

TAKING IT EASY—THE ARBITRATION OF SLEEPING-ON-THE-JOB CASES

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ABSTRACT

Sleeping-on-the-job grievances have long been a part of the menu of cases for labor arbitrators. Current arbitral thinking on the subject was reflected in seventy-three reported arbitration cases used in this study. Part of the challenge facing an arbitrator in such matters is to determine whether or not an employee is at sleep. This will, in part, depend on the duration of time that the employee is observed "sleeping," as well as other body position and physical indices of sleep. Inadvertent sleeping is considered less serious to an arbitrator than deliberate sleeping or "nesting." Arbitrators may also take into account environmental factors, such as an employee has been working long hours, state of employee's health, etc., as possible mitigating circumstances when an employee is discovered sleeping.

Sleeping on the job is considered a serious workplace offense because it robs an employer of time and productivity, and may jeopardize the safety of the involved employee, not to mention his/her coworkers. The employer need not suffer an economic loss or have damages sustained in order to justify the imposition of a heavy penalty for sleeping on the job [1, at 535]. If a sleeping employee is undetected, s/he will actually be rewarded for his/her failure to work.

This article explores the issues connected with discipline for sleeping on the job. All reported arbitration cases were utilized from the Bureau of National Affairs' *Labor Arbitration Reports* and Commerce Clearing House's *Labor Arbitration Awards* for the past ten years. It was believed these cases would represent the most current arbitral thinking concerning the subject in question. A few earlier arbitration awards were also included to provide a historical perspective and when especially relevant to the discussion. In all, seventy-three reported arbitration cases were reviewed.

NEED FOR A RULE

Normally, sleeping on the job, is an offense requiring an employer to establish a rule forbidding it as well as the attendant penalty (or progressive penalties if discharge is not imposed for a first offense). Moreover, the no-sleeping rule is expected to be made known to employees through posting, memoranda, etc. Arbitrator Finston observed in this regard:

It appears from the above discussion that awards sustaining sleeping on the job are not uncommon, provided the employer has framed and publicized a clearly stated policy on the subject, and, equally important, that the policy or rule has been applied in a consistent manner [2, at 5546].

However, not all arbitrators have required that a formal rule be in existence in order for discipline or discharge to be upheld in sleeping cases. Arbitrator High made the strongest statement in this regard, contending that the:

. . . presence of such a rule . . . is generally not held necessary to support the discharge of an employee who sleeps on the job [3, at 648].

High cited the *Purex* case [4] as precedent for his position. Nevertheless, in *Purex*, the employees were aware of the existence of a rule based on the company's consistent disciplinary action taken against employees who slept on the job. Arbitrator Edelman noted:

The company is on weaker ground for not posting conspicuously its rules against sleeping, but that would be a far more serious defect if the application of the rule had not been so consistent in the past. (In five earlier cases at *Purex*, employees were discharged who had been sleeping) [4, at 316].

Similarly, arbitrator Sass reduced a thirty-day suspension to one of ten days because the employer's practice was to impose a ten-day suspension for a first offense of sleeping on the job [5]. In that case, there was no written rule, but arbitrator Sass contended that employees were aware that no sleeping was allowed, even during breaks, because "numerous employees had been disciplined in the past for such conduct" [5, at 246]. Thus, some arbitrators will uphold discipline or discharge for sleeping without the existence of a rule forbidding it, based on the employer's consistent disciplinary actions against employees in the past for the same offense. In other words, there is "common knowledge" regarding the sleeping prohibition. Nonetheless, as arbitrator Edelman cautioned, an employer is on safer ground in arbitration if the company establishes a definite rule forbidding sleeping on the job and widely promulgates it [4].

IS THE EMPLOYEE SLEEPING?

