

PUBLIC LAW BOARD NO. 5332

**SYSTEM COUNCIL NO. 6
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

and

NORFOLK SOUTHERN RAILWAY COMPANY

Case No. 208

Statement of Claim:

Claim on behalf of Electrician D. Doty in Elkhart, Indiana, for reinstatement with seniority rights unimpaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician Doty is unjustly withheld from Carrier's service. We also request his personal record be cleared of this matter.

Background

In December 2020, Claimant D. Doty—an employee with seniority dating from approximately January 3, 2019—was employed at the Carrier's Locomotive Shop in Elkhart, Indiana. By letter dated December 29, 2020, Claimant was instructed to report for an investigation regarding his responsibility, if any, regarding his allegedly having been:

1. Observed sleeping in locomotive 6142 by Mechanical Supervisor P. Haase at approximately 1:50am.
2. Conduct unbecoming an employee when you displayed inappropriate and/or unprofessional behavior towards Mechanical Supervisor P. Haase at approximately 1:56am.

These incidents occurred between approximately 1:50am and 2:00am on December 20, 2020 while you were working as a third shift electrician in Elkhart Locomotive Shop.

An investigative hearing was held on February 10, 2021. Mechanical Supervisor P. Haase introduced a December 20 written statement he prepared, and testified that he had assigned Claimant at approximately 1:35 a.m. that day to perform an NSure on locomotive 6142 in the

green room of the shop. An NSure is an inspection and check performed inside without a locomotive running and outside with the locomotive running, after repairs have been made and before it is released into service. According to Haase, at approximately 1:50 a.m., he was walking through the shop and noticed that it was quiet in the green room. He went to investigate. He entered from the northwest, then looked around and listened. He did not see anyone or hear any work being performed. The lights inside the locomotive cab were off. Haase walked around the locomotive, failing to see anyone on the south side. He then climbed up and crossed the east-facing short hood to the northeast part of the locomotive.

According to Haase, he then observed Claimant in the cab, reclining in the engineer's seat, with the hood of a hoodie pulled over his eyes to block out light and his feet up on the cab heater. Haase subsequently testified that it was not typical for employees to wear hoodies unless it was cold where they were working. Haase stated that he was reaching for the cab door handle when Claimant turned, saw him, and stood up. Haase asked him why he was sleeping. Claimant denied that he had been sleeping. He told Haase he was waiting for machinist and mechanical working gang leader Brad Guest, who was also assigned to NSure locomotive 6142, to return from a priority road run. Haase testified that he told Claimant that the posture he had seen Claimant in was considered a violation of the rule prohibiting sleeping. He also told Claimant that when he was at a point where there was no additional work he could perform, he should have contacted Haase, and not have waited for someone while lying down.

After reporting the incident to shop manager Chad Morrison, Haase told Claimant to go home pending investigation, as Morrison had instructed. Haase stated that Claimant argued, saying, "This is bullshit" and "This is bullshit and you know it." Haase told him to go home a second time, and then told him he would have police escort him off the property if he had to.

Claimant left at approximately 2:00 a.m. Haase acknowledged that he did not check what work Claimant had completed.

Additionally, Haase testified that sleeping on the job was a cardinal rule violation. Haase submitted Operating Rule 2(b), which prohibits sleeping and states that lying down or slouching in a seat with one's eyes closed, covered or concealed, is considered to be sleeping. He also submitted General Conduct Rule 900, which requires employees to conduct themselves in a professional manner and not engage in offensive or inappropriate behavior. Haase also stated that Claimant should have come to him or someone else for help moving the locomotive outside for the rest of the NSure check, rather than wait for Guest. Additionally, Haase testified that the green room is heated. He noted that Claimant was not wearing a hard hat.

Testifying on his own behalf, Claimant stated that he finished the tasks he could complete inside the shop. He was waiting for Guest because Guest had asked him to wait so Guest could change brake shoes while the locomotive was not running. According to Claimant, he was not fully reclining in the engineer's seat. Although he was not sitting vertically, his feet were on the floor. He was making sure in his mind that there were no other tasks he could do. He had taken his hard hat off, and had the hood of his jacket up. Claimant stated he intended to stop waiting for Guest once he determined that there were no other inside tasks to be completed.

