

Award No. 4866

Docket No. 4802

2-CB&Q-MA-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Donald F. McMahon when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Machinists)**

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the controlling agreement Machinist E. H. Warth was unjustly discharged from service at 10:15 A. M., July 20, 1964, at West Burlington, Iowa.

2. That accordingly the Chicago, Burlington & Quincy Railroad Company be ordered to compensate Machinist E. H. Warth for all time lost between 10:15 A. M., July 20, 1964 and November 23, 1964 when the carrier reinstated him with service rights unimpaired. This to include premiums for Hospitalization and Life Insurance.

3. That the Carrier be ordered to clear this charge from his personal record.

EMPLOYEES' STATEMENT OF FACTS: Machinist E. H. Warth, hereinafter referred to as the claimant was employed by the Chicago, Burlington & Quincy Railroad, hereinafter referred to as the carrier, for a period of approximately 10 years at its West Burlington, Iowa shops.

On July 20, 1964 the claimant was engaged in making repairs to a boring mill and was assisted by another Machinist, J. W. Darnold. They were to change the lower bearing and this necessitated getting into the pit under this machine and first draining the oil from two supply cavities. The claimant was draining the oil into a bucket from the first cavity when he discovered they would have to have a different wrench in order to drain the second cavity. Machinist Darnold went to the tool room to get this wrench while the claimant stayed in the pit to watch the bucket so that it did not overflow.

Supt. of Shops W. C. Horst appeared on the scene and summoned the Ass't Supt. upon which they accused, the claimant, of sleeping and dismissed him.

The Shop Supt. had arrived at this pit area immediately following Machinist Darnold having talked to claimant and leaving to obtain the wrench.

on this point are numerous, and we will briefly review three additional sleeping on duty cases where this principle was followed:

In Second Division Award 1795 a carman was dismissed for sleeping on duty and was still out of service at the time his case was brought to the Board. The Board held —

Second Division Award 1795, Carmen vs. T&P, Referee Wenke

"Was dismissal unreasonable? The charge is a serious one and claimant admitted that on one other occasion, August 1, 1951, he had been off duty in a card game. For this offense his record had been assessed 45 demerits. We do not think it can be said, under these circumstances, that it was."

In Second Division Award 1828 a coach cleaner was dismissed for sleeping on duty. This employe was likewise out of service and not reinstated at the time the case was decided by the Board. The Board found sufficient evidence to support the carrier's finding that the claimant had been lounging on a pile of mail sacks, and dismissal was upheld.

Award 4629 of this Board was decided on December 11, 1964. In that case an employe was dismissed for sleeping on duty, and the Board held —

Second Division Award 4629, Elect. vs. C&NW, Referee Whiting

"Claimant was charged with being asleep on duty. There was substantial credible evidence supporting the Carrier's decision that he was guilty of the charge.

Sleeping while on duty is generally regarded as an offense which justifies discharge and, since the claimant had only about three years' service with the Carrier, the penalty of discharge cannot be considered excessive." (Emphasis ours)

In the light of these awards surely the discipline assessed here cannot be held excessive, arbitrary or abuse of the carrier's discretion.

It will be noted that in his Statement of Claim, as well as payment for time lost the claimant has included in part 2, "This to include premiums for hospitalization and life insurance." Such an element of damage is not properly includable within Rule 31 of the agreement between the parties. In that rule the carrier is bound only to compensate an employe unjustly disciplined "for wage loss, if any, suffered by him, resulting from said suspension or dismissal, less any amount earned during such period of suspension or dismissal." In this regard see Second Division Awards 3883, 4532 and 4557.

In view of all the evidence in this case, the Board has no alternative but to deny this claim in its entirety.

* * * * *

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

The carrier or carrier 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 were given due notice of hearing thereon.

This cause concerns the discharge of Machinist E. W. Warth, from the service of Carrier on July 20, 1964, at West Burlington, Iowa.

The Organization is requesting the claimant be restored to his former position with all service rights unimpaired. In addition request is made to require Carrier to pay premiums for Life and Hospitalization insurance to Travelers Insurance Company, for the period of said discharge, and to clear his personnel record of the charge preferred against him by Carrier.