The threshold issue in most sleeping-on-the-job cases is, of course, whether an involved employee is asleep. A related question refers to the expertise required to determine whether an employee is sleeping or not. Arbitrators have not insisted that medical tests be employed to confirm that an employee is sleeping [see 6 at 116], nor have they required that supervisors (discovering employees who are apparently sleeping) have special training to assess the state of employee consciousness. Arbitrator Fullmer pointed out:

. . . sleeping is not a matter of expert opinion. Classified employees, supervisors, advocates, and arbitrators have all both been asleep and seen people sleeping. We know what it looks like and it is the appearance which must guide our actions [7, at 6082].

In this regard, arbitrator Hays also acknowledged the difficulty of achieving absolute certainty regarding the somnolent state of an employee. He noted:

Personal experience and common knowledge has persuaded us that there is no "litmus test," available in the "shop," which will unequivocally establish that the employee is actually asleep on the job [8, at 5198].

Thus, the proof required by arbitrators to establish sleeping on the job is one based on appearance and common sense (sometimes circumstantial evidence) rather than any technical or scientific process such as drug testing. Nevertheless, circumstantial evidence can be so compelling as to leave little doubt in the arbitrator's mind that the accused employee was indeed sleeping. For example, arbitrator Yarowsky upheld a discharge of an employee for sleeping on the job despite the fact that he was not actually discovered asleep by two foremen. The grievant had improvised a bed in a remote area of the plant and had also made a make-shift pillow. When the supervisors found the employee, he was awake and outside his nest, but that did not weaken the inference that he had been sleeping a few minutes before discovery [9].

DURATION OF THE OBSERVATION

One factor for determining whether an employee is sleeping is the length of time that he or she is observed in an apparent dormant state. It is said that an employee thought to be sleeping should be viewed at least a sufficient time to establish that he or she was actually asleep instead of just experiencing a momentary closing of the eyes. Discharge or some lesser discipline has been upheld for sleeping on the job when a supervisor observed the employee for:

- twenty to thirty seconds [10];
- one minute [11, 12];
- ten to fifteen seconds to two minutes [13];
- two minutes [1];
- two to three minutes [14];
- four to five minutes [8];
- five minutes [5, 15, 16];
- five to seven minutes [7];
- “several minutes” [17];
- ten minutes [18].

The time estimates reported in the cases ranged from twenty seconds to ten minutes. However, the most typical observation times were one to five minutes, with five minutes being the median observation duration. Normally, the observation period encompasses the time when the employee remains motionless. No specific time limits for observation are required by arbitrators, because other factors are taken into account to determine whether or not an employee is sleeping, which, when combined with the time the employee is observed, either establishes or refutes the notion that the employee was asleep.

INDICES OF SLEEP

As noted above, there are a number of factors arbitrators also take into account in the assessment of the sleeping state of an employee. These may include the nature of the employee’s body position as well as the personal appearance of the employee.

Body Position

- head down resting on arm [6, 17-21];
- lying down [5, 22-24];
- chin on chest [3];
- head tilted back [13, 25];
- remains motionless [8].

Personal Characteristics

- eyes closed [13, 15, 18, 25-27];
- sitting low in chair [18];
- shoes off [23, 26];
- snoring [12];

- mouth open [25];
- feet propped up [14];
- heavy and/or regular breathing [8, 18].

As noted previously, the length of time that an employee is observed while allegedly sleeping is not necessarily determinative evidence of sleep. Many of the reported cases did not even mention the duration of time that the employee was observed, and the appearance of sleep became the critical factor. Employees give the appearance of sleeping when they rest their head on their arm, when their head is down with their chin on their chest, if the head is back resting on something, and if they are lying down. Of course, the location in which the employee is discovered when allegedly sleeping places the outward signs in perspective. For example, one does not generally operate a truck or piece of machinery with one's head tilted back or one's chin on the chest. Naturally, when an employee is discovered in a remote area of the workplace, the outward "symptoms" of sleeping become even more convincing. [See [9] and section dealing with "nesting."]

