

Award No. 4173

Docket No. 4063

2-SP-FO-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. — C. I. O. (Firemen & Oilers)**

**SOUTHERN PACIFIC COMPANY
(Texas & Louisiana Lines)**

DISPUTE: CLAIM OF EMPLOYES:

1. That Laborer A. W. Kennedy was unjustly dealt with when he was discharged from service on February 3, 1961, for allegedly failing to devote himself to his duties, failure to perform work; being idle and asleep during his tour of duty on the morning of January 17, 1961.

2. That accordingly the Carrier be ordered to restore Laborer Kennedy to service with seniority rights unimpaired with pay for all time lost.

EMPLOYEES' STATEMENT OF FACTS: Laborer A. W. Kennedy herein-after referred as the claimant was working as a laborer on the car cleaning facilities at Englewood Yards on an assignment from 11:00 P. M. to 7:00 A. M.

On January 24, 1961, Superintendent S. E. Tanner addressed a letter to the claimant, charging him with failure to devote himself to his duties; failure to perform work; being idle and asleep during his tour of duty while assigned to work as laborer, Englewood, on the morning of January 17, 1961.

A hearing regarding the charges was held at the Englewood Yard Office, on the morning of Thursday, February 2, 1961.

On February 3, 1961, the claimant was notified that he had been discharged for failure to devote himself to his duties; failure to perform work; being idle and asleep during his tour of duty while assigned to work as laborer, Englewood, on the morning of January 17, 1961.

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

CONCLUSION:

The Southern Pacific Company (Texas and Louisiana Lines) have published rules of conduct for employes of the mechanical department. These rules, revised as of September 1, 1948 and May 1, 1958, require each employe to be conversant with and obedient to their requirements. The carrier holds receipt from Mr. Kennedy which indicates he was furnished copies of such rules; also, that he would familiarize himself with the directives contained therein. Rule 2, Conduct of Employes, states in part, "... Indifference in the performance of duties will not be condoned. ...". Rule 3, Attention to Duties, provides in part, "... Employes shall report for duty at the prescribed time and place and devote themselves exclusively to their duties during prescribed hours ..."; also, such rule states, in part, "... reading of books or papers during working hours or devoting time to other than duties to which assigned is prohibited." Claimant Kennedy flagrantly violated these rules by being indifferent to his work and by failing to devote his time exclusively to duties assigned. He was idle while his assigned work was left unattended and during part of the time between 4:10 A.M. and 5:00 A.M. on the morning of January 17, 1961, he was asleep while on duty. Such action on his part violates every concept of employe duty in employee-employer relationship. We feel that Mr. Kennedy was properly discharged.

Should the Board erroneously rule that the appeal herein has merit and direct the carrier to reinstate this former employe with pay for time lost, we call your attention to the fact that the carrier should be allowed to deduct the amount of any compensation earned in outside employment during the period in question. See Second Division Award 1638.

The carrier asserts that the employes claim is without merit and we respectfully request your Honorable Board to so decide.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Laborer Kennedy was employed by carrier in car cleaning work. The Organization alleges he was unjustly dismissed February 3, 1961. He was charged by the carrier with failure to devote himself to his duties; failure to perform work; and being idle and asleep during his tour of duty while assigned to certain car cleaning work on the 11:00 P.M. - 7:00 A.M. shift, on January 16 - 17, 1961. Hearing was duly held concerning said charges and as a result thereof claimant was discharged. The agreement of August 1, 1947 is controlling.

A study of the transcript would support a finding by carrier that claimant, on the night in question, did not attend to and perform the work assigned to him in the manner his employer had a right to expect; that he was not diligent in attention to duty and did fail to perform some work assigned

as well as tardily attended to other necessary work in connection with the car cleaning operations he and others were to accomplish. There was a conflict of evidence as to whether or not claimant fell asleep once during his shift.

On the other hand, it appears that claimant complained to a fellow employe of feeling ill and, not only so testified, but produced in evidence bottles of medicine he had received during the morning after the shift in question. True, he should have reported his illness during the shift, but apparently thought he could carry on until relieved at 7:00 A.M. We also learn from the testimony of his foreman: "personally I have had no trouble with him at all." He performed his work "As he is instructed to, yes. I have had no trouble with him or with any of them, they all seem to work pretty good. I am fortunate that way, I guess." From elsewhere in the record we learn that the foreman was speaking of claimant as a man who had given twenty years of service to this employer.

Although we subscribe to the statement of Referee Francis B. Murphy in Award 3430:

"We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty."

here, however, there appear to have been extenuating circumstances which the carrier did not take into consideration and as a result assessed a penalty which was excessive and unreasonable. See Award 6713, Third Division, where Referee Curtis G. Shake observed:

"Taking into account all of the facts and circumstances as disclosed by the record before us, we cannot escape the conclusion that the penalty was fixed in an atmosphere that falls somewhat short of that standard of calm deliberation and impartial consideration that ought to prevail in a proceeding of this character."

The Third Division in that case then proceeded to cut down the penalty very materially under the authority of many previous decisions, notably Award 6104, Third Division, where it was said:

"That this Board may reduce the discipline in the event the discipline assessed is unreasonable, arbitrary, or an abuse of discretion, has been held on numerous occasions. See: Awards 4942, 5849, 4829, 4622, 5645, 5752, 6074, this Division."

In the instant case we believe the carrier assessed an unjust penalty, which was an abuse of managerial discretion, and that a suspension of five working days is proper under the circumstances. Accordingly, the claim will be sustained to the extent indicated but with the wage loss suffered being less amounts earned in other employment since February 8, 1961.

AWARD

Claim sustained to the extent indicated in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1963.