Award No. 4532
Docket No. 4478
2-CRI&P-MA-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That effective June 4, 1962, Machinist V. B. Wiles was unjustly dismissed from the service of the Carrier.

2. That accordingly the Carrier be ordered to restore Machinist V. B. Wiles to service with seniority and vacation rights unimpaired.

3. That the Carrier be ordered to reimburse Machinist V. B. Wiles for all time lost. Eight (8) hours for June 4, 1962 and eight (8) hours for all subsequent dates (exclusive of rest days), until restored to service.

4. That the Carrier be ordered to pay his Hospital and Surgical and Medical Benefit and Life Insurance premiums to which he was entitled under a negotiated Agreement, for all time that he is withheld from service.

EMPLOYES' STATEMENT OF FACTS: Machinist V. B. Wiles, hereinafter called the claimant, was employed by the Chicago, Rock Island and Pacific Railroad Company, hereinafter called the carrier, as a machinist more than 34 years prior to his discharge from carrier's service.

In a notice dated May 12, 1962, the claimant was charged with being asleep while on duty at 12:55 A. M. on May 12, 1962.

The carrier dismissed the claimant effective June 4, 1962.

The carrier's dismissal of the claimant was promptly appealed to Master Mechanic K. O. Thomas.

The master mechanic declined the claim without giving his reasons except to state that the investigation developed evidence that the claimant was asleep on duty.

The general chairman then sent the complete file to vice president of

lost, but Rule 34 limits recovery in the event of an unjust suspension or dismissal, that part reading:

> "It is understood that 'wage loss' will be less compensation earned in any other employment."

Also that part of the claim requesting payment of Hospital and Surgical and Medical Benefit and Life Insurance premiums has already been decided on this railroad, under this agreement and under Rule 34 as being invalid by the Second Division in its Award 3883 (Carey) in part:

> "The contracting parties have specifically agreed that the damages for contract violation such as occurred in this case, is the amount of wages shown to have been lost, less earnings from other sources. Other elements of consequential damage have been excluded by implication. The term "wage" in its ordinary and popular sense means payment of a specific sum for services performed. That is the sense in which the term is used in this agreement. The language of Rule 34 has been in effect since 1941, long before the contracting parties had provided for group insurance for hospital or medical expenses. The insurance program which was in effect in July 1957 was specifically declared in the 1956 agreement to be in addition to the wage adjustments therein provided. It was by the parties own arrangement distinguished from wages. Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate. We conclude that this Board lacks the power to order the carrier to reimburse the claimant for his medical and hospital expense."

The carrier in conclusion submits:

> 1. The claimant had a fair and impartial hearing as required by the rule.
>
> 2. The hearing transcript conclusively shows the claimant violated Rule "Q," and the board has repeatedly held that the transcript record if it allows, not necessarily compels, a conclusion, that conclusion cannot be held to be unreasonable or arbitrary.
>
> 3. When a violation is found the board also has repeatedly held it will not substitute its judgment for that of carrier officers with regard to the measure of discipline.
>
> 4. The claimant cannot with sincerity contend he has been unjustly treated by this carrier. The record speaks for itself.

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 Division finds that the record supports some but not all of the charges levelled against the Claimant by the Carrier.

In brief, the Division finds that the record does not contain substantial evidence to uphold the Carrier's contention that the Claimant was sleeping on the job. The Division does find, however, that there is adequate evidence in the record to hold that the Claimant did not devote himself exclusively to his duties and was therefore in violation of Rule "Q."

In analyzing the evidence in support of the Carrier's charge that the Claimant was asleep on the job, it stems from the testimony of two supervisors on a routine inspection tour, that as they proceeded along a black top walk on their way to the Diesel House, came upon the Claimant lying on this walk with his head cradled in his arms, with his back toward them. It was dark (12:25 A. M.) and the supervisors did not see Claimant's face. An official stated "Jack, you are getting your rest, aren't you?" and then the two supervisors continued to walk on and went into the Diesel House.

The evidence tending to support the Claimant's plea that he was not asleep is that as the Supervisor approached the Claimant, a fellow worker, Mr. Green called out "Don't let those fellows step on you Jack." When the Supervisor returned from the Diesel House within a few minutes, the Claimant had arisen and replied to the question directed at him by the Supervisor clearly and responsively, plus the corrobative testimony of Mr. Green, the fellow worker who said that the Claimant was not asleep because the two men had been talking outside the Diesel House. On the basis of this evidence and that a black top surfaced walk in front of the Diesel House is an unlikely and uncomfortable place to seek a clandestine rest, the Division is unable to conclude that there is substantial evidence to support the charge of sleeping on the job.

However, the same analysis of the record, discloses substantial evidence to uphold the charge that the Claimant was in violation of Rule "Q" in not giving his exclusive attention to his duties during his tour of duty. When the Supervisors returned from the Diesel House, they asked the Claimant "if he had enough work on this night in particular to keep you busy as a machinist." The Claimant replied: "Yes but not urgent enough to work during my 20 minute lunch period." He further admitted that he had eaten no lunch that night and claimed he had the right to rest during his lunch period.

Rule 8 of the Agreement allows an employe 20 minutes for lunch without deduction in pay. It is evident that the Carrier agreed to the paid use of this time for eating and not resting purposes. If an employe chooses not to eat, and has duties to perform, he does not have, under this Rule, the option to rest and relax in lieu of performing the available work. In view of the candid admission of the Claimant that he had work to perform but it was not important to be performed during his lunch period, which he regarded as the equivalent of a rest period when he did not take lunch, the Division must conclude that the record supports the charge that the Claimant violated Rule "Q" in that he did not devote himself exclusively to his duties.

Having found thus, the Division also nevertheless, finds that the sanction imposed upon the Claimant is too severe and incommensurate with the offense so that it must be regarded as unreasonable and arbitrary. The Carrier held the Claimant out of service from June 4, 1962 until May 20, 1963. The Division finds that an appropriate remedy in light of all the facts of the case is being withheld from service from June 4, 1962 until January 4, 1963, with

seniority and vacation rights unimpaired. The punishment of course includes deduction of outside earnings and statutory unemployment compensation received during this period of being withheld from service.

In addition the Division finds that the Petitioner's request for premium to be paid by the Carrier for Hospital, Surgical and Medical benefits as well as Life Insurance premiums for the period withheld from service cannot be sustained. Rule 34, the cognizant rule, specifically refers to "wage loss" in connection with re-instating improperly disciplined employes. The Rule, with special reference to "wage loss" has been construed by this Division (Labor Members Dissenting) in a well reasoned Award—No. 3883—and the Division believes that there is no valid reason for departing now from the finding on this issue as expressed in the aforementioned Award.

AWARD

Claim sustained except as modified by the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June, 1964.