



Award No. 5922

Docket No. 5755

2-C&O-EW-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 41,
RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO
(ELECTRICAL WORKERS)**

THE CHESAPEAKE & OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Chesapeake and Ohio Railway Company violated the current agreement when it unjustly dismissed Electrician Robert D. Beinbrech from service on February 22, 1968.
2. That accordingly the Chesapeake and Ohio Railway Company be ordered to restore Electrician Robert D. Beinbrech to service and compensate him for all time lost subsequent to and including February 22, 1968, and restore all other benefits he would have had if he had remained in service.

EMPLOYEES' STATEMENT OF FACTS: Electrician Robert D. Beinbrech, hereinafter referred to as the claimant, was employed by the Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, at Russell roundhouse shops at Russell, Kentucky.

The claimant's work week was Wednesday through Sunday, 3:00 P.M. to 11:00 P.M. with rest days Monday and Tuesday. On Sunday, January 28, 1968, Claimant called his foreman and reported off from work because of sickness. The carrier cited claimant for an investigation, charging him with falsifying his reason for reporting off.

The investigation was held as scheduled and as a result, claimant was dismissed from service effective February 22, 1968.

This dispute has been handled up to and including the highest officer of the carrier designated to handle such matters and all have declined to make a satisfactory settlement.

The agreement effective July 21, 1921 as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the claimant complied with rule 22 of the current agreement reading:

From the further statements made by Assistant Special Agent Bradley, and Special Officer Steward, it is further seen that Beinbrech, as well as the others, had been drinking and were not in condition to work. Therefore, it becomes abundantly clear that Beinbrech falsified his reason for being absent and not protecting his regular assignment on January 28, subjecting carrier to penalty payment to secure an employe to work his place, delay to operations due to not showing up at the regular starting time and reporting that he would not be in after the starting time, requiring additional time to get a replacement employe on duty.

The carrier officer conducting the investigation heard the statements of all witnesses and since the statement of Beinbrech was in conflict with other statements made at the investigation determined that Beinbrech's self-serving statements were not subject to belief and found him guilty of the charges. After determining that Beinbrech was guilty, reference was made to his record which is brought out in Foreman Adkins' statement, indicated that Beinbrech had been previously given five (5) days actual suspension. This occurred approximately two (2) months before the January 28, 1968, incident and Beinbrech was given five (5) days actual suspension December 1 to 5, 1967, inclusive, when found at fault account being absent from his regular assignment at Russell, without permission.

In addition to Beinbrech, the names of Electricians Vance and Duty also appear in the investigation. Both Vance and Duty were charged, as was Beinbrech, and instructed to report for investigation in connection with the charges. After considerable postponement, delays, etc., investigation was held on Vance and he was dismissed from carrier's service. Approximately 15 months after the January 28, 1968, incident, investigation had still not been held in the case of Duty as he has not returned to work since that time and repeated postponements have been granted due to his being in and out of the hospital, under medical care, etc.

In the general chairman's letter of March 8, 1968, it is stated "It is felt by all concerned that the discipline administered in this case is by far too severe since this employe called off sick properly on the date in question and was not on the Company property when he was seen by the General Foreman Gill."

During conference the general chairman asked that Beinbrech be reinstated on a leniency basis, thus again acknowledging Beinbrech's guilt. It is well established that the Adjustment Board does not have jurisdiction in leniency cases and can only disturb the discipline rendered by the Carrier if it is shown that the discipline is arbitrary, capricious, unjust or an abuse of discretion. Full review of the Beinbrech investigation will disclose no justifiable basis for disturbing the discipline as rendered by the carrier and the carrier urges that your board deny the claim of the employes in its entirety.

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.

Claimant was charged "with responsibility of falsifying your reason for being absent from your regular assignment on second shift, January 28, 1968, and being in the Y. M. C. A. at Russell, Kentucky, after starting time of your assignment on this date."

Hearing was held, and Claimant was subsequently dismissed from Carrier's service. With one exception, the record shows that Claimant's employment record of 20 years was unblemished. The organization contends that Claimant was dismissed unjustly.

The undisputed facts were that at approximately 3:00 P.M., the beginning of the second shift, Claimant called in and laid off sick. Two other employees on the same shift also laid off at approximately the same time. At this point Carrier supervisors went to the Y. M. C. A. located a few hundred feet from Claimant's area of employment.

The remainder of the testimony was in dispute. Claimant was observed, according to Carrier supervisors, as being under the influence of intoxicants. This is denied by Claimant who contended he was "sick."

In its submission Carrier states: "There was nothing developed at the investigation to indicate that Beinbrech was sick as claimed nor any justifiable reason given why he should not be on his regular assignment. In other words, instead of being on his assignment, Beinbrech was at the Y. M. C. A. in an intoxicated condition and alleged that he was absent from his work because of personal illness.

It should be kept in mind that Claimant was dismissed from service for "falsifying" his reason for being absent from his assignment; he was not charged with being intoxicated. Carrier, therefore, has the burden of showing by a preponderance of the evidence, that Claimant was guilty of "falsifying" in that he was not sick. Carrier attempts to prove that Claimant was not sick by showing that he was in an intoxicated condition.

Even accepting the disputed contention that Claimant was in an intoxicated condition (viz. "the odor of intoxicants on his breath," and "the tone of his voice and his facial expressions were not that of a normal person"), this does not preclude being "sick". Intoxication and sickness are not mutually exclusive. We cannot conclude, as Carrier apparently did, that but for the intoxicants Claimant was fit, well and able to work. To dismiss an employee on such an assumption is without justification. Claimant should be reinstated with seniority and compensated for any wage loss incurred.

A W A R D

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1970.

**CARRIER MEMBERS' DISSENT TO AWARD 5922, DOCKET NO. 5755
REFEREE ZUMAS**

Under the circumstances evident in the record, the logic of this Award loses sight of common sense.

For this and other reasons, we dissent.

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ H. S. TANSLEY
H. S. Tansley

/s/ H. F. M. BRAIDWOOD
H. F. M. Braidwood

/s/ W. R. HARRIS
W. R. Harris

/s/ P. R. HUMPHREYS
P. R. Humphreys