



Award No. 5843

Docket No. 5722

2-SP(PL)-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES'
DEPARTMENT, AFL — CIO
(Carmen)**

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Car Inspector J. P. Robbins (hereinafter referred to as the Claimant) was unjustly deprived of his service rights and compensation when he was improperly discharged from service under date of March 7, 1967, and as a result of such action suffered loss of all compensation from March 10, 1967 to February 23, 1968, date on which the Organization agreed that he be restored to service pending the determination of the associated monetary time loss by Second Division, National Railroad Adjustment Board.
2. That accordingly the Carrier be ordered to compensate Claimant for all wage loss including wage adjustments during the period referred to hereinabove.

EMPLOYES' STATEMENT OF FACTS: The Southern Pacific Company (Pacific Lines) hereinafter referred to as carrier, maintains at Fresno, California, a large train yard, wherein claimant was employed as a car inspector with a seniority date of October, 1960, having prior employment with the carrier before the 1960 employment date.

Claimant and a shop associate under date of February 20, 1967 were notified by Master Mechanic W. W. Atkinson pursuant to Rule 39, current working agreement, that formal hearing was to be held in the office of general foreman, Fresno, California, at 9:00 A.M., February 23, 1967, in connection with allegedly having been found asleep on duty in Fresno Train Yard at approximately 2:45 A.M., February 18, 1967. Formal hearing was held and claimant under date of March 7, 1967 was notified by Master Mechanic W. W. Atkinson that he was dismissed from the service of the carrier.

Under date of April 7, 1967, Local Chairman W. M. Swafford filed an appeal in writing with Master Mechanic W. W. Atkinson protesting the carrier's action of removing claimant and his shop associate from service and claimed compensation for all wage loss and other fringe benefits due the employees as a result of the unjust dismissals. Master Mechanic W. W. Atkinson replied thereto under date of May 23, 1967 denying the claim filed in be-

on a leniency basis without compensation for time lost and returned to work May 26, 1967. The claimant refused an offer for the same consideration and was adamant that he would not accept reinstatement unless the carrier paid him for lost time. The case proceeded in that manner until February 23, 1968 when in response to request by petitioner's general chairman it was agreed that claimant would be reinstated and, if desired, the matter of lost time be adjudicated before your board. Thus, the claimant authored his own wage loss for some nine months.

The petitioner has offered no basis for the claim in this docket during handling on the property. Carrier asserts there is no basis or merit for it and respectfully requests that it be denied.

ANALYSIS OF CLAIM

The carrier, having already conclusively proven that the claim as submitted is, in its entirety, without merit, is confident the Board will deny it. Notwithstanding this position and in no way admitting that the carrier's dismissal of the claimant was not justified and proper, the carrier submits that in the event the Board should sustain the claim for compensation for time lost, the Board should take into consideration the matter of deducting the amount earned in other employment during the period involved.

Rule 39 of the current agreement reads in part as follows:

"If it is found that an employe has been unjustly suspended or dismissed from service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The board has previously interpreted this rule providing for compensation for "wage loss, if any" as requiring deduction of outside earnings in computing compensation due. See Second Division Awards 2523 and 2653.

CONCLUSION: The carrier respectfully submits that having conclusively established that the claim is entirely without merit, it should 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 waived right of appearance at hearing thereon.

Claimant entered Carrier's service as a Carman on June 1, 1953. He worked in this capacity until March 7, 1967, when he was dismissed following a discipline proceeding in which he was respondent. He was reinstated to service on February 26, 1968.

The following charge was served upon Claimant by letter dated February 20, 1967:

"You are hereby notified to be present at the Office of General Foreman, Fresno, California, 9:00 A.M., February 28th, 1967 for formal hearing in connection with your allegedly having been found

asleep in Fresno Train Yard during your tour of duty at approximately 2:45 A.M., February 18th, 1967; in connection with which occurrence you are hereby charged with responsibility which may involve violation of Rule 810 of General Rules and Regulations as issued by General Manager dated November 1st, 1960, posted where assessible (sic) to all employees, reading as follows:

'They must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.'

After hearing held, Carrier's findings and imposition of discipline was served on Claimant in letter dated March 7, 1967:

"Evidence adduced at formal hearing conducted at Fresno, California, February 28th, 1967, established your responsibility for being found asleep in Fresno Train Yard during your tour of duty at approximately 2:45 A.M., February 18th, 1967.

"Your actions in this case constitute violation of portion of Rule 810 of General Rules and Regulations, reading as follows:

'They must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.'

For reason stated, you are hereby dismissed from the service of the Southern Pacific Company."

On May 22, 1967, Claimant was offered reinstatement without compensation for pay lost on a leniency basis. He rejected the offer.

On February 23, 1968, Claimant was offered reinstatement with the right reserved to process the claim for loss of pay to this Board. He accepted and reported for duty on March 7, 1968.

We are satisfied that Claimant was afforded due process and the record contains substantial evidence in support of Carrier's finding of Claimant's guilt as charged.

While Claimant was subject to disciplinary measures we find: (1) in view of Claimant's long years of service; (2) the circumstances and nature of the offense; and (3) lack of other evidence of prior disciplinary action against him for like or other derelictions, that the discipline imposed was excessive.

We find the following discipline to be reasonable and will so award:

1. Claimant to suffer loss of pay from March 7, 1967 to May 22, 1967; and
2. Claimant to be made whole for loss of pay he suffered, if any, in the period from May 22, 1967 to date he was returned to service (March 7, 1968) to be computed by application of the following: The total amount of pay, including vacation pay, Claimant would have received from Carrier had he been in service during the period LESS the total of pay received by him from other employment during the period, including vacation pay, if any.

A W A R D

Claim sustained to the extent set forth in FINDINGS, *supra*.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Kileen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.