

Award No. 2523

Docket No. 2475

2-SP(PL)-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT A. F. of L.-C.I.O. (Carmen)**

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES:

That under provisions of current agreement Passenger Carmen W. Stotts was unjustly dismissed from service of Carrier on April 20, 1956, and that accordingly, Carrier be ordered to reinstate him with all pertinent rights of employment and compensation for all time lost retroactive to the aforementioned date.

EMPLOYEES' STATEMENT OF FACTS: The Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier employed Carmen W. Stotts, hereinafter called the claimant, from 11:00 P.M. to 7:00 A.M. at Los Angeles Union Passenger Terminal and elsewhere, Los Angeles, California, and that claimant had been in the service of the carrier for approximately five years, and had maintained his position satisfactorily and efficiently since date of original employment.

The carrier's representative, W. R. Fread, assistant superintendent of Los Angeles Union Passenger Terminal summoned the claimant to appear for formal hearing at 8:30 A.M., March 5, 6, 7 and 8, 1956, on alleged charges of loafing and sleeping while on duty at the Los Angeles Union Passenger Terminal, and which summon is affirmed by copy of letter dated February 29, 1956, attesting to aforementioned alleged infractions as occurring on February 22, 1956, between the hours of 4:00 A.M. and 5:00 A.M., identified as Exhibit A. Hearing was held as scheduled, confirmed by Exhibit B. ■

Carrier's Assistant Superintendent W. R. Fread, also on above specified date, made the election to summon as his witnesses for presentation at this hearing: Chief Special Agent J. T. Malrooney, Assistant Chief Special Agent W. H. Brasher, R. D. Workman, superintendent of Los Angeles Union Passenger Terminal, and Mr. Raymond B. DiDieu, patrolman, and which witnesses were present on March 5, 1956, and subsequently thereto until conclusion of hearing, and which aforementioned names are contained in Exhibit B, page 1 and in other contents of this exhibit.

the carrier's service. The carrier's position in this respect is sustained by numerous awards of the National Railroad Adjustment Board, some of which are as follows:

In Second Division Award 1638, with Referee Edward F. Carter, statement is made under "Findings" as follows:

"Whatever the method of calculating the compensation may be, a deduction of outside earnings is required . . ."

In First Division Award 15765, with Referee Edward F. Carter, statement is made under "Findings" in part as follows:

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 19, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period."

This position is also sustained by First Division Award 15258, with referee Curtis W. Roll, rendered on January 26, 1954, wherein it was ruled that outside earnings would be deducted when payment is made for wage loss. In this connection also see First Division Award 16558.

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the Board to follow the logical and established principle set forth above and require that any and all earning by the claimant during the period for which compensation is claimed be deducted.

CONCLUSION

Having conclusively established that the claim in this docket is without merit, carrier respectfully submits that it be denied.

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 the dispute were given due notice of hearing thereon.

While this dispute arises from a group hearing involving a common charge, i.e., loafing and sleeping while on duty, we are concerned only with the case of Passenger Carman Stotts and specifically whether or not his dismissal from service was unjust as contended by Employees. This claimant has been employed for five years and possesses a good service record.

The bulk of the hearing transcript of 188 pages concerns itself with the question of whether or not the several employes were asleep while on duty. We are satisfied from the record that Passenger Carman Stotts was asleep as charged. Rule 2 of the Rules and Regulations of the Los Angeles Union Passenger Terminal provides, in part, as follows:

"Employees while on duty must not sleep . . ."

We also find that claimant was accorded a fair hearing and our only question concerns the justification for the penalty assessed in view of the abrupt, unannounced, change in policy instituted by the newly-appointed Superintendent of the Terminal.

The evidence shows that claimant, after completing his work on the baggage trucks, went to the Carman's Shanty to await the arrival of Train No. 99, in compliance with the policy and procedures laid down by the Carman Foreman. As need for their services arose, the Foreman customarily summoned the employes by telephone or horn. While the Foreman, who incidentally lost his job in the same housecleaning, could not justify the act of sleeping, he appeared fully satisfied with the presence of two of his men in the shanty at the time in question. Stotts was not accused of neglecting any specific work.

The Superintendent testified that the weather was cool (p. 51), that the shanty was heated by an electric heater and it was very warm inside (p. 54), and that he observed claimant asleep, sitting up in a chair.

Rather than resort to warnings and directing changes in conditions and procedures to correct the problems which he believed existed, the Superintendent descended unannounced upon the yard between 4 and 5 A. M., accompanied by Railroad Police and made the discoveries leading to the several discharges.

Under past standards, claimant was not to be considered as loafing simply because he was sitting in the Carman's Shanty. While sleeping while on duty is never wholly excusable, its seriousness is dependent upon the setting and the consequences which could result from the act. Here such consequences were insignificant and accordingly the severe penalty of dismissal was unwarranted and capricious.

AWARD

Claim sustained. Deduction of outside earnings shall be made in computing compensation due.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June, 1957.