

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332

Parties to Dispute:

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

-and-

NORFOLK SOUTHERN RAILWAY
COMPANY

AWARD

Case No. 150

Claimant G. M. Douglas

STATEMENT OF CLAIM:

"Claim on behalf of Electrician G. M. Douglas to be reinstated to service and to be made whole after being dismissed by letter dated February 20, 2015, for sleeping while on duty and for making false and conflicting statements."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

The Organization in this claim challenges Carrier's dismissal of Claimant Douglas on charges of sleeping on the job and being untruthful with Company officials in connection with responding to the triggering event. For the reasons that follow, the Board must deny the claim.

According to the record provided to the Board, Mr. Douglas had been initially employed by Carrier on July 11, 2011. On January 17, 2015, Norfolk Southern Supervisor Trainee Ramon Aguirre states that in the process of doing his routine checks on the progress of ongoing maintenance work he observed Claimant while working third shift slumped over with his eyes closed in the Engineer's seat of locomotive NS 5213 at approximately 5:00 a.m.. According to Aguirre's written statement and testimony at Claimant's formal investigation on February 9, 2015:

"Tonight I observed and took pictures of George Douglas sleeping in the Engineer's seat of NS 5213 right outside #2 house track. This unit was a

three month maintenance that we were finishing up from the previous shift. I walked up onto the locomotive from the Engineer's short hood end, and as I stepped the few steps in front to the short hood end cab door, I saw that Mr. Douglas was in the sleeping position, slouched down with his eyeglasses laying on his right knee, hard hat on, wearing his issued safety jacket and facing the short hood end cab door which I was also observing from. During my observation I was able to take not only 1 but 2 photos of him sleeping. During my first photo with my phone I did not feel it was sufficient enough, so I proceeded with a second photo and at this time I reached into my holster and pulled my flashlight out and simultaneously shines the light into Mr. Douglas's face, in which he was still motionless and unaware of my presence and took the second picture with my phone at 5:05 a.m. ...This startled Mr. Douglas. He raised up and mumbled, however, I was unaware of what he was trying to say and then he proceeded to laugh. As I walked in I noticed Mr. Derrick Tarrance sitting in the Conductor's seat...[I] asked if they were through with their maintenance items. Each of the individuals said yes and that they were about to head inside and sign off their task in the computer. At this time, I asked Mr. Douglas to step outside the cab and he followed me to the short hood end platform and I asked him 'Were you sleeping?' He said, "No." I asked him, "Are you sure?" He replied, "I wouldn't do that."... As we were signing tasks off in LMIS, George asked if he had to sign off remote check items for the maintenance and I said yes. He grabbed a remote and went to perform his remote check items even though he already told me that all he had to do was sign off his task in LMIS in our previous conversation in the cab..."

Following close of the formal investigation and Carrier's review of the record developed in that proceeding, by letter of February 20, 2015, Claimant was found guilty of the charges and dismissed from service. This claim ensued. When it was not resolved in claim handling on the property it was advanced to this Board for final disposition.

Carrier argues that the record fully supports the charges of sleeping on the job and making false statements with respect to that matter. The Organization suggests the charges were fabricated, and that in making his allegations Supervisor Aguirre was motivated by personal bias. It cites the Grievant's testimony at hearing indicating that he heard earlier that day he should "watch out for Ramon. He [is]...out to get you." More specifically, it argues that the photographed evidence received during the investigation does not reveal sleeping. If fact, it contends, Claimant had his head down solely because he was texting on his cell phone at the time, although conceding that Carrier's safety rules forbade such

activity on duty. With respect to the allegation of untruthfulness, Claimant testified that at no time did he tell Aguirre that he had completed his inspection, but rather that he had said it was nearly complete.

There is sadness aplenty in this narrative, but whether there was unfairness too is a more difficult calculus. Several considerations, in the judgment of the Board, push back hard on the defense of Claimant offered by Organization. First, Carrier's Exhibits 5 and 6 received in evidence at the formal investigation, two colored photos taken by Aguirre, do indeed depict Claimant in the mode Aguirre described—slouched, eyes apparently shut, but without question cast downward, nothing visible in his hands, particularly as depicted in Exhibit 6. Accordingly, the evidence at minimum presents the appearance of sleeping. When taken together with Aguirre's account of how long it took the Grievant to respond to his presence, Claimant's denials are hard to hold onto. Indeed, under the conventions that govern the functioning of this appellate forum, the Board is not the trier of fact. So long as the credibility determinations made by Hearing Officers are not patently in error, the Board has no authority to reject such findings. Here the Hearing Officer determined that Aguirre's account was more reliable than that offered by Mr. Douglas. The Board concurs.

Secondly Claimant's vague allegations of personal bias on the part of Mr. Aguirre, including citing second-hand rumor of Aguirre's vengeful attitude, enjoy no support whatsoever in the record, thus remaining unproven allegations. The record is entirely devoid of anything that might establish a motive for Aguirre to fabricate testimony.

Was the discipline imposed reasonable? Carrier suggests that sleeping on duty is a serious offense. We agree. It implicates both the concepts of theft and disregard of safety. In this instance, moreover, there are aggravating factors. In his relatively short career with Carrier, Claimant had been the subject of several prior disciplinary actions, including one for the same offense. His discipline record notes that on December 21, 2013, he had been observed by a maintenance supervisor "in a slouched position in chair with head resting on shoulder and eyes closed," categorized as a Serious infraction for which he received a Five (5) Day Actual Suspension and counseling. He must thus be considered to have been familiar with the predictable consequences of further repetition of that misconduct. We take no pleasure in saying it, but the Grievant has been shown to have again fallen into the

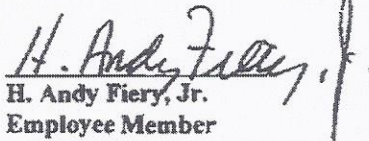
OPINION AND AWARD

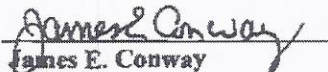
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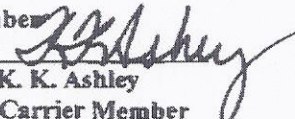
hardly surprising bad places to which continued poor judgment may lead. Under those circumstances, the Board concludes the discipline imposed was reasonable.

A W A R D

The Claim is denied


H. Andy Fiery, Jr.
Employee Member


James E. Conway
Chairman and Neutral Member


K. K. Ashley
Carrier Member

Dated: September 27, 2016