

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12618
Docket No. 12571
93-2-92-2-102

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

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:"DISPUTE AND CLAIM OF EMPLOYEES:

1. That the Chicago and North Western Transportation Company (hereinafter referred to as the "Carrier") violated the applicable provisions of Rule 35 of the July 1, 1921 Joint Agreement as specifically amended by Agreement dated July 1, 1979 when, subsequent to an investigation which was neither fair nor impartial it unjustly and improperly dismissed from service California Avenue Maintenance Facility Machinist V. Perez (hereinafter referred to as the "Claimant").
2. That accordingly, the Carrier be ordered to
 - (a) Restore Claimant to service with all seniority and vacation rights unimpaired.
 - (b) Compensate Claimant for all time lost from service commencing May 17, 1991.
 - (c) Make Claimant whole for all Health, Welfare and Insurance benefits lost while dismissed from service.
 - (d) Expunge from Claimant's personal record any and all reference to the investigation proceedings and the discipline subsequently imposed."

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.

The Claimant, who is a Machinist, was charged with sleeping on duty. Subsequent to a hearing, he was discharged from the Carrier's service.

The Organization has made a number of procedural arguments with respect to the fairness of the proceedings, including the role of the Hearing Officer. After careful review of these objections, we find no basis to set this claim aside on those grounds.

On the merits of the dispute, there is the direct testimony of two of the Carrier's Foremen that they observed that the employee had his eyes closed and was postured in such a way to strongly suggest that he was asleep. While the Board finds it to be highly unusual (on the basis of our review of past cases) that neither Foreman spoke to the Claimant at the time when they observed him, their behavior does not detract from the testimony given by them. This is particularly true because the testimony of a co-worker, in our judgment, did not support the contention advanced by the Claimant that he was not asleep.

With respect to the discipline assessed by the Carrier, we note that sleeping on duty has been many times regarded as an offense which could justify discharge. In this case, the Claimant was subject to the Carrier's Discipline Policy ("Policy"). Under the Policy, the Carrier may apply the discipline of dismissal for a third offense, a situation that applies to the Claimant in this case. Nonetheless, while the Carrier may properly apply its Policy, as written, it must be within the context of fairness and should not be applied by rote. Each case must stand or fall on its own merits in light of all the individual facts and circumstances of record which must be considered at the time. Otherwise, minor and major offenses could lose their distinction and work performance could easily become irrelevant and subordinated to the disciplinary process.

In this case, the employee was last disciplined in 1989. He has fifteen (15) years of relatively good service and had been out of service since May 1991. Given these facts, as well as other circumstances, we are inclined to believe that the discipline

imposed has served its purpose. Accordingly, we shall order the return of the Claimant to service with seniority unimpaired, but without payment for the time he has been out of service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of November 1993.