Of course, an employee also gives an appearance of sleeping when his or her eyes are closed, mouth is open, feet are propped up, shoes are off and is snoring or breathing heavily. In any given case, usually there are a number of both body position and personal appearance factors that lead the arbitrator to his ultimate conclusion.

EMPLOYEE REACTION UPON AWAKENING

While the various factors described above may indicate that an employee *appears* to be asleep, the consideration that may prove crucial to an arbitrator is the reaction of an employee (or lack of reaction) to attempts by supervisors to rouse him or her from apparent sleep. For example, in one case [8], when an employee remained motionless for four or five minutes, a supervisor passed a light in front of him in a strobe-like manner. [See also 14, 28.] When the employee failed to stir in response to that stimulus, the supervisor kicked the employee in the foot and he jumped. The employee's eyes were also noticeably red upon awakening [8]. In another case [3], an employee did not respond to having his name called. (See also [24].) Only after vigorous shaking did the employee awake [3]. Discharge was upheld for one employee after a supervisor had lifted the sleeping employee's leg and dropped it without reaction by the employee [11]. In still another case when discharge was upheld, the supervisor slammed the door without reaction from the sleeping employee, after which he (the supervisor) grabbed the employee's leg and shook it before the employee awakened [22]. Upon wakening from sleep, an employee stretched as if he had just awakened. This reaction followed a supervisor's attempt to rouse him by whistling at the grievant, dropping the forks on his tow motor (without the grievant responding), and finally awakening him by honking the tow motor's horn [1].

INADVERTENT SLEEPING

Arbitrators typically distinguish accidental or inadvertent sleeping from purposeful sleeping when an employee leaves his/her work station to find an undisturbed place to sleep. This latter behavior, commonly referred to as “nesting,” is discussed in another section. Normally, discharge is the preferred penalty for nesting, but inadvertent sleeping has been treated less harshly by arbitrators [29]. Arbitrator Byars explained in *Georgia-Pacific Corporation*:

Without exception, the only cases where the arbiter upheld discharge of an employee found sleeping at his duty station was where the discharged employee had other disciplinary incidents of sleeping on the job and/or an extremely poor work record [30, at 248; cites omitted].

Thus, arbitrators will not sustain discharge for inadvertent sleeping that takes place at the work station unless the involved employee has had prior warnings for the same offense or generally has a poor work and/or disciplinary record.

While arbitrator Byars’ observations above represent the majority arbitral opinion, not all arbitrators distinguish deliberate and inadvertent sleeping. Arbitrator Fullmer maintained that the distinction is a meaningless one when a company rule prohibits both categories of sleeping on company premises, including during break and lunch times. He noted:

A coal mine is not a medical laboratory, and laboratory determinations of sleep are not possible. Whether a person is medically asleep for three hours or is “playing possum” for three hours, the economic result to the company, as set out above, is the same [7, at 6082].

Even so, Fullmer ruled that discharge was too harsh because the grievant had an unblemished record and his sleepfulness did not interfere with production or pose a safety hazard [7]. (See also 31], when a transfer of a security officer to the day shift was upheld. The arbitrator observed that it was “immaterial” whether the officer (who was also a student) was asleep or studying.)

Arbitrators will consider a number of factors when making a determination that sleeping was inadvertent. Among these are the following:

- whether or not something in the nature of the job or work environment contributed to the employee’s desire for sleep;
- the employee was working long hours;
- the employee slept on his own time, even though not at the work station;
- employee was working an extra contractual non-bargaining unit job; and
- employee illness

ENVIRONMENTAL CONSIDERATIONS

In one case the arbitrator found that factors in the environment contributed to a grievant's sleeping when he was assigned to monitor a computer terminal [18]. The need to continuously monitor the terminal and the thirty-five minutes' operational work cycle did not excuse the grievant's dozing, but constituted a "drowsiness inducement factor" in the mind of the arbitrator. There was no evidence of neglect of duty, so discharge was reduced to a one-day suspension [18].

