progressed on the property in the usual manner but without resolution; it was submitted to this Board for disposition.

**POSITIONS OF THE PARTIES:** The Carrier argues that Claimant admits that he and his engineer were asleep at the same time on the date in question. It maintains that this constitutes a clear violation of the GCOR as charged. The Carrier asserts that the Organization does not dispute the merits of the case.

The Carrier contends that in keeping with the PEPA, dismissal is the appropriate penalty in this case based on Claimant's prior Level S violation within three years.

The Carrier rejects the Organization's arguments that alleged procedural deficiencies warrant reduction or dismissal of the charges against Claimant. First, the Carrier contends that it did not violate any due process obligation by failing to furnish the Organization with a computer floppy disk with one exhibit, because the text of the floppy disk was transcribed into the record and a full transcript. Second, the Carrier argues further that it was not necessary that it provide eye-witness testimony that Claimant was asleep because, it maintains, Claimant *admitted* that he was asleep on duty at the same time the Engineer was asleep. Third, the Carrier contends that it did not commit a fatal error by administering different discipline to the Engineer from that imposed on Claimant. It points out that Claimant had a Level S violation within the previous three years which was still "live" at the time of the incident, but that the Engineer did not. The

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Carrier also contends that the Organization waived its claim to pay for time lost because the initial appeal only sought reinstatement.

The Carrier urges that the claim be denied.

**The Organization** argues that the Carrier failed to conduct a fair and impartial investigation and failed to meet its burden of proof. It further argues that dismissal is not commensurate with the rules violation alleged by Carrier.

Specifically, the Organization contends that the Carrier failed to provide it with a copy of Exhibit No. 3 so as to permit further investigation of the validity of the voice tapes. It asserts that the lack of the voice tape interfered with its ability to provide a proper defense. The Organization further asserts that the Carrier provided an altered tape that showed a much shorter period of time elapsed during which Trainmaster Bas attempted to contact Claimant and his Engineer.

The Organization also argues that the Carrier introduced "assumption and innuendo" against Claimant. It contends that no Carrier officer testified that he/she witnessed Claimant and/or the Engineer sleeping.

The Organization contends that it is well-established that no crew member should be punished more severely than any other for the same offense. It argues, by implication, that Claimant's punishment is disparate, in addition to being harsh, arbitrary, and capricious.

The Organization urges that the claim be sustained and that Claimant be reinstated to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of rule 1.1.2, 1.6, 1.11, and 1.11.1 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 as supplemented or amended from his personal record.

**DISCUSSION AND ANALYSIS:** The Carrier had the burden to establish Claimant's guilt of the charges against him through substantial evidence, considered on the record as a whole, and to establish that the penalty of dismissal was appropriate. For the reasons which follow, the Board holds that the Carrier met its burden and that the penalty of dismissal is appropriate.

The evidence establishes that Claimant was asleep on duty at the same time the Engineer - the only other crew member on the

train - was also asleep. Claimant admitted as much. The delay in response to the Carrier's communication confirms that the crew was unavailable and is strong circumstantial evidence that both members of the crew was sleeping. While sleeping on duty is permitted under some circumstances, none are applicable here. One clear restriction in the rules is that at least one crew member must be awake. There is substantial evidence that was not the case. The record makes clear that Claimant was not awake. Indeed, the Organization does not directly challenge the Carrier's assertion of a violation of the rules. Claimant's sleeping on duty while the rest of the crew was also asleep constitutes a violation of GCOR 1.11.1 and warranted discipline.

The record establishes that Claimant had incurred a Level S violation within three years of the March 3<sup>rd</sup> incident, rendering that violation "live". The Carrier argues that a second such violation of the PEPA entitles it to dismiss an employee. The fact that Claimant is "subject to dismissal" under PEPA for a second Level S violation does not make his dismissal automatic. PEPA is an employer-promulgated system which constitutes notice to employees of the Carrier's expectations and of the disciplinary consequences of violations of those expectations, but is not a substitute for proof of just cause. However, the Board holds that the Carrier met its burden to establish that the penalty of dismissal was appropriate.

The Organization raises certain procedural objections. With respect to the failure to provide Exhibit No. 3, the Board is persuaded that the information on the tape did not alter the essential fact that Claimant and the Engineer were asleep at the same time. The Organization failed to establish that the absence of the tape denied it notice of the case against Claimant or affected the preparation of Claimant's defense. The conduct for which Claimant was disciplined, he admitted. The absence of the tape, when the text of its contents was included in the record, is not a sufficient basis for overturning the discipline.

The Board is not persuaded by the Organization's assertion that the evidence Claimant was composed only of "assumption and innuendo". Eye-witness testimony is not necessary to establish the fact that Claimant and the Engineer were sleeping at the same time. However, Claimant's admission and the inability of the Carrier to contact the crew without delay constitute substantial, credible evidence in the record to support that finding.

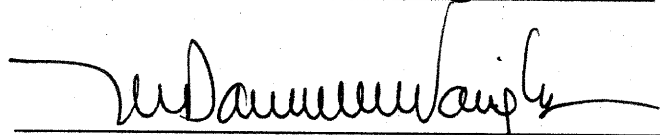
As to the Organization's argument that Claimant was improperly assessed a more severe penalty than the Engineer, the record establishes that Claimant and the Engineer were not similarly situated with respect to their prior disciplinary record: it was the Engineer's first Level S violation and Claimant's second. That is sufficient to support the different disciplinary action assessed.

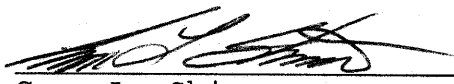
The railroad industry is an inherently dangerous workplace. Alertness to the many dangers in that workplace is essential to the safety of employees and the public, to the smooth operation of the railroad, and to the Employer's equipment and capital resources. While the Carrier established rules that permit napping under limited circumstances, those rules are designed to maintain safe and efficient operations. Claimant's failure to nap within those rules raised numerous safety and operational risks. It delayed Carrier operations and created the potential for an accident.

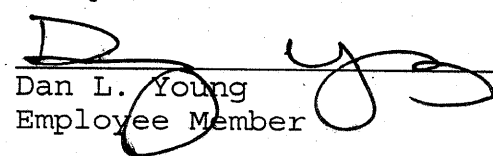
The Carrier's rule on napping is reasonable and violation of the rule is serious. The record further establishes that Claimant experienced a rule violation of a similar magnitude within a three year period. In view of his relatively short service and his previous violation, the Board finds that dismissal is an appropriate penalty. The Award so reflects.

**AWARD:** The Carrier sustained its burden to prove by substantial, credible, evidence in the record, that Claimant was sleeping on duty on March 3, 2006 in violation of reasonable Carrier rules and that the penalty of dismissal is appropriate. The Claim is denied.

Dated this 14 day of JAN, 2007.

  
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M. David Vaughn, Neutral Member

  
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Gene L. Shire  
Carrier Member

  
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Dan L. Young  
Employee Member