

Award No. 1979

Docket No. 1763

2-L&N-MA-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Machinists)**

LOUISVILLE & NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the controlling agreement Machinist R. D. Owens was unjustly dismissed from the service of the Louisville and Nashville Railroad Company, October 29, 1953.

2. That accordingly the Carrier be ordered to restore Machinist R. D. Owens in its service with all his earned rights intact and fully compensate him for all time he has lost since October 29, 1953.

EMPLOYES' STATEMENT OF FACTS: Machinist R. D. Owens hereinafter referred to as the claimant, was employed by the carrier 11 years past and served the carrier in the capacity of apprentice and then machinist.

By letter dated September 14, 1953, the claimant was notified to appear for a hearing at 9:00 A. M. September 17, 1953, but by request the hearing was postponed until 9:00 A. M. October 13, 1953. Copy of said notice is submitted herewith and identified as Exhibit A.

The hearing was held October 13, 1953 by J. O. Rose, master mechanic, Corbin, Kentucky. Copy of the hearing record is submitted herewith and identified as Exhibit B.

Under date of October 28, 1953, Master Mechanic J. O. Rose notified the claimant he was dismissed and would not be permitted to perform further service for the carrier after October 29, 1953. Copy of this notice is submitted herewith and identified as Exhibit C.

The grievance of this claimant has been handled with each carrier official including the highest designated officer, without securing a satisfactory settlement.

The agreement of September 1, 1943, as amended, is controlling in this dispute.

Carrier submits that it is entitled to eight hours' work for eight hours' pay, and that loafing and sleeping on the job can not be tolerated. Further, that the supervision of employes is the responsibility of management, and instructions of management must be obeyed if the railroad is to be efficiently operated. And a failure to carry out the directions of the carrier, unless they exceed all bounds of reasonableness, constitutes insubordination (Second Division Award 1459). Attention is also invited to Second Division Awards 1542, 1543 and 1544 concerning the necessity of employes complying with instructions.

The instructions given Owens on September 2, 1953, were entirely reasonable and in line with the duties he stood to perform as a machinist. They were readily understandable, and were material to the immediate proper and efficient operation of the carrier's business. And there was no justifiable excuse for his willful refusal to comply with them. (See First Division Award 11514).

In conclusion carrier reiterates that there is ample evidence to substantiate the charges against Machinist Owens. Further, that in view of the seriousness of his offense, and his prior record, his dismissal was entirely justified and should stand. In this connection attention is invited to the following excerpts from awards of this and other divisions of the Adjustment Board:

"This Board is loathe to interfere in cases of discipline if there is any reasonable grounds upon which it can be justified."
(Second Division Award 1109)

". . . it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed." (Second Division Award 1323)

"In proceedings such as these we do not examine the record of testimony to determine weight of credibility. We look for substantial and satisfactory support, and when that is found our inquiry ends. Awards upon this point are so numerous as to make citation of any of them unnecessary." (First Division Award 14552)

". . . Our function in cases of the kind here involved, as we understand it, under Awards of this Division of the Board so well known and established that they require no citation or further consideration, is not to pass upon the credibility of the witnesses or weigh the evidence but to determine whether the evidence is substantial and supports the charges as made. If it is we cannot substitute our judgment for that of the carrier and it is our duty to leave its findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion." (Third Division Award 5401)

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.

Claimant was dismissed from service after hearing on charges of insubordination and loafing and sleeping on the job, and here claims unjust dismissal and seeks restoration to service with compensation for time lost.

Such hearing is not analogous to a criminal proceeding, requiring "irrefragible evidence" of guilt, as urged by employes. We properly determine only whether there appears to be decision without prejudice and penalty without caprice. A careful review of the evidence in the record before us convinces that carrier representative decided fairly upon substantial evidence. The statement of Foreman Russell as to insubordination was supported by that of Machinist Setser, and the statement as to loafing was supported by witnesses who saw claimant sitting in the cab seat and in the cab room chair when he should have been working, as well as by his own admission of sitting in each "for a short time." Showing as to his frequently leaving work to use the telephone was not denied and his asserted reason for his extended telephone call on the occasion involved shows nothing to indicate emergency or need of haste.

Carrier's statement as to past record is not disputed and indicates that claimant had become careless in his work and indifferent to the obligations of his employment so as to make the penalty of dismissal not capricious.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of July, 1955.

DISSENT OF LABOR MEMBERS TO AWARD NO. 1979

The majority find and we quote "a careful review of the evidence in the record before us convinces that the carrier representative decided fairly upon substantial evidence."

With this we disagree, since the hearing record on the property fails to support the charges of insubordination and sleeping and loafing while on duty.

Direct interrogation of the claimant at said investigation failed to prove the insubordination charge and Machinist Setser's statement did not prove the insubordination by repeating some heresay statement. None of the witnesses were able to state that the claimant was sleeping except Foreman Russell who made the charge.

Section 3, First (1) of the Railway Labor Act provides for the selection of a neutral person or a referee to sit with the Division and make an award.

In a case such as the present one, it is desirable to have a neutral party evaluate the evidence. Evaluation of evidence in this case supports the claimant's contention that he was not proven guilty as charged.

Therefor the Division should have ordered his reinstatement.

R. W. Blake,
C. E. Goodlin,
T. E. Losey,
Edward W. Wiesner,
George Wright.