Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7973
SECOND DIVISION Docket No. 7869
2-C&O-CM-'79

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Chesapeake and Ohio Railway Company

Dispute: Claim of Employes:

1. That Carman Mahmound A. Bitar was unjustly dismissed from all service of the Chesapeake and Ohio Railway Company effective December 9, 1976 as a result of investigation held in office of the General Mechanical Foreman, Plymouth, Michigan, December 15, 1976 at 9:00 A.M.

2. That accordingly the Chesapeake and Ohio Railway Company compensate Carman Mahmound A. Bitar his applicable straight time rate of pay, from December 9, 1976 until restored to service.

3. That accordingly Carman Mahmound A. Bitar be restored to his former position with seniority rights unimpaired and made whole for pension benefits, health and welfare benefits, insurance benefits including Railroad Retirement and unemployment insurance, 6% annual interest, also all other benefits he would have if he remained in 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 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 suspended from service on December 9, 1976 pending an investigation scheduled and held on December 15, 1976. Claimant was charged with insubordination with regard to two alleged actions: (1) failure to follow direct orders from his supervisor and (2) departure from job during his tour of duty without permission. Claimant was found guilty as charged and dismissed from the service of the Carrier effective December 27, 1976.

Claimant reported for work on time for his second shift assignment beginning at 3:00 PM and ending at 11:00 PM on December 8, 1976. At approximately 4:30 PM, December 8, 1976, Claimant was instructed to change the brake shoes on N&W Car 420259, located at Wixom, Michigan where Claimant is regularly assigned. Allegedly, Claimant changed two (2) brake shoes and when instructed by his supervisor to replace three (3) additional brake shoes on the same car, Claimant told his supervisor he was not going to change any more brake shoes. The supervisor then assigned another carman to complete the job of replacing the brake shoes and as that man assumed the job, Claimant left the work area and proceeded to the locker room. Claimant's supervisor followed him into the locker room to find Claimant changing out of his work clothes. Claimant declared he was going home whereupon his supervisor told Claimant he could not go home as he was needed to work. Claimant proceeded to walk off the job anyway, departing the property at approximately 5:50 PM.

The Organization contends that Claimant had a severe toothache on December 8, 1976 and that the weather conditions of blowing wind and cold air that day aggravated Claimant's ailment. The Organization maintains Claimant's supervisor was aware of Claimant's toothache, as Claimant reminded his supervisor of his condition requesting he be allowed to go home. The Organization claims that the following morning, December 9, 1976, Claimant went to his dentist and had the problem tooth pulled. To support this position, the Organization entered into evidence at the investigatory hearing, a receipt, from apparently Claimant's dentist, indicating payment received on December 10, 1976. Further, the Claimant at the hearing on December 15, 1976 produced as physical evidence a tooth he claimed to be the one which was pulled on December 9, 1976. The Organization takes the position, Claimant's supervisor should have allowed Claimant to leave his tour of duty on December 8, 1976 so as to seek relief for his toothache.

Carrier contends that Claimant did not, at anytime, on the date of the incident (December 8, 1976) complain of a toothache, but did so for the first time one week later at the investigatory hearing. The Carrier takes the position that Claimant's story regarding his toothache was contrived after the fact in an attempt to mitigate his guilt. Carrier expresses wonderment regarding Claimant's ability to have even reported to work at all on date of December 8, 1976 in view of testimony given by Claimant's wife at the hearing that his tooth "was bothering him so badly he just couldn't stand it. He couldn't sleep or nothing". Carrier refutes the physical evidence of a tooth produced by the Claimant at the hearing by asserting, that such presentation of a tooth is unsupported by any facts concerning its nature, its origin or how it came to be dismembered from its resting place. As to the receipt entered into evidence supposedly issued by Claimant's dentist, the Carrier states the receipt shows only that twelve dollars had been paid by "Mahmound Bilar" (sic) on December 9, 1976 but does not indicate the reason for such payment. The Carrier further maintains that two other dentist receipts presented by the Organization during on property handling of the instant claim, have even less value and authenticity, as one of the receipts is dated

December 9, 1977 making it invalid, and production of yet a third receipt causes Carrier to question whether such receipts are available on demand with any date or alleged work shown thereon. Furthermore, Carrier submits it is of little significance whether or not Claimant was suffering from an ailment, as the fact remains that he reported for work, at no time did he make a request to be relieved for any reason whatsoever and when instructed to do work of his craft he apparently did not want to do, he openly refused to obey. Additionally, Carrier submits, even assuming arguendo, Claimant did not refuse any work, he still left the property without permission during his tour of duty notwithstanding whether or not he, in fact, requested to leave work.

Finally, Carrier cites Claimant's past service record which reflects other instances of leaving work without permission, in addition to falsifying his service card, engaging in an altercation with another employee and incurring wage garnishments as fully justifying the discipline of dismissal.

In reviewing the record, this Board notes the conflicting positions of the parties as advanced by the two witnesses, the Claimant and Claimant's supervisor. As an appellate body, this Board is without jurisdiction to resolve conflicts in hearing testimony or to determine credibility of witnesses. As we find the record contains substantial proof supporting the allegation of insubordination and that nothing in the record leads us to the conclusion that the discipline assessed was arbitrary, capricious, discriminatory or excessive, the Board rules to uphold the finding of guilt determined by the hearing officer from evidence adduced at the December 15, 1976 investigatory hearing.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.