

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 EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Machinists)**

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 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.

EMPLOYEES' 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

personnel, Mr. G. E. Mallery, appealing Master Mechanic Thomas' decision. Vice President Mallery replied under date of August 22, 1962 and declined the claim. Like Master Mechanic Thomas, Mr. Mallery did not give any reason for denying the claim other than stating that in Carrier's opinion the investigation conclusively proved that the Claimant ". . . was in violation of the Rule cited." Conference was held September 6, 1962.

The agreement effective October 16, 1948 as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the claimant, a machinist with more than 34 years of service, is an employe subject to all of the terms of the controlling collective bargaining agreement and, therefore, he not only believes that he has been unjustly dealt with, but the provisions of the agreement were violated when he was dismissed from service on June 4, 1962. Moreover, depriving this claimant of his service rights, even for one minute without compensation, therefore, in the factual circumstances are not warranted because—

1. The investigation record does not in any remote degree convict the claimant of the charge.
2. The claimant was a machinist on his lunch period from 12:40 A. M. to 1:00 A. M.
3. The carrier has discharged this claimant on the basis that he violated carrier's so-called Rule Q which is not a part of the collective bargaining agreement and is in conflict therewith.
4. It is adduced from a study of the hearing record that the claimant was completely exonerated of any wrong doing.
5. The carrier's action in discharging the claimant convicts it of being malicious toward the claimant and of exercising arbitrary power based on capricious judgment resulting in loss of earnings as well as mental anguish to the Claimant and his family.

It is inevitable, therefore that the investigation record does not sustain the charge. Consequently, under the provisions of Rule 34 of the controlling collective bargaining agreement, in applicable part—

"if it is found that an employe has been unjustly suspended or dismissed from the 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. It is understood that "wage loss" will be less compensation earned in any other employment.

there is no basis to escape finding after a careful examination of the investigation record, that the carrier unjustly dismissed the claimant from service, not only without sufficient reason, but without any cause whatsoever. Therefore, the action of the carrier stands reversed by the hearing record and the claimant accordingly is entitled to be made whole by the honorable members of this division.

CARRIER'S STATEMENT OF FACTS: 1. There is an agreement in effect between the Chicago, Rock Island and Pacific Railroad Company and

System Federation No. 6 (Machinists), Railway Employes Department, AFL-CIO, Mechanical Section Thereof bearing an effective date of October 16, 1948, except as revised September 1, 1949. A copy of this agreement is on file with your Board and by reference is made a part of this submission.

2. Following a hearing held in accordance with Rule 34 of the Agreement on May 28, 1962, Machinist V. B. Wiles was dismissed from service on June 4, 1962, for:

“Violation of Rule ‘Q,’ relative to being asleep while on duty at 12:55 A.M., May 12, 1962, as developed in investigation held at Fairbury, Nebraska, May 28, 1962.”

3. On May 20, 1963, Mr. Wiles was reinstated on a leniency basis, with seniority and vacation rights unimpaired.

POSITION OF CARRIER: Two carrier officers stated in the investigation as follows:

Diesel Supervisor Kelly

“Q. Mr. Kelly, please state your name, occupation.

A. J. C. Kelly, Diesel Supervisor, Fairbury, Nebr.

Q. You have heard the reading of the heading of this investigation and you know for what reason it is being held?

A. Yes.

Q. On May 12, 1962, approx. 12:55 AM you and Mr. Brenton visited the diesel house at Fairbury, Nebr. Please state what you found this night in particular with respect to Machinist Wiles.

A. I and Mr. Brenton walked over to the diesel house. I was making routine inspection and as we started approx. 6 or 7 feet from the diesel house door I noticed an employe lying on the sidewalk and as I walked up an employe hollered “Jack, don’t let those fellows step on you.” We walked around Mr. Wiles who was lying on the sidewalk and we went to the door of the diesel shed and came back and at that time I asked Mr. Wiles if he was getting his rest. He didn’t respond when I asked him the question. Then as I asked it to him the second time he propped up on his elbow.

Q. Did you have any further conversation with Mr. Wiles?

A. Yes sir. I asked Mr. Wiles if he had work to do which there was work to be done around the shop and he quoted yes. Then I asked him it didn’t look like he would get it done lying on the sidewalk there.

Q. What was Mr. Wiles’ reply?

A. He said he was waiting for Train No. 7.

Q. Mr. Kelly when you and Mr. Brenton came across Mr. Wiles lying on the sidewalk in your opinion was Mr. Wiles asleep.

A. Yes sir.

Q. Why do you think that he was asleep?

A. Well when approaching 3 or 4 feet from the position where

he was lying he made no attempt to clear the path without our going around him into the diesel house and then from the comment from one of the fellow employes and the statement that I made to him and he still took no action to remove himself I think that he was asleep."

