

Award No. 4123

Docket No. 4006

2-AT&SF-EW-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Electrical Workers)**

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Coast Lines)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Atchison, Topeka and Santa Fe Railway unjustly and improperly disciplined Electrician Paul E. Smith during the period of July 21, 1960 through August 3, 1960 by suspending him from service pending a hearing.

2. That the Atchison, Topeka and Santa Fe Railway unjustly and improperly dismissed Electrician Paul E. Smith from service.

3. That Electrician Paul E. Smith be restored to service with all rights unimpaired and paid for all time lost.

EMPLOYEES' STATEMENT OF FACTS: Electrician Paul E. Smith assigned as a radio or electronic technician in the Barstow Radio Shop, hereinafter referred to as the claimant, is an hourly rated employee regularly employed by the Atchison, Topeka & Santa Fe Railway System, hereinafter referred to as the carrier, in the Coast Lines Communication Department, headquarters, Barstow, California.

The claimant is one of a number of electricians assigned as radio or electronic technicians at Barstow, to inspect, clear trouble, make repairs and overhaul all types of Radio, Micro-Wave and Electronic equipment. The claimant was assigned the hours 11:30 P.M. to 7:30 A.M. with 20 minutes for lunch not later than between the fifth and sixth hours. His assignment was Tuesday through Saturday with Sunday and Monday as rest days. The claimant was notified by letter dated July 21, 1960, that he was to stand an investigation on the charge of alleged violation of Rules 20 and 21 and 22 of the carrier's 1950 issue of its so-called general rules alleging that claimant was found asleep on July 16, 1960 while on duty. In that same letter, the carrier

carrier. His action in sleeping on duty clearly indicated that he was not interested in his job nor in becoming a reliable employee. In that connection witness the following from the Board's Findings in Second Division Award No. 1658, denying claim involved:

"* * * His seniority as a car inspector dated from October 7, 1950. He had been working on this position less than ten months. He has no long record of faithful and efficient service to receive the consideration of this Board.

"We can find no reason in the record to warrant us in interfering with the decision of the carrier. There being sufficient evidence in the record which, if believed, establishes the violation of the rules alleged to have been violated and there being no mitigating circumstances, the action of the carrier cannot be said to be arbitrary or unreasonable."

In conclusion the carrier submits that the evidence in this case is conclusive that Claimant Smith was asleep while on duty and under pay and that his dismissal was fully warranted.

* * * * *

Without prejudice to the position of the carrier that it was justified in dismissing the claimant for reasons which are stated hereinabove, carrier desires to further state that if this claim is sustained, and the carrier emphatically asserts that the claim does not merit such a decision, nor does the employee even merit reinstatement, any allowance for wage loss should be less amounts earned in other employment, pursuant to the provisions of Rule 33½, paragraph (d), of the current shop crafts agreement, reading:

"If the final decision shall be that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any resulting from said suspension or dismissal." (Emphasis ours)

Attention in this connection is also directed to Second Division Awards 2811, 2653 and 1638, Third Division Awards 6074 and 6362, and Fourth Division Award 637.

* * * * *

The carrier is uninformed as to the arguments the Brotherhood may advance in its ex parte submission, and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are necessary in reply to the Brotherhood's ex parte submission or any subsequent oral argument or briefs presented by the Brotherhood in this dispute.

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.

The charge was that claimant was asleep on duty and thereby violated Rules 20, 21 and 22 of carrier's General Rules for the Guidance of Employees, which require employees to devote themselves exclusively to their duties during tour of duty, and forbid their absenting themselves from duty or being indifferent to it.

The principle is well settled that this Board is not a trier of facts and will not determine the weight of evidence, but will examine it to determine its sufficiency to sustain the discipline. We cannot, therefore, hold that the hearing officer should have believed the claimant's denial and disbelieved the testimony of two witnesses that the claimant was asleep on the job, and of another witness working in the same room who stated that he believed claimant was asleep, but explained that he "couldn't see him directly."

It was admitted that the hearing was fairly conducted and that claimant merited discipline; but the contention is that his suspension and discharge were unjust and improper.

Award 1664 is cited in which this Division held that sleeping on the job was a serious charge, but that an employee's discharge was excessive after almost thirty years' service with a good record. But in Award 1658 this Division held otherwise where the employee's service was less than ten months. Here it was only six months.

It is also contended that claimant was improperly suspended pending the hearing, under Rule 33½ which authorizes "suspension in proper cases." No awards are cited which hold that charges of sleeping on duty are not proper cases for suspension; in Award 1541, under an identical suspension rule, this Division held that sleeping was a complete neglect of duty, and upheld both the suspension and the discharge. Claimant's suspension pending the hearing cannot be held improper.

The record shows that claimant and his shop associate had divided the work of the shift, claimant taking the outside work, and that there being no outside work for some undisclosed period, claimant considered himself at leisure without looking for work inside the shop. He expressed surprise that such a charge was made, and said:

"I don't want to get anybody in trouble, but when the work is slack, as far as laying down or even sleeping, that is a pretty common thing around here, for about half the people on this railroad."

That statement, and the examining officer's comment that he was concerned only with the facts on the present case, indicate a condition suggesting, although not actually constituting, a situation similar to those in Awards 2623, 2653 and 2851, in which sudden strict enforcement of general rules without notice was held to constitute an abrupt change in policy which made discharge an excessive, arbitrary and capricious penalty. Under these circumstances we consider the penalty excessive to the extent exceeding claimant's suspension beyond the time needed to make this award effective.

AWARD

Claim 1 denied.

Claims 2 and 3 sustained to the extent that claimant be restored to service with all rights unimpaired but without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of February, 1963.