Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8311
SECOND DIVISION Docket No. 8132
2-N&W-MA-'80

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

Parties to Dispute: International Association of Machinists and Aerospace Workers

Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly assessed Machinist E. S. Giblin five (5) days actual suspension beginning July 18, 1977, and continuing through and including July 22, 1977, as a result of investigation held on June 9, 1977.

2. That accordingly the Norfolk and Western Railway Company be ordered to make Machinist E. S. Giblin whole for any and all losses resulting from the investigation described in No. 1 above and to clear his record of all mention of the investigation.

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 approached his foreman on May 20, 1977 and requested permission to go home for medication for a toothache. Claimant indicated that the loud noise and jarring effect of the impact wrench that his job required him to operate would aggravate his condition. Permission was granted and the Claimant marked off at 8:45 p.m.

At approximately 10:00 p.m. the Claimant was observed at a local bar with a beverage in front of him. A hearing was held to "determine (the Claimant's) responsibility in connection with (his) falsifying the reason for (his) being absent from duty on May 20, 1977."

At the investigation the Claimant argued that he had, in fact, gone home and taken his medication before going out to gas his car and then stopping at the bar. The Carrier concluded, however, that the Claimant was in the bar and, as a result, he was suspended from work for five days.

The Carrier defends the discipline by pointing out that the Claimant said he was "going home to get some medication." The Carrier submits that if an employee is sick enough to leave his job, he should go home or seek medical care. The Carrier argues that the Claimant's first obligation was to the Carrier and that the Claimant should have returned to work if he felt better after taking the medication.

The Carrier notes that there was no probative evidence introduced to support the Claimant's contention that he did go home. The Carrier argues that the Claimant was at the tavern when it (the Carrier) "had every right to believe he was home sick".

The Carrier does not take issue with the Claimant's having had a toothache, and acknowledges that having to operate an impact wrench with a sore tooth could be sufficient grounds to seek permission to go home. The Carrier argues, however, that the toothache only justified the Claimant's going home, not to a tavern. The Carrier notes that driving a car (and stopping for gas) is not the same as going to a bar.

The Carrier additionally asserts that the trial was fair and that the discipline was not excessive.

The Organization charges that the Carrier has not met its burden of proof. While the Claimant was alleged to have "falsified his reason for being absent from duty," the Organization contends that the allegation is not supported by evidence or testimony. Rule 33 of the Agreement, the Organization argues, protects the Claimant from such "arbitrary discriminatory actions".

The Organization notes that the Claimant lived close enough to work and to the bar to have gone home as he said he did. It is pointed out that the Carrier did not prove that the Claimant did not have a toothache or that he did not go home and apply the medication.

The Organization concludes that "this case seems to reduce itself to the proposition that (the) Claimant falsified his reason for leaving work because he stopped at the ... tavern'." The Organization queries whether driving a car to a gas station is also falsification and, in any event, argues that it is possible to feel too ill to operate an impact wrench without being totally incapacitated.

The Organization notes that on at least one other occasion the Claimant has had a serious toothache requiring medication of the type prescribed and applied in the instant case. The Claimant's clean record is also noted.

The Carrier is primarily concerned with the Claimant's having been in a bar while on leave from work. The Organization argues that that alone does not constitute falsification.

At the outset, the Board notes that it is the Carrier that bears the burden of proof in a discipline case. In light of this, we also note that the Claimant's unrebutted testimony indicates that he did, in fact, go home and take medication.

The Carrier's observation that it was more clearly established that the Claimant was in a bar does not disprove the Claimant's credible testimony that he went home for the purpose stated.

The Claimant was specifically disciplined for "falsifying the reason for (his) being absent from duty". The Carrier argues that the Claimant's being seen in a local bar an hour and fifteen minutes after he was allowed to leave work constitutes falsification.

However, it is not clear that the Claimant promised or was specifically required to go home and stay home. The Claimant said he would go home and take his medication; this he apparently did. The Carrier has not demonstrated that the Claimant was required to stay at home, or to see a doctor, or to report back to work.

While the Carrier asserts that the Claimant has such obligations, it has not made out a prima facie case to support its assertions. On the other hand, the Board is persuaded by the record that the Claimant was too ill remain at work although he was not totally incapacitated. If the Carrier does not want employees in this condition to be in a bar during the hours that they have been excused from work (and if the Carrier wants such employees to stay home), it must point to some rule or policy supporting such prohibition.

In this case there was no policy or specific rule requiring the Claimant to return to work or not to frequent a local business establishment. Further, the Carrier has not proven that there was an implied prohibition.

The Claimant did, apparently, go home for medication. The Carrier has not shown that the Claimant falsified his reasons for leaving work.

Accordingly, the Claimant should be compensated for wages and benefits, less outside earnings, lost as a result of his five-day suspension. Record of the discipline should be removed from the Claimant's file.

A W A R D

Claim sustained.

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 16th day of April, 1980.