

Award No. 3712

Docket No. 3630

2-C&O-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Machinists)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region and Hocking Division)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Machinist Helper Leslie B. Hubbard was unjustly discharged from service on December 8, 1958.

2. That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and compensation for all time lost retroactive to December 8, 1958.

EMPLOYEES' STATEMENT OF FACTS: Machinist Helper Leslie B. Hubbard, hereinafter referred to as the claimant, was employed by the Chesapeake & Ohio Railroad, hereinafter referred to as the carrier, for a period of 14 years, at its Newport News, Virginia, Piers.

On November 24, 1958, while engaged in the performance of his duties as a machinist helper from 7:00 A.M. to 3:00 P.M. he had an accident injuring his ribs, but did not report same.

On November 25, he reported for work as usual but was suffering considerable pain so that it was necessary for him to use a number of aspirins to relieve the pain. These aspirins did not give him sufficient relief so he decided he would ask his foreman to go home. While waiting for the foreman to ask permission to go home, he fell asleep for a short time, the record not being definite. He was found asleep by the foreman and a special agent and was directed to go home.

The claimant visited, on the same day he was sent home, the Riverside Hospital, Newport News, Virginia, for medical attention and the doctors

Hubbard had been sent home for sleeping on duty and he started looking for a means of justifying his being asleep.

Sleeping on duty is a serious offense and one which, when proven, warrants dismissal. There are no extenuating circumstances which justify consideration of leniency or the application of discipline less than dismissal in Hubbard's case.

Carrier has shown that it did not act arbitrarily, capriciously nor has it abused the discretion vested in management in its administration of discipline in Hubbard's case; therefore, the discipline administered by the carrier should not be disturbed.

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 were given due notice of hearing thereon.

Machinist's helper Leslie B. Hubbard was employed by the C&O Railroad for a period of 14 years at its Newport News, Va. piers.

On November 25, 1958 he reported for work. Claimant did little work that morning and somewhere between 10 A. M. and 10:40 A. M. he fell asleep on a bench in the pump room. He was awakened by Mr. W. A. Otey, pier foreman, who shook him. He was asked what was the trouble and replied that he was laying down on the bench and dozed off. He was charged with being under the influence of intoxicants and asleep while on duty. An investigation was held and claimant appeared and testified. He was represented by the local Chairman. Claimant was found guilty of sleeping while on duty. The charge of being under the influence of intoxicants was dismissed and will not be further discussed.

There is no question but what claimant was guilty of being asleep while on duty, but his claim is that on November 24th, the day before he was found asleep, he was injured while working for the company on a tow motor which came in the side door at Pier 9; that he had grease on his shoe and his foot slipped off the clutch causing the tractor to run into a work bench throwing him into the steering gear and hurting his floating rib on his right side. He did not report the accident, as required by the rules of the company, at the time of the accident. As far as this record shows he never has to this date. He claims on the morning that he fell asleep his side was hurting him; that he secured some aspirin and took same; that he intended to ask the foreman to go home on account of the injury; that after being sent home on account of having fallen asleep his wife took him to Riverside Hospital where an intern examined him and treated him.

Hubbard did not at the time he was awakened by the foreman complain of having been injured or of the pain he said he was suffering. He did not on that day inform the foreman in regard to his injury. In fact the officials of the Railroad at the time all say that Hubbard did not inform them and

that they had no knowledge of his injury at the time he was sent home. There is evidence of employes that Hubbard told them he was injured and suffering pain on the morning that he was sent home, but for some reason he did not inform the foreman or others connected with the company. Why he did not give notice of the injury as required by the rules of the company does not appear in the record. The employes in their rebuttal said, we quote:

"The employees submit that the Carrier is guilty of acting arbitrarily capricious and beyond any shadow of doubt even if it was shown that discipline was warranted, discharge of the claimant constitutes excessive discipline."

There are many statements in the Carrier's rebuttal in regard to Hubbard's record as an employe; that he had fallen asleep before and had been disciplined for same; that he had been talked to about his drinking and that he had been given numerous chances and that he had shown no improvement.

