

Award No. 798
Docket No. 750
2-L&N-MA-'42

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the controlling agreements, the seniority date of Machinist Harry M. Killinger of August 2, 1926, and so carried on seniority rosters for fourteen (14) years until the 1940 seniority roster was revised, be reestablished as of August 2, 1926.

EMPLOYEES' STATEMENT OF FACTS: Machinist Harry M. Killinger was regularly employed at Corbin Kentucky shops, in July, 1926, from 11:00 P. M. to 7:00 A. M. in the machine shop.

On July 3, 1926, during regular working hours in the morning, Machinist Killinger in cooperation with Electrician Hudson and Machinist Helper Bennett, wilfully committed dischargeable offenses and were found guilty thereof.

On July 5, 1926, at the close of shift starting July 5, the carrier cancelled the services of the aforesaid employees, should they not elect to resign.

On July 6, 1926, Machinist Killinger tendered his resignation.

Electrician Hudson has not since been employed at Corbin, Kentucky by the carrier. Machinist Killinger was reemployed by the carrier at Corbin, Kentucky, on August 2, 1926, and on August 31, the same year, Machinist Helper Bennett was reemployed.

Machinist Killinger has been carried on the Corbin seniority roster for fourteen (14) years as of the date reemployed, August 2, 1926.

The carrier on August 31, 1940, without the consent of the duly certified representative organization, favored Machinist Killinger with seniority as of his original date of employment, November 28, 1922, over forty-four other machinists on the Corbin seniority roster.

Machinist Helper Bennett is carried on the current seniority roster, the date of reemployment, August 31, 1926.

POSITION OF EMPLOYEES: Machinist Killinger was regularly assigned to the third trick machine shop at Corbin, Kentucky. His regular hours were from 11:00 P. M. until 7:00 A. M. Upon reporting for his regular tour of duty at 11:00 P. M., July 5, 1926, he (Killinger), was handed a letter (copy of which is submitted and identified as Exhibit A), by his foreman, notifying him that his services were no longer needed after completing his regular tour of duty, but he would be given the privilege of resigning from the service in order to prevent anything being placed against his record that would hinder him from being given consideration for future employment.

"After third shift tonight, July 5th, your services will be no longer needed. This action is taken due to you being found asleep in the smoke box of an engine in the back shop about 3:00 A. M. on July 3rd. You have acknowledged that you are guilty of the charges preferred against you and will be given the privilege of resigning from the service to prevent anything being placed on your record that will hinder you from being given consideration for future employment at some other point on the railroad, or re-employment at Corbin, if at some future date it was decided that you were worthy of another trial. Employees that will deliberately leave their place of work and seek a hiding place to sleep or loaf, do not have the Company's interest at heart, nor any sympathy for those in charge. I am very sorry that it is necessary for me to take this action, but under the conditions it is not consistent for me to do otherwise. My decision in this case is final and you need not consult me relative to being given another chance." (Emphasis added.)

From the foregoing it can not be denied that these men were dismissed from the service; the question of resigning being secondary. In this connection the agreement in effect at that time did not require that an employee be given formal investigation—unless requested by him; nor did the agreement at that time place a time limit in which seniority might be protested.

Mr. Killinger reentered the service on August 2, 1926. On September 30, 1930 we received first request that Mr. Killinger be restored to his original seniority, which was declined on the grounds that he had resigned from the service. The matter was then handled almost continuously on down through the years, and consistently declined as we were informed he had resigned on July 6, 1926.

In January, 1940, we received a petition signed by every man on the machinists' roster at Corbin, Ky., who would be affected by the restoration of Mr. Killinger's original seniority, copy of petition submitted and marked Exhibit AA. On Tuesday, July 30, 1940, Mr. Killinger appealed his case in person, producing the original letter of July 5, 1926, as quoted above, showing that he was discharged, **which letter had not previously been produced in any discussions with this office, it being the understanding of this office that Killinger resigned and was not discharged.**

Taking into consideration the fact that an employee advised in writing on July 5 that he was being discharged, it follows he could not resign on July 6; that the men to be affected were agreeable to the restoration of his original seniority and that Mr. Killinger had proven to be a high class and capable employee since his return to the service, instructions were issued in August, 1940, that he be given seniority as machinist as of November 28, 1922, his original seniority dating.

The Board will please understand that the carrier retains the right to restore to the service any employee dismissed by it for cause, without the concurrence of the employees.

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.

The parties to said dispute were given due notice of hearing thereon.

The facts in this case are that Machinist Killinger, on July 5, 1926, had his employment relationship with the carrier severed.

He was re-employed on August 2, 1926, and for fourteen years carried this date as his seniority date in accordance with the provisions of the agreements.

The change in seniority status of Machinist Killinger on August 31, 1940, was in violation of Rule 12 (f).

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 16th day of June, 1942.