

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: ( International Brotherhood of Firemen and Oilers  
( Southern Pacific Transportation Company (Pacific Lines)

Dispute: Claim of Employees:

1. That in violation of the current agreement Firemen and Oiler S. Flores, was unjustly dismissed from service of the Carrier on November 19, 1979, following a hearing held on November 7, 1979.
2. That accordingly, the Carrier be ordered to make the aforementioned S. Flores, whole by restoring him to Carrier's service with seniority rights unimpaired, plus restoration of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law and compensated for all lost wages. In addition to money claimed herein, the Carrier shall pay the Claimant an additional amount of 6% per annum compounded annually on the anniversary date of this claim.

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.

Claimant S. Flores was employed by the Carrier on November 23, 1977. At the time of the incident triggering Claimant's dismissal from the service of the Carrier on November 19, 1979, Claimant was working as a Laborer.

By directive dated October 11, 1979, Carrier instructed Claimant to appear on November 7, 1979 as follows:

"... For formal hearing to develop the facts and place responsibility, if any, in connection with your actions on October 7, 1979 at approximately 4:00 AM, when you were allegedly away from your assigned post of duty during your tour of duty, in a private automobile in company parking lot, in a reclining position, with eyes closed, allegedly asleep; also for your allegedly threatening two supervisors subsequent to this occurrence.

For these occurrences you are hereby charged with responsibility which may involve violation of the following quoted portions of our General Rules and Regulations, reading:

Rule 801--'Employees will not be retained in the service who are vicious...'

Rule 810--'Employees must ... remain at their post of duty during their tour of duty ... They must not absent themselves from their employment without proper authority ... Employees must not sleep while on duty. Lying down or assuming a reclining position, with eyes closed ... or eyes ... concealed, will be considered sleeping.'"

Following the formal hearing, Claimant was notified by letter dated November 19, 1979 that the evidence adduced at the formal hearing sustained the charges against him and, consequently, he was dismissed from the service of the Carrier for violating Rules 801 and 810.

The instant claim was timely filed and handled with all Carrier officers authorized to handle same, including the highest designated officer of the Carrier, all of whom declined to make satisfactory adjustment. Following discussion of the claim in conference without settlement, the matter was processed to this Board.

It is the position of the Employees that Carrier's action in dismissing Claimant from Carrier's service was an arbitrary, capricious and unjust action and an abuse of managerial discretion.

Specifically, the Organization notes that Claimant was not working his regular assignment on the day in question. He had been loaned out from the Ramp and was unfamiliar with the duties that were assigned to him on the Service Track Facilities. Further, it is contended that the conflicting testimony of the Carrier's witnesses who allegedly saw Claimant asleep is not sufficient to establish violation of Rule 810, particularly in light of Claimant's denial of being asleep.

The Organization contends that the Carrier's Rules and Regulations are not enforced on a uniform basis. In support of that position, it is noted that Mechanical Inspector, Amtrak, L. E. Martin, admitted that he had allowed Claimant and others to go home as much as two hours early. However, on the date in question, the evidence shows that Claimant absented himself from his place of duty for at most one hour, including the lunch break. Given these circumstances, if any discipline were to attach in this case it should certainly not have been the supreme penalty of dismissal from service. The penalty imposed was beyond all reasonable discipline. Consequently, dismissal was not justified and cannot be sustained.

It is the position of the Carrier that the claim is completely without merit inasmuch as the evidence at the formal hearing supported the charges against Claimant and the dismissal from service of Claimant was justified, particularly in light of Claimant's past disciplinary record.

The Carrier notes that before Claimant's 60-day probationary period expired, a supervisor had advised against Claimant's retention in service due to Claimant's attitude problems and sleeping. Because the Mechanical Department was in the process of reorganization at that time, the evaluation was overlooked. On November 2, 1978, Claimant was suspended for sixty days for sleeping on a bench. On July 9, 1979 Claimant was assessed twenty demerits for absenting himself without proper authority. On September 20, 1979 (seventeen days prior to the incidents precipitating Claimant's dismissal from service) Claimant was found asleep in his automobile during his tour of duty. At that time, Claimant was given a letter that stated, in part, "While this incident is being passed without formal disciplinary action, wish to impress upon you that total compliance with all Company rules and regulations is a mandatory employment requirement. Trust it will not be necessary to call matters of this nature to your attention in the future. Copy of this letter is being placed on your personal record."

The Carrier is satisfied that Claimant is predisposed to violate Rule 810 and that Claimant has proved himself to be not only an undesirable employe, but one who does not seem to want to abide by Carrier's rules.

After having carefully considered the transcript of testimony of the formal hearing in this case, and the contention of the parties, the Board finds all necessary factual support for the Carrier's conclusion that Claimant violated Rule 810. The contentions raised by the Organization are irrelevant or without mitigating force. The ultimate penalty of dismissal from service is not excessive under all of the circumstances of this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of March, 1983.