EMPLOYEE WORKING LONG HOURS

Sometimes, arbitrators will also take into account the work schedule of an employee disciplined for sleeping. Long hours may contribute to drowsiness. Arbitrator Cipolla, quoting from an earlier case, stated:

To one tired, sleep may come with such a compulsion that no matter what is going on he sleeps . . . if the body really requires it, sleep will conquer everything: pain, hunger, misery, even a certain knowledge of being hanged the next morning [1, at 537].

There was no just cause to dismiss an employee who had worked more than sixty hours per week for more than one month, and who slept during an electrical outage that caused a slack time. Arbitrator Cipolla noted that the company had contributed to the employee's physical conditions by requiring him to work long hours [1].

EMPLOYEE SLEEPS ON OWN TIME

Arbitrators have also considered whether or not the employee's act of sleeping takes place during working time or the employee's own time. If the latter, then discipline will almost always be reduced or entirely set aside. For example, in one case [32], an employee went into the lunchroom to sleep during his break. The employee worked the graveyard shift and was entitled to a half-hour break. In addition, he had informed his supervisor that he was going to go to the lunch room and sleep. Later, he was discovered asleep in the darkened lunch room. The grievant, upon being awakened, was not allowed to tell his side of the story. Under the circumstances, because the employee was sleeping on his own time, and because he had informed his supervisor of his intention to sleep in the lunchroom, the discharge was rescinded by the arbitrator [32].

Similarly, a ten-year employee who was discovered sleeping for eight to ten minutes in a bathroom stall was reinstated [33]. The grievant had been sitting on the toilet with his pants down, elbows on his knees, chin cupped in his hands, and breathing in a deep and regular manner. Arbitrator Cox ruled there was no evidence the grievant had intentionally gone to the bathroom for the purpose of

sleeping. Neither had he stayed beyond the normal toilet break time of ten to fifteen minutes [33].

AN EMPLOYEE WORKS AN EXTRACONTRACTUAL JOB

While it is doubtful that the issue would arise often in sleeping cases, one arbitrator held that when an employee voluntarily worked guard duty during a plant shutdown, he could not be disciplined for sleeping [34]. Arbitrator Cohn explained:

. . . when an employee is moonlighting at the job site on extracontractual, nonbargaining unit work, errors, omissions, negligence, carelessness, and other performance of the nonbargaining unit job cannot serve as a basis for the imposition of discipline applicable to the employee's bargaining unit job [34, at 406].

Accordingly, the discharge of the sixteen-year grievant was set aside.

EMPLOYEE ILLNESS

Arbitrators will normally not permit discipline to be imposed when sleeping is induced as a result of prescribed medicine or drugs taken by the employee. In such situations, the arbitrator will consider the fact that sleep was not intentional on the part of the employee. For example, in one case, an arbitrator set aside a discharge of a warehouse employee who was taking prescribed doses of Valium [35]. Approximately one hour prior to "sleeping," he took a ten-milligram tablet. He had previously informed his supervisor that he was "not feeling good." Arbitrator Rimer observed:

His [grievant's] suspension of consciousness was health-related and not an act intended to receive pay for time not worked during an unauthorized rest period [35, at 1203].

Despite the existence of a plant rule providing for discharge for a first offense for sleeping on the job, the grievant was reinstated because the appearance of sleeping was medically induced by the drug and was not intentional [35].

Nevertheless, not all medical excuses proffered by employees are sufficient to allay disciplinary actions. For such excuses to stand, an employee must:

1. inform his supervisor *prior* to being discovered that he or she is ill. After an employee is discovered sleeping, the arbitrator may view the offer of a medical excuse as an afterthought. [5, 13, 22-23, 36-37].
2. not have contributed to his medical problem. For example, in one case (38), a public sector employee was properly discharged for sleeping on the job

despite the existence of a variety of medical problems, including obesity [38]. The evidence showed that the grievant's personal conduct was a contributory factor to his sleeping behavior at work. He stayed up late at night and ate numerous candy bars (his weight brought on pulmonary problems).

