

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employees:

1. That under the current Agreement and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company schedule of rules, the Carrier unjustly dismissed Machinist Myron Wilburn from service effective October 4, 1978.
2. That, accordingly, the Carrier be ordered to restore M. Wilburn back to service in the following manner: (a) Restore the Claimant to service with all seniority rights unimpaired, (b) Compensate Claimant for all time lost, (c) Make Claimant whole for all vacation rights, (d) Pay the premiums for hospital, surgical and medical benefits for all time held out of service, (e) Pay the premiums for group life insurance for all time held out of service.

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 employees 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 record indicates that the claimant was employed by the Carrier in the Mechanical Department of the Carrier's Wheel Shop, Building CD-9, Milwaukee, Wisconsin. Claimant was initially hired by the Carrier as a laborer on June 14, 1971, subsequently was promoted to a Machinist Helper position on August 2, 1973 and advanced to a Machinist position on March 7, 1978, and at the time of the incident had a Machinist assignment on the second shift, working 3:30 p.m. to midnight.

On August 9, 1978, Machinist Wilburn received written notification to appear for a formal hearing for being absent without proper authority from his assigned work area between the hours of 10:00 p.m. and 12:00 midnight on August 4, 1978, and with sleeping in his car during that time.

The Employees charge in this discipline case that the Carrier violated Rule 34 of the controlling Agreement by dismissing Claimant from service since the charges on which Claimant's dismissal were based were not supported by substantial evidence in the record as a whole. The Employees claim that the Carrier has failed to carry

its burden of proof and that the charges against Claimant were not sustained by the record.

The Carrier asserts a proven offense of sleeping on the job is considered a dismissal offense, and when "we take into consideration the claimant's poor record of absenteeism and tardiness, for which he had been properly warned, and insubordination, which resulted in a dismissal and his subsequent insubordination, which resulted in a dismissal and his subsequent reinstatement on a leniency basis after being held out of service for a period of about two years", the disciplinary action that was taken in the instant case was fully warranted and justified.

A hearing on the matter was originally scheduled to be held on August 16, 1978, but was postponed and subsequently held on August 29, 1978.

The record of the investigation indicates that the Claimant denied he was sleeping between the hours of 10 p.m.-12 midnight. His superior asserts he observed the Claimant asleep in his automobile as early as 11 p.m. after having looked for him when he was not at his assigned work area at 10 p.m. This conflict in the testimony is not within the purview of the Board to resolve, but rather must be left to the hearing officer.

In Second Division Award 7542 (Referee Eischen), the Board held:

"The only way for us to sustain the claim is to make a credibility determination by rejecting the Patrolman's version and accepting Claimants. On the state of the record before us the Hearing Officer could have easily done so, but his acceptance of the Patrolman's story is not per se arbitrary, unreasonable and capricious. Even if Carrier believed the wrong man where the issue is narrowed to credibility alone, we are unable to resolve such conflicts. Rightly or wrongly it is firmly established by a host of Awards that this appellate tribunal shall not resolve pure credibility questions. See Second Division Awards 6408, 6604, 7144 and 7196; See also Third Division Awards 14556, 19696 and 21258. We often are frustrated by this anomalous precedent, but the principle is established, it is understood and acknowledged by the parties and it is dispositive of the claim before us. We have no alternative but to deny the claim."

The hearing officer in the instant case rejected the Claimant's version and credited that of the Foreman. Given such a determination, the evidence is sufficient to support the charge that the Claimant is guilty of the offense of sleeping on the job.

The Claimant's prior record was properly considered in establishing the appropriate measure of discipline. Several awards of this division have deemed that sleeping while on duty is a sufficiently serious infraction to warrant dismissal. (See Second Division Award 8537, Referee Brown.)

On the entire record, the claim to reverse the decision or to modify the penalty must be denied.

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Award No. 8861
Docket No. 8673
2-CMStP&P-MA-'82

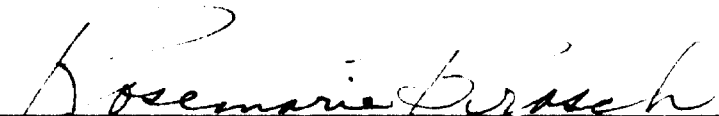
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of January, 1982.