Claimant also stated that he was facing the rear-view mirror of the cab, and saw Haase crossing in front of the nose in the mirror. When he saw Haase start climbing on the hood, Claimant opened the cab door and greeted him. Haase responded by asking, "What the fuck do you think you're doing up here? Is this what you do is you just come up here and sleep?" Claimant told Haase he was waiting for Guest, not sleeping. Claimant acknowledged that after Haase told him to go home, he said to Haase, "This is bullshit," and "This is bullshit and you

know it.” He agreed that Haase had said he would call the police, and only after that did Claimant comply with Haase’s instruction and leave the property.

By letter dated March 8, 2021, Claimant was informed that he had been found guilty of the charges against him, and had been assessed the penalty of dismissal.

Contentions of the Parties

The Carrier contends that it proved that Claimant was guilty of the charges against him. Emphasizing that Claimant had only been in the green room a short time at 1:50 a.m., the Carrier argues that it is unlikely Claimant had finished all that could be done. Moreover, even assuming *arguendo* that Claimant had nothing else he could do, he should have found someone to help him move the locomotive outside for the remaining tasks, rather than wait for Guest. The Carrier further notes that Claimant admitted arguing with Haase when he instructed Claimant to go home. Sleeping is a serious offense, the Carrier submits, and Claimant had only short tenure.

The Organization emphasizes that Haase did not enter the locomotive cab on December 20 and, according to his testimony, observed Claimant for only ten seconds – hardly enough time to accurately determine if he was sleeping. As Claimant credibly testified, he spoke first, and he was not sleeping, as Haase assumed. Moreover, Haase did not know whether Claimant had completed all the inside tasks that could be done because he did not check the NSure form. The Organization further avers that Haase behaved unprofessionally toward Claimant, and testified evasively about Claimant’s use of his hood. According to the Organization, the Carrier failed to prove the misconduct with which Claimant was charged. But even assuming *arguendo* that the misconduct was proved, dismissal was not progressive in nature and was excessive and harsh.

Opinion

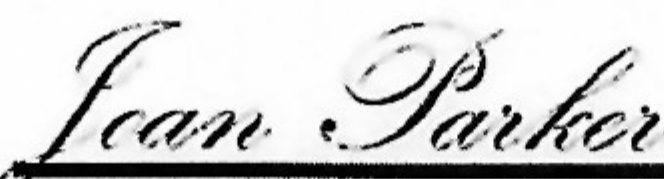
Having thorough considered the Record in this matter, the Board finds that while

Claimant may have been “sleeping” for purposes of Operating Rule 2(b), there is no convincing proof that he was actually sleeping or had not completed his tasks. The Board also finds that Haase’s testimony that Claimant’s eyes were concealed by his hood is unpersuasive. Indeed, his claim that employees did not generally wear hoodies was undermined when the Hearing Officer pointed out that Haase himself was wearing a hoodie at the hearing. The evidence demonstrates that Haase *assumed* that Claimant was sleeping—he did not even ask Claimant whether he had been—and it is thus unlikely that Haase spent much time assessing whether Claimant’s eyes were truly concealed. The Board concludes that in these circumstances, dismissal was excessive and Claimant should be given a second chance.

Claimant therefore will be reinstated. However, he must remember that being observed in a posture of sleeping *is* a violation of Rule 2(b) and a serious offense. Furthermore, it is incumbent upon Claimant to be respectful and behave professionally whenever he interacts with a supervisor. Claimant should have complied with Haase’s instruction to go home the first time, without arguing. To impress this upon Claimant, his reinstatement will be without back pay. Claimant also will be reinstated on final warning status: if he is ever again found to be sleeping in violation of Rule 2(b), he will be subject to immediate termination.

Award:

The claim is sustained in part. In accordance with the above Opinion, Claimant will be reinstated, but will not receive any back pay. Claimant also will be under a final warning for sleeping, which will subject him to immediate termination should he be found to be in violation of Operating Rule 2(b)’s prohibition of sleeping in the future.

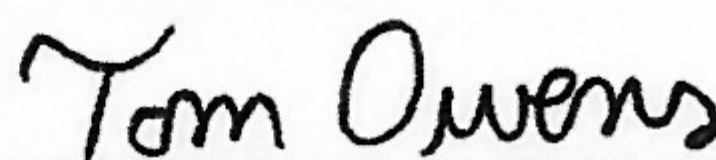


JOAN PARKER, Neutral Member



CARRIER MEMBER

DATED: 08/02/2022



ORGANIZATION MEMBER

DATED: 08/01/2022