

Award No. 6104

Docket No. 5946

2-SP(PL)-MA-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC TRANSPORTATION COMPANY (PL)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Machinist C. Townsend, (hereinafter referred to as Claimant) was unjustly dismissed from the Carrier's service on November 19, 1969.

2. That accordingly the Carrier be ordered to reinstate this employe with seniority and service rights unimpaired and that he be compensated for all time lost retroactive to November 19, 1969.

EMPLOYEES' STATEMENT OF FACTS: The carrier first employed claimant as a machinist apprentice at its Los Angeles diesel shop on April 22, 1965. Claimant subsequently completed his four-year apprenticeship and was thereupon employed by the carrier as a machinist with a seniority date of August 2, 1969, a position he held until dismissed from service on November 19, 1969.

On September 24, 1969, claimant sustained an on-duty injury consisting of a severe flash burn to his eyes, occasioned by a welder striking an arc without first providing suitable protection for other employes working within the immediate vicinity. He reported to the carrier's first aid facility at Los Angeles at time of injury on September 24th, and again on September 26, 1969. His regular daily assignment of hours were from 3:00 P.M. to 11:00 P.M.

Claimant requested permission from his immediate supervisor to absent himself from his work assignment at 4:05 P.M., September 23, 1969, for the purpose of obtaining further medical treatment for the eye injury sustained while on duty September 24, 1969. Permission was granted and claimant then reported to the carrier's first aid facility and, in reporting to the nurse on duty, he asked if he should report to a doctor for necessary further treatment, to which she replied in the affirmative.

The nurse was informed by claimant that he was not responding satisfactorily to medical treatment received prior thereto from the company

in the event the board should sustain the claim insofar as the request for compensation is concerned, it 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 employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensation 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 Award 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 employee or employees involved in this dispute are respectively carrier and employee 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.

This is a claim that on November 19th, 1969, Machinist C. Townsend was unjustly dismissed for the reason that, contrary to Carrier's Rule 810 he was away from his post of duty for approximately an hour and a half.

It is the position of the Organization that the Claimant was unjustly dismissed, and that the punishment was harsh and excessive.

After full consideration of the evidence and the record in this matter, the Board is convinced that standing alone, the uncontested and basis incident and circumstances for which the Claimant was discharged, namely being absent from his place of duty, would not be sufficiently grave to warrant discharge.

However, the fact of the Claimant's absence from his post of duty, and his signing of a bizarre and untrue statement as to his whereabouts during the ninety minutes in question, when added to his previous record of misconduct, justify the conclusion that Carrier's decision to discipline him was not arbitrary or capricious.

Innumerable prior Awards have held that absent a showing that the Carrier acted in an arbitrary or capricious manner in disciplining an employee, the Board should not substitute its judgment for that of the Carrier.

However, the Board has also established by innumerable prior Awards its prerogative to question and weigh the justness of a disciplinary action in the light of whether the penalty of discharge was or was not excessive and

unreasonable, in view of the actual misconduct committed by the disciplined employe. After due consideration, the Board has concluded that discharge was excessive, and therefore orders reinstatement of the Claimant effective 26 weeks subsequent to the date of his discharge, with seniority unimpaired. It is further ordered that the employe is to be reimbursed for lost earnings between the date of his reinstatement and the actual date of his being restored to employment, minus any other earnings.

AWARD

Claim sustained to the extent stated in opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. KILLEEN
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April 1971.