Hubbard violated the rules of the company. He fell asleep while on duty. For this the company was justified in disciplining him, but in view of the fact that there is evidence of the injury it does seem that the punishment was severe.

The Board is reluctant to substitute its judgment for that of the carrier officers, however we feel that under the circumstances in this case the penalty has served its purpose. The Board directs that Hubbard be reinstated with seniority and vacation rights unimpaired, but with no pay for time lost.

AWARD

The Claim is sustained as limited in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of March 1961.

DISSENT OF CARRIER MEMBERS TO AWARDS NOS. 3712 AND 3738

The majority, consisting of the Labor Members and the Referee, in our opinion went beyond the recognized rights and practices of this Board when it ruled that leniency was to be granted though claimants were guilty as charged.

Claimants were afforded a fair and impartial investigation, at which they presented witnesses in their behalf and were represented by the General Chairman of the Organization, both of whom were permitted to freely cross-examine witnesses, all in strict accordance with the rules of the applicable agreement. There was substantial and convincing evidence presented at the investigation to show that claimants were guilty of the serious charges against them.

In the handling on the property, the Carrier declined in its sound discretion to extend leniency to the claimants. The Carrier took into considera-

tion the entire service records of the claimants before assessing its penalty, and under the circumstances we have no right to set aside its judgment, because no evidence was presented before this Board to show that the Carrier had abused its prerogatives.

The Carrier has a right to expect its employees to observe the rules of the controlling agreement and to be able to perform work for which they are paid. Referee Carter in Award 2207 ably stated, "It is not the function of this Board to weigh the evidence as in an original hearing. If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained."

For the reasons set forth herein, the Carrier Members believe that the majority has erred with the issuance of these awards.

P. R. Humphreys

H. K. Hagerman

D. H. Hicks

W. B. Jones

T. F. Strunck

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Richard F. Mitchell, when the interpretation was rendered.

**INTERPRETATION NO. 1 TO AWARD NO. 3712
DOCKET NO. 3630**

NAME OF ORGANIZATION: System Federation No. 41, Railway Employees' Department, A. F. of L. — C. I. O. (Machinists)

NAME OF CARRIER: Chesapeake and Ohio Railway Company

QUESTION FOR INTERPRETATION: Do the words in the findings of Award 3712, reading as follows:

"The Board directs that Hubbard be reinstated with seniority and vacation rights unimpaired, but with no pay for time lost."

and the award reading:

"The claim is sustained as limited in the findings."

provide that the claimant be paid for vacation due and earned?

The carrier and employes have been unable to agree about the application of Award 3712 and the employes request interpretation of the pertinent portion of the findings therein concerning the measure of relief granted the claimant.

At no time in the Submission of this case, was the question argued by the parties that the carrier be ordered to pay claimant Hubbard in lieu of vacation, nor was it ever intended in the award that claimant was to be paid for vacation time.

The Organization's question must be answered in the negative.

Referee Richard F. Mitchell, who sat with the Division as a Member when Award No. 3712 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November, 1962.

**LABOR MEMBERS' DISSENT TO INTERPRETATION NO. 49
OF AWARD NO. 3712**

The majority in Interpretation No. 1 to Award 3712 stated:

“At no time in the submission of this case was the question argued by the parties that the carrier be ordered to pay Claimant Hubbard in lieu of vacation, nor was it ever intended in the award that claimant was to be paid for vacation time.”

The record now is just as clear and unchanged as it was when the Board ruled by its finding in Award 3712.

“The Board is reluctant to substitute its judgment for that of the carrier officers, however, we feel that under the circumstances in this case the penalty has served its purpose. The Board directs that Hubbard be reinstated with seniority and **vacation rights unimpaired.**”
(Emphasis ours.)

Thus the question still remains. How can the claimant's vacation rights be unimpaired if he is not paid for vacation earned and due in 1959? The failure of the majority to answer the question for interpretation in the affirmative is in error.

/s/ **C. E. Bagwell**
C. E. Bagwell

/s/ **T. E. Losey**
T. E. Losey

/s/ **E. J. McDermott**
E. J. McDermott

/s/ **R. E. Stenzinger**
R. E. Stenzinger

/s/ **James B. Zink**
James B. Zink