Assistant Superintendent Brenton:

"Q. Mr. Brenton you have heard the reading of the heading of this investigation and know for what reason it is being held?

A. Yes sir.

Q. Please state your name and occupation.

A. B. B. Brenton, Asst. Superintendent, Western Division, headquarters Goodland, Kans.

Q. On May 12, 1962, about 12:55 AM you in company with Mr. Kelly were making routine check of the property at Fairbury, Nebr. when approaching the diesel house this night in particular. Will you please state what you observed with respect to Machinist V. B. Wiles?

A. Mr. Kelly and I approached the diesel house along the narrow blacktop walk leading south of the station platform directly into the center door of the diesel house. As we approached the diesel house we were talking in a normal tone of voice. Walking south towards the diesel house I observed someone lying on the ground just north of the diesel house itself, this being at 12:55 AM. As we neared this individual lying on the ground with his back towards Mr. Kelly and myself carman Green who was sitting just west of the diesel house center door stated "Don't let those fellows step on you Jack." The man lying on the ground did not move or respond. The man was lying on his left side facing south with his head cradled in both arms and extended upon the blacktop walk. It was necessary for Mr. Kelly and I to walk off the walk around the man to get to the diesel house. After walking around this man Mr. Kelly and I stopped and Mr. Kelly addressed the man "Jack, you are getting your rest, aren't you"? And received no reply. I had moved toward the diesel house, then Mr. Kelly followed me into the diesel house. After a short period in the diesel house, and returning this man had gotten up and was moving around near the diesel house door. At this time I instructed Mr. Kelly to have the man come by the office. After departure of Train No. 7 Mr. Wiles came to the Supts. office at approx. 1:30 AM at which time an effort was made to determine why he would be asleep during his tour of duty. Mr. Wiles advised me that it looked back and I told him it was very bad and offered various reasons for this performance. The primary one being that he was waiting for No. 7. In view of the explanation given I advised Mr. Wiles that I could not tolerate such action and that he would be advised today of my decision. At this time Mr. Wiles left the office. This morning at this investigation is my first contact with Mr. Wiles since that time.

Q. Mr. Brenton from Mr. Wiles' position he was lying in and from your observation would you say that Mr. Wiles was definitely asleep?

A. Yes sir."

By reviewing the record the board will note that the claimant's "lunch period" excuse was a later development for use in the hearing. At the time

he was discovered his excuse was that he was waiting for No. 7—and there was no “lunch period” contention forwarded.

It is a fact that we have an agreement which provides “an allowance of twenty minutes for lunch” where a shift is for 8 consecutive hours. That agreement covers only one thing—to provide an employe with ample opportunity to take nourishment and no deduction in pay is made for such lunch period.

We have not yet agreed with this organization that where a shift is for 8 consecutive hours that an allowance of any time to sleep is permitted. But as previously stated it is clear from the record that this position by the claimant and organization is a belated contention designed only for use in the hearing, but it is not a valid contention in any event.

The board will also note that the claimant had duties which he could be performing so a clear violation of Rule “Q” was established. It will also be noted that no exceptions were taken as to the way the hearing was conducted. The claimant and his representatives stated it was held in a fair and impartial manner.

In determining the measure of discipline to be assessed, if any, for the violation the Carrier turned to the personal record of the claimant. On July 9, 1947, Mr. Wiles made a written statement to Rock Island special agents admitting theft of Rock Island property.

Upon receipt of this information by carrier officers, Mr. Wiles was suspended pending a hearing in connection with the matter. Rather than attend the hearing Mr. Wiles resigned July 22, 1947. The carrier did not prosecute.

Since Mr. Wiles had resigned he could not be reinstated, but the carrier did re-hire Mr. Wiles on October 12, 1949, with full knowledge of and in spite of his record. Prior to his resignation this carrier had promoted Mr. Wiles to diesel supervisor and various foremen positions.

Mr. Wiles was reinstated on May 20, 1963, in the hope that the discipline had served its purpose.

It is impossible to see how Mr. Wiles can contend he has been unjustly treated by this carrier, when

1. The carrier promoted the man to supervisory positions.
2. The carrier did not prosecute the man for admitted theft.
3. The carrier rehired the man, and
4. The carrier did not permanently dismiss the man for the instant rule violation, but reinstated him when it was felt and hoped the discipline had served its purpose.

Yet, here is a claim before your board asking for pay, etc., because this man was in effect suspended for not devoting himself exclusively to his duties as required by the rule and contending that a rule saying he can have lunch permits him to sleep on the job. This claim and contention are both patently erroneous and should be denied.

Also the claim as presented is invalid. The claim requests pay for time

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 corroborative 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.