

Award No. 4453

Docket No. 4334

2-GN-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee P. M. Williams when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the agreement when they dismissed Carman Neil Leigh from the service of the Carrier September 14, 1961.

2. That Carman Neil Leigh be returned to service and paid for all time lost, with all previous rights restored because of said violation.

EMPLOYEES' STATEMENT OF FACTS: The Great Northern Railway Company, hereinafter referred to as the carrier, employed Carman Neil Leigh, hereinafter referred to as the claimant, at Minot, North Dakota with assigned hours of duty from 12 M. to 8:00 A. M. — Wednesday and Thursday rest days.

On Midnight August 23, 1961 the claimant reported for work at the Minot car shop. At 3:20 A. M. he was ordered by the car foreman to check out for allegedly sleeping on the job.

The claimant was served with a notice August 23, 1961, to report to conference room, superintendent's office, Minot, at 3:00 P. M., Tuesday, August 29, 1961, for formal investigation for being found sleeping while on duty in lunch room at Gavin car shop by Foreman Manuel Dahl between 3:00 and 3:30 A. M. on August 23, 1961. He was also charged with insubordination and making threatening remarks to Car Foreman Dahl and Leadman Cyril Gilday.

Investigation was held on August 29th with the claimant present, and represented by Local Chairman Gooch.

The claimant was notified on September 14, 1961, that he was discharged from the service of the company.

Protests as to the manner in which the investigation was being handled were made by Local Chairman Gooch all through the investigation but were ignored or overruled by the investigating officer.

have altered the result. Under such circumstances, this Board has held that even oral testimony which was improperly excluded from an investigation did not constitute a denial of a fair and impartial investigation hearing within the meaning of schedule rules essentially identical to Rule 26(e). See Awards 2529 and 3364.

Even if this Board should find that some rule was violated in this case, and that the claimant is entitled to damages, it must be governed by the last sentence of Schedule Rule 26(e) which limits the damages to "wage loss, if any." Essentially identical language has been interpreted by this Board in Awards 1638, 2068, 3449, 3703, 3747 and 3752, to require the deduction of all outside earnings in computing the amount of the wages lost.

**THE CLAIM OF THE ORGANIZATION, THEREFORE,
IS WITHOUT MERIT FOR THE FOLLOWING REASONS:**

1. This was a "proper case" in which to withhold the claimant from service pending the investigation hearing, as that language has been interpreted by awards of this Board.
2. The organization has failed to produce any competent evidence that the carrier's decision that the claimant should be dismissed because of his conduct on August 23, 1961, was arbitrary, capricious and an abuse of the discretion vested in management.

For the foregoing reasons, the carrier respectfully requests that the claim of the organization 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.

Parties to said dispute were given due notice of hearing thereon.

Carman Neil Leigh was employed by the Carrier at Minot, N. D. until his discharge on September 14, 1961 for, it is alleged by the Carrier, "violation of Rules 12, 18 and 25 of the Rules and Instructions for Locomotive and Carshop, Roundhouse, Repair Track and Maintenance of Equipment Employes, all in connection with your sleeping on duty, making threatening remarks and being guilty of insubordination on August 23, 1961". Claimant Leigh denies that his acts on the latter mentioned date were such that the Carrier was justified in discharging him and claims "that he should be returned to service and paid for all time lost, with all previous rights restored because of said violation."

The record discloses that the claimant admits being asleep in the lunchroom from 3:30 A. M. to 3:20 A. M. but he alleges that during this time he was "on my 20 minutes for lunch". To support his allegation the claimant offered a signed statement from four coworkers that the 20 minute lunch period of August 23, 1961 was taken sometime between 3:00 A. M. and 3:30 A. M. The record also discloses that Assistant Car Foreman Manuel Dahl, at the formal hearing on August 29, 1961, said, in describing the threatening remarks:

Answer: "After this I went back, proceeded around the shop a little bit and when I arrived back at the office Mr. Leigh was in the office and finished eating my lunch and he started threatening me. He said "should have good notion to kill me and Mr. Gilday.

Question: Did he give any reason for making this statement?

Answer: No he didn't."

Mr. Dahl also said that when he attempted to call a Special Agent to take Carman Leigh from the property he was prevented from doing so because the telephone was taken away from him, but that no call was made after Carman Leigh left his office at 3:45 or 3:50 A. M.

The insubordination offense against the claimant is described by Assistant Car Foreman Dahl as being for his refusal to perform the work assigned to him on August 23, 1961, though he does admit that claimant "eventually" finished the job. Additionally he states that claimant takes too much time at the drinking fountain and walks around the shop and molests the other men. He also describes the claimant as being "undependable on whatever job he is put on".

As a result of the events enumerated in the preceding two paragraphs the claimant was suspended from service at 3:30 A. M., August 23, 1961. The Carrier, in its submission, tells us that, "After the formal investigation on August 29, the claimant was allowed to return to work pending a decision. On September 14, 1961 the Master Mechanic notified the claimant in writing that he was discharged from the service effective at the close of his shift on that date."

The charges made against the claimant are most serious, and in view of the happenings in the early morning hours of August 23 we find that the Carrier acted within its rights in suspending claimant from service pending a formal and prompt investigation. Insofar as Carman Leigh's claim is for the period of his suspension, August 23rd to 29th, 1961, it is denied. We are of the opinion however that at the formal investigation and hearing the charges made against the claimant were not proven by the Carrier. Our opinion that proof of the charges was lacking is amply supported by the instant record but if there was any doubt as to the soundness of our findings it was dispelled by the action of the Carrier's Minot, N. D., Master Mechanic for it was he who conducted the investigation, determined the soundness of the charges and the credibility of the witnesses at the hearing and who, at the conclusion of the investigation reinstated claimant to service pending a final determination, which, the record shows, was 16 days later. To reinstate an employe who had just been proven guilty of sleeping on duty, making threatening remarks and insubordination is unthinkable; it must have been that the Master Mechanic also was of the opinion that the charges had not been proven.

Since we have found that the formal investigation did not disclose that claimant was guilty of the charges it necessarily follows that he must be reinstated as of September 15, 1961 with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from his improper dismissal.

The Organization urges in its submission that, "In requesting that all previous rights be restored, this is intended to cover:

1. Restoring the claimant to service with seniority rights unimpaired;

2. Making the claimant whole for all vacation rights;
3. Paying the premiums for Hospital, surgical and medical benefits for all time held out of service;
4. Paying the premiums for Group Life Insurance for all time held out of service."

The Carrier states, and it is not denied by the Organization, that items (3) and (4) above were not discussed, or raised, by the Employes on the property and that those matters cannot be made a part of the claim that is under consideration now. The Carrier, in support of its position, cites numerous awards of this and the Third Division which hold that unless a demand or claim is submitted on the property it cannot be raised before this Board. For the purposes of this Award the matters claimed in (3) and (4) above are dismissed because they were not presented on the property. We express no opinion and none should be inferred, as to items (3) and (4) and their validity or invalidity, had they been raised or discussed on the property.

AWARD

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST. Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1964.