

Referee Harold M. Weston

PARTIES Railroad Yardmasters of America  
TO  
DISPUTE: The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that: -

Yardmaster J. D. Annis be returned to service as Yardmaster and be reinstated with full pay from December 3, 1969, and unimpaired seniority, vacation and sick day rights.

OPINION OF BOARD: Claimant was dismissed from Carrier's service on December 3, 1969, for being indifferent to duty and asleep while on duty at approximately 4 a.m. November 13, 1969. He was reinstated to his yardmaster position in July, 1970.

In considering the evidence upon which the discipline is based, it is important to emphasize several principles that have been well established by a legion of awards of all Divisions of the Railroad Adjustment Board. First, it is not necessary that misconduct be established beyond a reasonable doubt, as Petitioner contends; it is sufficient if Carrier's findings are supported by substantial, though controverted, facts. Second, it is equally clear that it is not this Board's province to determine credibility and weigh conflicting evidence; the wisdom of this doctrine is manifest when it is considered that the members of the Board do not preside over disciplinary hearings and do not have the opportunity to examine witnesses and observe their demeanor.

Of course, the mere opinions, conclusions and suspicions of witnesses carry no weight and there must be sufficient proof of the facts to establish, upon an evaluation of the entire record, that an employe actually engaged in the misconduct upon which his discipline rests.

In the present case, Claimant has been disciplined for being asleep in his car at 4 a.m. while on duty. Claimant has denied these charges and insists that he was examining at the time the fuses in the car's fuse panel in order to repair the lighting system. He testified that while driving he had just been stopped by a police car and warned that his "tail lights were out." A disinterested witness, a town police officer, testified that he stopped Claimant at about 3:45 on the morning in question and informed him that the "brake and tail lights on his vehicle were not working." The brief lapse of time, fifteen minutes, between the conversation between the police officer and Claimant and the time when the latter was allegedly found asleep is a compelling circumstance that could, however, be rebutted by strong particularized evidence.

The testimony of the other witnesses, Trainmaster Bowen and Assistant Trainmaster McMillan, is not sufficient to overcome that significant time factor. Both testified that while driving about looking for Claimant they found him lying across the front seat of his car with his jacket over him and that he was motionless. They concluded that he was asleep but made no effort to call him or rap on the car windows or awake him. From McMillan's testimony, it does not appear that they remained at the scene for more than an instant. ("I looked in the window of the car and saw a figure lying on the front seat, motionless. We returned to the car and continued our patrol in the Malabar area.")

Claimant may well have selected that rather strange location, which Bowen testified was "well-lighted" and dangerous, to sleep while on duty at 4 a.m. but the record, stripped of opinion evidence and conjecture, is not sufficiently substantial to substantiate that essential point.

The claim will be sustained. No basis exists for reducing, back pay by earnings received by Claimant in outside employment since Article IX Section 1-f of the parties' Agreement expressly prescribes that where charges against a yardmaster are not sustained, he will be "compensated for the actual wage loss, if any, suffered by him." This provision applies only to loss of wages as a yardmaster in Carrier's employ.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST:

*E. A. Killeen*  
E. A. Killeen  
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1971.