Arbitrator Sinicropi noted:

While this writer does not dispute that the sleeping incidents were probably caused by the medical conditions outlined by Dr. Judresch, the grievant's personal physician, he finds it noteworthy that the grievant did little to mitigate his medical problems [38, at 1008].

3. be able to show that the medicine (drugs) taken would cause drowsiness or sleep. For example, in one case, a union claimed that an employee was not sleeping but was "unconscious" as a result of taking antibiotics for an ear infection. The arbitrator noted, however, that antibiotics do not cause drowsiness or fainting. In addition, the grievant had taken the last pill the day before the sleeping incident. A ten-day suspension was upheld [27]. In another case, discharge was sustained despite the grievant's proffered medical excuse that Tylenol 2 had caused the sleep. The grievant had taken the Tylenol five-and-a-half hours prior to being found in a truck asleep [39]. (See also [40-41]. In the latter case an employee did not know the effects of two prescribed drugs that he was taking after two years of their use [41].)

NESTING

While arbitrators sustain discharges for sleeping under a variety a circumstances, it has been widely held that when an employee leaves his or her work station to find an out-of-the-way area to hide in order to sleep (nesting), it is a more serious offense than inadvertent sleeping. The reason, of course, is because the decision to sleep is premeditated, as is the attempt to avoid discovery. Arbitrator Talarico explained:

In assessing discipline for sleeping on duty, it is a common industrial practice for arbitrators to often make a distinction between an employee who has inadvertently fallen asleep at his duty station and one who leaves his work station to find a comfortable place to sleep. One who deliberately seeks out a secure hiding place to avoid detection and proceeds to deny management of his services willfully is not the same as one who, through circumstances of his work or other situations, falls inadvertently to sleep without the intention of defrauding management [42, at 6037].

Thus, it is the willfulness of the employee's action to sleep and his or her theft of time that gives rise to the harshness of arbitral response to nesting. For example,

arbitrator Tamoush found just cause for the dismissal of two aircraft maintenance workers. The two had gone to the rear of an aircraft and were sitting in seats with their legs resting on folded-down seats in front of them. Their heads were back on a headrest and were leaning to the side, and their eyes were closed [13]. In a similar case, an arbitrator sustained discharge, even for a twenty-seven-year employee who had never previously had formal discipline [43]. The circumstances of the case involved a search for the grievant, who had been missing for two-and-one-half hours. He was discovered asleep in a laboratory equipment room, some 200 to 300 feet from his regular workplace. The grievant had placed corrugated paper box material on the floor to make a bed and covered himself with a quilt. Discharge was also warranted when an employee was absent from his job for thirty-seven to thirty-nine minutes. His supervisor and a union steward found him in a restroom stall. His head was resting on his forearm which, in turn, was resting on his knees. There was no change in his position for five minutes. The employee did not raise his head when the stall door was opened and the two observers stood there for twenty seconds [16]. (See also 27, 36, 44-47) for examples when “nesting” was involved.)

SLEEPING AS A SAFETY HAZARD

While sleeping on the job may create a real or potential loss of productivity, when safety is threatened by an employee caught sleeping arbitrators seem less inclined to mitigate disciplinary penalties. As pointed out by arbitrator Marlatt:

It hardly needs to be pointed out that sleeping on the job is a serious offense. As the company observes in its brief, such conduct may create a hazardous condition for the sleeper as well as [for] fellow workers, may deprive other workers of what they need to perform their respective services, and may result in delayed or defective shipments of products to the company's customers [48, at 707].

