Award No. 6234
Docket No. 5972
2-SP(T&L)-MA-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis X. Quinn when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

SOUTHERN PACIFIC TRANSPORTATION COMPANY (Texas & Louisiana Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier's dismissal of Machinist R. J. Wilson from service, February 5, 1969, was not supported by the current Agreement.

2. That in restitution the Carrier be ordered to reinstate Machinist Wilson with all seniority, the rights and privileges pertaining thereto, under the provisions of the current Agreement, Rule 20, thereby giving him the provisions of Rule 19, which has been violated. All Exhibits, unless otherwise designated, will be the Claimant's. Carrier's Exhibits to be found in attached copy of investigation.

EMPLOYES' STATEMENT OF FACTS: Machinist R. J. Wilson, hereinafter referred to as the claimant, with seniority date of February 2, 1956, held a second shift assignment, 4:00 P. M. to 12:00 P. M., rest days Wednesday and Thursday, at the San Antonio, Texas facilities of the Southern Pacific Company (Texas and Louisiana Lines), hereinafter referred to as the Carrier. Claimant was injured while on duty with the Carrier on August 6 or 7, 1967. Notation in upper right hand corner of this document August 18 or 19, 1967, was made by the carrier's claim agent as reference to additional contributing factors of claimant's injury, at which time claimant was informed that the record would be retained to substantiate his claim. The Labor Relations Department maintained that the claim department was separate and that both departments operated separately, and did not work in conjunction with each other. The agent's report, read orally to the claimant and general committee, gives reference to the notation on said document, but this report was not released to the claimant. This document plainly states that the transaction of it shall not be admissible as evidence. The intent of the Claimant is not to use it as such. The intent is to show there was a personal injury, because there was no Personal Injury Report made. He could not endure the physical strain of his assignment, and was unable to report

It is the Carrier's contention that Mr. R. J. Wilson was absent from his assignment without proper authority from October 15, 1968. He contended that he was still under doctor's care for a skin condition and submitted a slip showing that Dr. Charles Reiter, Jr. had treated him for such condition on September 2, October 2, 4, 8, 15, 23, 30, and November 15, 1968. **No statement was ever submitted which showed that such skin condition prevented Mr. Wilson from performing the work of a machinist.** At the same time, we refer the Board to carrier's Exhibit 17 and its attachment where Dr. Reiter stated that Mr. Wilson was in good condition when discharged — we assume that date being November 15, 1968.

The testimony shows that orthopedists and neurosurgeons have found Mr. Wilson to be physically fit for duty, but he has ignored every request of the carrier to protect his assignment as a machinist. The carrier had no alternative but to charge this employe with being absent without proper authority and because of his activity in his trailer court business, he was charged with being engaged in other business without permission of a proper officer of the carrier.

There can be no question but the testimony of Inspector C. B. Suhl and the film shown at the hearing shows that Mr. Wilson could and did perform manual labor in December, 1968.

It is for these reasons the Carrier submits that the issues involved in this dispute should be denied in their entirety.

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 were given due notice of hearing thereon.

The grievance under consideration arose when Machinist R. J. Wilson was discharged. The discharge was executed on February 5, 1969.

The record indicates that the Grievant was engaged in other business without permission of the proper officer of the Carrier.

The Carrier argues that a long record of absenteeism led to the investigation and subsequent dismissal. The Organization sought to demonstrate that many of the Grievant's absences were due to illness, and that Mr. Wilson has a record of performance dating from 1956.

Our review of the record indicates that the Grievant cannot be faulted for personal illness. However, when his extracurricular activity leads him to be undependable, a burden on the Carrier and his fellow workers, or when his outside work activity interferes with his contracted job responsibilities, it is within the province of the Carrier to correct the situation.

While the Grievant was working at his personal business during a time when he was excused from work by the Carrier for being sick, he had visited his doctor, received prescriptions from him, and did complain of recurring pain.

The conduct used by the Carrier as the predicate for the discharge was, in fact, committed by the Claimant — he was subject to discipline. However, mitigating factors indicate that discharge is too severe a penalty. Discharge is the ultimate penalty, economic capital punishment. Before discharging the employe it is incumbent upon the Carrier to consider an employe's length of service, his record of service, and all other mitigating or extenuating factors. The Grievant had at least thirteen years of service with the Carrier. Illness itself is considered a mitigating circumstance. The concept of just cause in support of a discharge includes certain notions of procedural fairness. If the Carrier does not intend to use some intermediate penalty, such as suspension, to drive home to the employe the seriousness of his continuing course of conduct, then at least the Carrier should clearly verbalize the threat and danger that discharge will result if and when future violations occur. We have repeatedly observed that misdemeanors do not require life sentences. Long experience has demonstrated that certainty of punishment is usually more of a deterrent to wrongdoing than the severity of the penalty.

Based on the entire record and considering all the circumstances in the case, we find that the Grievant was abusing his sick leave privileges; but we consider permanent dismissal to be excessive, and conclude that the Claimant should be restored to service with seniority and other rights unimpaired, but without pay for time lost while out of service.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December, 1971.

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