He was reinstated to service of the Carrier on November 23, 1964. The period of time involved here is from July 20, 1964 thru November 23, 1964.

The record before us disclosed that claimant was accused of being asleep while at work in the pit of the Boring Mill, West Burlington Shops, at about 10:00 A. M., July 20, 1964. Investigation and Hearing were furnished claimant by the Carrier on August 4, 1964, in the Shop Superintendent's Office at West Burlington Shop. Said Hearing was conducted by S. F. Kuzma, Assistant Master Mechanic, Galesburg, Illinois. Carrier produced testimony at the Investigation to support its charge that claimant was asleep, in the Boring Mill Pit where he was preparing to make necessary repairs on the Cutmaster Boring Mill, which required mechanics to work in the pit, in order to make repairs required by Carrier. Claimant was engaged in draining oil from the lower part of the machine. He was working with his Foreman James Darnold.

It became necessary while draining the oil from the machine, for claimant to require a special type wrench to drain the upper reservoir of the machine. Not being equipped with this wrench, Darnold went to the shop tool crib for this equipment. Claimant in his absence was in the pit draining the oil from the bottom of the machine. During the absence of Darnold, Superintendent Horst came near the pit, and decided claimant was asleep, but made no effort to talk to or wake claimant. The Superintendent came no closer than six feet from claimant, and observed him for about fifteen minutes. While observing claimant he sent word to C. R. Bignell, Assistant Shop Superintendent and J. L. Sink, Lead Machinist to come to the pit. Mr. Horst testified that claimant was in the pit but he could not recognize him from where he stood. He stated he could see a part of a man's back and the top of his head and was in a stationary position. This observation went on for about 15 minutes, before Mr. Bignell and Sink arrived in response to Mr. Horst's message. Mr. Bignell testified he and Mr. Sink arrived together, at 10:10 A. M., and observed claimant until 10:13 A. M. He stated claimant was asleep, he also stated he could see the back of claimant's head, and the left side of his face to the ear. That he was motionless except for one nod of his head, and was in a sitting position. All this observation was made from a distance of about 5 feet from the pit. Mr. Sink testified he observed claimant from a distance of 2 feet from the pit, where he observed his head and shoulder in the pit. He did not at any time say claimant was asleep, and that he

couldn't swear claimant was asleep. Also stated that claimant's head was observed and was about 5 to 8 inches below the floor level, also he was sitting on some 4 x 4 blocks.

From this evidence we must determine whether or not claimant was guilty as charged.

The Docket here shows that claimant had no witnesses present to testify in his behalf, altho Carrier asked him if he had any witnesses present, and his answer was "Yes". H. J. Henry, Local Chairman did testify on behalf of claimant as to his qualifications to work, but offered no testimony in reference to facts concerning the discharge of claimant.

It is noted that after the discharge of claimant and following the Investigation and Hearing date, the Organization in its submission attached Exhibits B, C, D, I and J, all purporting to be statements or testimony of employees, on behalf of the claimant. This Division has no authority to consider such exhibits, as evidence and will receive no consideration in arriving at an Award herein. Carrier had no opportunity to meet such information, and it is our view claimant had every opportunity to present such witnesses at the hearing held, which he failed to do.

The record shows that only the Shop Superintendent and the Assistant Shop Superintendent, testified the claimant was asleep during their observation of claimant on behalf of Carrier. The Lead Machinist made no specific statement the claimant was, and testified he could not swear claimant was asleep.

After reviewing the Docket here, and considering the facts as produced, we find that the claim should be sustained. Further the proof on behalf of Carrier, that their own witnesses, observing claimant from various distances from six feet to two feet, is not convincing that claimant was asleep, when the only witness Mr. Sink, testified he could not swear claimant was asleep, and he observed claimant a distance of two feet and testified he observed claimants head some 6" to 8" below ground level.

In view of all the record before us, we find the claim should be sustained, except that we make no finding in reference to insurance premiums for Hospitalization and Life Insurance. We can find no requirement in the Agreement between parties which makes any reference to payment of premiums by Carrier. Such claim for insurance premiums is not a wage loss as described in Rule 31 of the Agreement.

AWARD

Claim sustained in accordance with the foregoing Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of May 1966.

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