Award No. 6028
Docket No. 5822
2-C&O-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That carman Roscoe Lewis has been unjustly dismissed from the service as result of investigation held in the car foreman's office, Fostoria, Ohio on June 26, 1968 at 9:30 A. M. The charges were not true and Mr. Lewis has been discriminated against as a carman.

2. That accordingly, the Chesapeake and Ohio Railway Company be ordered to restore carman Lewis to service with all seniority rights unimpaired, paid for all time lost and all benefits accruing to employes in service.

EMPLOYES STATEMENT OF FACTS: Carman Roscoe Lewis, hereinafter referred to as the claimant was regularly employed by the Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, at Fostoria, Ohio where the carrier owns and operates a facility consisting of shop track and transportation yards, where cars are switched, repaired and cars are interchanged from other roads to the C&O lines.

Claimant was charged, "with sleeping while on duty during the second shift at Fostoria, Ohio on Sunday, June 16, 1968" and notified by letter to attend investigation on Friday, June 21, 1968 at 9:30 A. M. At the request of Local Committeeman Mr. William Saldusky the investigation was postponed and re-scheduled on June 26, 1968 at 9:30 A. M. The investigation was held as scheduled.

In letter dated July 19, 1968 signed by carrier's Mr. T. H. Conkle, Car Superintendent claimant was notified that it had been found that he was at fault and disciplined from all service of the Railway Company. As result of said dismissal the appeal was processed through proper channels. This dispute has been handled up to and including the carrier's highest designated officer, designated to handle such claims or disputes all of whom have declined or refused to make satisfactory adjustments. The agreement effective July 21, 1921 as subsequently amended is controlling.

as possible. This question of alleged discrimination was dealt with at length in the handling of the property.

The Board has held innumerable times that it will not disturb the carrier's discipline unless there is a showing that carrier's action was arbitrary, capricious or an abuse of discretion. (See Second Division Awards 4408 and 5185). No such showing can be made here. Lewis was found guilty of a serious offense and one on which he had been previously found guilty. His dismissal from carrier's service was fully justified.

Carrier has shown that:

(1) The evidence introduced at the investigation clearly proved that Lewis was asleep while on duty as charged.

(2) There is no basis for the contention that Lewis was discriminated against.

(3) The discipline rendered was not too severe in view of the seriousness of the offense, particularly when such was a repeated offense for which he had previously been disciplined.

(4) Under the facts in this case carrier's action was not arbitrary, capricious or an abuse of discretion.

The claim is without justification or merit and it should be declined.

For the record it should be noted that there is no basis under rules of the basic agreement for that part of the employes' claim reading:

"* * * and all benefits accruing to employes in service."

Rule 37 of the Agreement provides in pertinent part as follows:

"If the judgment be in his favor, he shall be compensated for the wage loss, if any, suffered by him."

From this it will be noted that the applicable agreement rule provides for "wage loss" only. In this connection see Second Division Award 4911 and 5223.

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 evidence presented clearly indicates that claimant was not active or alert or otherwise in condition to perform his duties at the time the Car Foreman approached him. Claimant does not deny that he was sitting in

his automobile with his eyes shut. All outward appearances indicated to a normal person that claimant was asleep. Were he in some other state, not his fault, it was incumbent on claimant to so establish by competent proof. This the claimant did not do.

Claimant attempted to explain his state of torpor by saying he was "Doctoring pretty heavy." He did not identify the drugs he was allegedly taking, the need for these drugs, nor their normal effect upon him. In merely stating that he was taking medication and was not asleep, claimant did not rebut the evidence to the contrary. That claimant was asleep must be considered to be adequately demonstrated.

The fact of the matter is that supervision did find claimant asleep on duty and so reported him. If more than the usual supervisory attention was directed to claimant, it is neither surprising nor improper. Claimant has twice before been penalized by this Board, either for sleeping on duty or for failure to promptly perform his duties. Certainly, experience had taught Carrier the need to closely observe claimant.

In considering the question of what constitutes an appropriate penalty, it is fitting that claimant's entire employment record be taken into account. Such review shows that, on one occasion, a previous 15 days suspension, (assessed against claimant for sleeping on duty), was affirmed by this Board. See Award 4981, NRAB 2nd Division. Then too, on another occasion, this Board reinstated claimant to work, but without back pay for lost earnings, following his discharge for lying down on a bench during working hours. See Award 5336, NRAB, 2nd Division.

On the basis of this record, it cannot be said that Carrier should be compelled to indefinitely have this employe imposed upon it. It must be concluded that, in this instance, the penalty of discharge may not be deemed to be arbitrary or excessive punishment.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1970.

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