

Award No. 1541

Docket No. 1459

2-MP-MA-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Machinists)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (a) That under the provisions of the controlling agreement, Machinist J. A. Simms was unjustly suspended from the service on April 20, 1951, and unjustly dismissed from the service on May 1, 1951.

(b) That accordingly the carrier be ordered to reinstate this employee to all seniority rights unimpaired with pay for all time lost retroactive to April 20, 1951.

EMPLOYEES' STATEMENT OF FACTS: At El Dorado, Arkansas, the carrier employed Machinist J. A. Simms, hereinafter referred to as the claimant, and his employment therewith has been continuous for a period of twenty-seven (27) years.

The carrier regularly employed the claimant as lead machinist from 8:00 P. M. to 5:00 A. M. with a lunch period of one hour, Thursday through Monday with rest days Tuesday and Wednesday, but because of operating short handed the carrier required this claimant to work on his rest day, Tuesday, April 17, 1951, during the same hours as he normally worked five days per week.

The carrier suspended the claimant from service effective April 20, 1951, and as of the same date ordered him to submit himself for investigation at 1:00 P. M. Monday, April 23, 1951, account having been charged with sleeping on duty in violation of Rule 1-A on the night of April 17, 1951. These developments are affirmed by copies of letters addressed by Mr. Warren, master mechanic, to the claimant, submitted herewith and identified respectively as Exhibits A and A-1.

The investigation of the claimant was conducted on May 1, 1951 and a copy thereof is submitted herewith and identified as Exhibit B. However, the carrier made the election of May 5, 1951 to dismiss the claimant from the service, which is affirmed by the attached copy of letter addressed by Mr. Williams, superintendent, to the claimant, submitted herewith and identified as Exhibit C.

The agreement effective September 1, 1949, is controlling.

In view of claimant's past record, considering the nature of the charge of which she has here been found guilty, we do not find the discipline imposed to be either unreasonable, excessive or arbitrary."

In Third Division Award No. 1599, the Board, with the assistance of Referee Bruce Blake, denied claim for reinstatement and held that:

"Second: In disciplinary matters it is not only proper but is essential, in the interest of justice, to take past record into consideration. What might be just and fair discipline to an employe whose past record is good might, and usually would, be utterly inadequate discipline for an employe with a bad record."

Again in Third Division Award No. 4229, the Board, with the assistance of Referee H. Nathan Swaim, denied claim for reinstatement and held that:

"The Organization also objected to the consideration or review of a past incident of insubordination by Claimant. We have said before that in fixing the penalty it is proper to consider the past record of an employe. Award 1599."

Once again in First Division Award No. 13634, the Board, with the assistance of Referee Sidney St. F. Thaxter, denied claim for reinstatement and held that:

"Having an unsatisfactory service record is not an offense known to the rules. Nor is it proper even to consider it in determining guilt. Having determined that by extraneous evidence, his record may be considered solely in assessing discipline."

This claim should, therefore, be denied as being entirely without support under the provisions of the agreement, and wholly without merit as a matter of equity.

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.

The parties to said dispute were given due notice of hearing thereon.

The machinists of System Federation No. 2 contend Lead Machinist J. A. Simms was unjustly suspended from service on April 20, 1951, and unjustly dismissed from service on May 1, 1951. If the charges made against Simms will sustain his dismissal from the service then it was proper, within the meaning of Rule 32 (b) of the parties' agreement effective September 1, 1949, to suspend Simms pending a hearing.

Simms was regularly assigned as Lead Machinist, Second Shift, Roundhouse, Eldorado, Arkansas with tour of duty from 8:00 P. M. to 5:00 A. M. with one hour for lunch. His assigned days of work were Thursday through Monday with Tuesday and Wednesday as rest days. Carrier charged Simms with sleeping on duty the night of Tuesday, April 17, 1951.

The evidence establishes that Simms slept from 12:45 A. M. to 3:00 A. M. on his tour of duty while assigned to work on Tuesday, April 17, 1951, but made a claim for the full eight hours at overtime. Tuesday was one of his rest days. Sleeping on duty results in a complete neglect of duty and is

subject to discipline. This is even more so when the employe makes claim for and receives pay for the hours he actually slept.

The record shows Simms was given a fair and impartial hearing within the meaning of Rule 32 of the parties' effective agreement and there is ample evidence in the record to support the carrier's finding that Simms was guilty of the charges made against him. However, certain contentions are made in behalf of Simms to apparently excuse his conduct. We will briefly discuss these contentions.

It is true that Tuesday, April 17, 1951, was one of Simms' rest days but there is no evidence that he asked to be excused from working on that day when he was requested to do so. It is claimed that Simms was not feeling well and sought to get relief. But that contention is not supported by the record, as evidenced by the fact that he continued to work after relief had been provided. It is suggested that he was sleeping during his one-hour lunch period, which he would undoubtedly have a right to do, but the fact is he slept for over two hours and fifteen minutes. In this regard it is suggested that other employes would have awakened him if officers of the carrier had not prevented them from doing so. But there is nothing in the record to show that he had arranged for them to do so within time so his sleeping would have been limited to his lunch period. It is suggested that all the work was done and that he fully carried out his duties but that fact would not justify his sleeping while on duty.

Whether or not the discipline imposed is excessive, considering the fact that claimant had been in carrier's employ for twenty-seven years, depends largely upon the circumstances surrounding the incident and the past record of the employe, which it is proper for carrier to consider. See Award 1367 of this Division. Ordinarily, we would consider it excessive but in view of claimant's past record we find carrier did not act unreasonable in dismissing claimant. Claimant had been dealt with very leniently in the past and could not always expect carrier to overlook his neglect of duty. This is particularly true here when claimant not only slept while on duty but actually filed a claim for such time and received pay therefore.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of June, 1952.