In one case, a discharge of an employee who was found sleeping was upheld [22]. Because the employee was not properly monitoring his job, he permitted the overflow of diesel fuel, thereby creating a dangerous situation. (See also [23], when an employee who failed to monitor gauges at an oil refinery because he was sleeping, put himself and others at risk.)

Similarly, in some job classifications, because alertness is a critical part of the job, the employee may be held to a more stringent disciplinary standard when the job incumbent falls asleep. For example, a tower guard at a maximum security prison fell asleep while doing physical exercise [49]. While the arbitrator found that the sleeping was inadvertent, he did note that the lack of the guard's vigilance could cause injury or death to fellow correctional officers and even imperil the safety of the general public. Arbitrator Kessler noted:

When sleeping on the job involves guards and other security officers, additional concerns are raised. Those employees were hired to stay particularly alert, an essential component of their job. Because of that, some arbitrators hold them to a higher standard [49, at 4882].

MITIGATION

As previously noted, arbitrators will reduce or reverse discipline when it cannot be established that an employee was actually sleeping or when sleeping on the job was inadvertent and not intentional. In addition to these considerations, arbitrators have mitigated discipline in cases even when an employee was proven to be asleep, under the following circumstances:

- disparate treatment [when other employees discovered sleeping were given lesser discipline] [5, 10, 12, 49-50];
- long service [26, 51];
- did not neglect duties [26];
- management also at fault [52].

The published cases demonstrate that the leading reason why employer-imposed discipline is reduced or set aside for sleeping on the job is disparate treatment. This may mean that the grievant was disciplined in a harsher fashion for the same offense than a coworker, or that the employer failed to follow prescribed penalties for a sleeping offense as found in the rules. In either case, arbitrators take a dim view of such disciplinary action, and what might have otherwise been a promising case for the employer is lost as a result of disparate treatment.

To a much lesser extent, long employee service, the fact that the employee did not neglect his/her duties, and management's contribution to the sleeping problem (such as requiring the employee to work long hours) were also mitigating circumstances considered by arbitrators.

DISCUSSION

This study reviewed seventy-three reported arbitration cases decided in the past ten years, dealing with sleeping on the job. It appears that employers stand on firmer disciplinary grounds when they adopt a rule prohibiting sleeping on the job and communicate it to all employees. Such a rule may ban sleeping on company premises whether the employee is or is not on company time. Arbitrators have not required medical or other scientific tests to determine whether or not an employee is sleeping. Such a determination can be based on supervisory judgment. Factors such as that the suspected sleeping employee's head is down, s/he is lying down, his/her eyes are closed, s/he is snoring, his/her is on the chest, etc., may establish a *prima facie* case of sleeping on the job. In addition, suspicion of sleeping may be strengthened when the employee is roused from apparent sleep. When the

employee reacts with a start, stretches, has red eyes and appears confused and/or difficult to awaken, it is more than likely that the grievant was asleep.

Arbitrators may distinguish between inadvertent and intentional sleeping on the job. A termination will not likely be upheld for inadvertent sleeping unless the employee has been previously warned for the offense, and/or has a poor work record. An employee's inadvertency claim may be strengthened if sleeping was caused by something in the nature of the job, if the employee was working long hours at work, and if the drowsiness was caused by illness. If illness is the stated cause, the employee should report that fact before s/he is discovered asleep. In addition, it is the employee's burden to prove the medicine ingested would have caused drowsiness or sleep.

When an employee leaves the work station to sleep, arbitrators consider the sleeping to be intentional, and discharge almost always follows. Such a practice is referred to as "nesting."

Moreover, sleeping on the job is viewed as more serious when the employee's action results in real or potential harm to employees' health or safety.

Even when an employee is found sleeping on the job, arbitrators may mitigate an employer's disciplinary penalty. The foremost reason for such mitigation is that an employer failed to discipline the offending employee in a manner consistent with prior discipline imposed or with disciplinary policy.

Employers should review their discipline policies to insure that their imposed discipline will stand the test of arbitral review.

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