

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

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(System Council No. 15 AFL-CIO
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Laborer Robert Noyola, Minneapolis, Minnesota, was unfairly dismissed from service of the Chicago and NorthWestern Transportation Company, effective May 22, 1981.
2. That accordingly, the Carrier be ordered to make Mr. R. Noyola whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement for all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his record.

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 employes 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 was employed as a Laborer at the Carrier's Cedar Lake Shop at Minneapolis, Minnesota. The record indicates that on May 3, 1981 the Shop Superintendent, after looking for the Claimant, maintained he found him sitting in the cab of Locomotive Unit 4434 slumped in the Engineer's seat with his feet up and his eyes closed.

The Carrier removed the Claimant from service on May 3, 1981, pending an investigation. The investigation subsequently took place on May 20, 1981 in connection with the following charge:

"To determine your responsibility, if any, for violation of Rule 23 in the book of General Regulations and Safety Rules of the Chicago and North Western Transportation Company. You are charged with sleeping in Unit 4434 at 11:02 a.m., Sunday, May 3, 1981."

The Claimant denied he was sleeping and maintains he was only in the unit because he was sick. Yet no proof of his sickness is established in the record.

Rule 23 states:

"Employees must not sleep while on duty. Lying down or in a reclining position with eyes closed or covered will be considered as sleeping."

The Claimant, upon direct examination, testified:

"Q. Are you familiar with Rule 23?

A. Yes, I am.

Q. Did you comply with Rule 23 on May 3, 1981?

A. I feel I, some parts of it no, you know I was up there.

Q. Do you want to elaborate?

A. Yes, I was up there sleeping, but I was not out, I wasn't sleeping, I was sitting up in the Unit but I was not sleeping. I had my eyes closed and I feel I wasn't breaking Rule 23.

Q. You were sitting in the position that Mr. Tweenen indicated earlier in the investigation?

A. Yes.

Q. With your eyes closed?

A. Yes, I was. I was not sleeping. I was just sitting there resting. I was sick, I was feeling really sick and I sat up in the Unit."

The Claimant's own admission as to his actions establishes that he was in violation of Rule 23. The difference between "sleeping but I was not out" is a difference without a distinction. This is particularly so in the case of Rule 23, which sets forth the physical conditions under which a presumption of sleeping is created. In this regard the Claimant's violation of Rule 23 is established by his own testimony.

A review of his prior disciplinary record reveals that the Claimant had previously served a ninety (90) day suspension for an identical offense. This negative factor supports the Carrier's determination to dismiss the Claimant from service.

However, even though the record may support a finding of termination, the Carrier has not demonstrated the existence of an extreme case "sufficient to support suspension pending investigation" in accordance with the requirements of Rule 21. The decision of the Carrier to remove the Claimant from service on May 3, 1981 until the hearing on May 20, 1981 violates both the spirit and intent of Rule 21. Accordingly, the Claimant shall be compensated for the May 3 to May 20, 1981 period.

Carrier improperly applied Rule 21 and that part of the claim is sustained in that the Claimant is entitled to back pay for the May 3 - May 20, 1981 period.

Nonetheless, the Claimant is found guilty as charged of sleeping on the job, and the decision of the Carrier to dismiss the Claimant will not be rescinded by this Board.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1984