

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24266
Docket No. 43807
93-1-91-1-C-4557

The First Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

"Engineer M. E. Collier, Western Division (South Morrill District) requests that this Board reinstate him to service with seniority rights unimpaired, compensate him for all time lost beginning from the day he was removed from service until he again resumes service.

Engineer Collier had been investigated on October 19, 1990 and dismissed on October 25, 1990, Discipline Notice 1392. The charge reads as follows:

'Your responsibility for being insubordinate when you failed to operate your train through Rochelle Mine as directed by Transportation Superintendent, M. E. Wirtz, while you were employed as engineer on 8530 West on duty South Morrill, Nebraska, at 1815 hours on September 15, 1990.'

Claim premised on BLE Rules 41 and 56(b), Employees' Exhibit A, and numerous Awards."

FINDINGS:

The First 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.

Claimant was an engineer regularly assigned to the South Morrill Engineers' Extra Board. On September 15, 1990, his assignment was to operate an empty coal hopper train for loading at the Cabayo Mine north of Bill, Wyoming. After arriving at Bill, he was instructed to transport another train to the Rochelle Mine. However, the Claimant informed the Carrier that he was too tired and needed to rest. The Claimant was informed that he was guilty of insubordination and was later dismissed from service on October 25, 1990.

Claimant was returned to service via letter dated September 13, 1991. However, the claim for all lost time from September of 1990 to September of 1991 has been denied.

This Board has thoroughly reviewed the evidence in this case; and although we are in agreement that an employee cannot take matters into his own hands and refuse a direct order, we must find that the Claimant in this case was not guilty of insubordination.

The record reveals that the Claimant had worked almost nine hours on the night of the incident. He was then ordered to operate another train at 3:10 a.m. after having completed the nine hours of work.

The phone conversation that was transcribed from a tape recording reads as follows:

"Claimant: Yeah, this is Mike Collier. I told Dan Hanna at the Coal Desk that I'm tying up enroute for needed rest. I'm too tired to continue originating another westbound train out of Bill Yard, over.

Supervisor: Well, how long have you been on duty?

Claimant: I'm sorry?

Supervisor: Well, how long have you been on duty?

Claimant: Let's see, 6:15 to 3:15, what is that, I don't know, 6, 7, 8, 9 hours?

Supervisor: Yeah.

Claimant: Does that make any difference?

Supervisor: Yes, it does did you have proper legal (rest) before you took up service?

Claimant: Well, I'd have to check time slip, but I can tell you now I'm tying up enroute for needed rest. I would really have no objection to originating another one or maybe several trains out of the yard, but I'm just too tired.

Supervisor: I guess my question is why are you too tired to go on?

Claimant: Why am I too tired to originate another train out of Bill Yard?

Supervisor: Did you get your rest prior to going to work?

Claimant: It's kind of noisy in here.

Supervisor: Did you get your rest prior to going to work?

Claimant: I deadheaded down for Bill and you know it all -- it all kind of blurs together when you work as much as I do.

Supervisor: I'm denying your permission to tie up, okay, and I expect you to take that train through.

Claimant: No, that is not okay. It says in my contract no fault will be found with an engineer tying up for needed rest. Are you finding fault with that?

Supervisor: Yes.

Claimant: I'm sorry, I can't help you beyond that, Mr. Wirtz.

Supervisor: Well, I'm denying you permission to tie up.

Claimant: I'm not asking you permission to tie up. I'm informing you as I informed Dan Hanna.

Supervisor: Well I don't care about your asking.

Claimant: I'm not asking anything

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Supervisor: Mike, since you've been on duty about 9 hours and I'm not asking about yard service, and you had your legal rest prior to taking up service, okay, I am instructing you that if you refuse to take that train through to the mine, I'll have to (inaudible) --

Claimant: Excuse me, Mike -- okay you say if I refuse what?

Supervisor: If you refuse to take that train to the mine, I'm gonna consider that grounds for insubordination, do you understand that?

Claimant: Do you understand, Mr. Wirtz, what I'm talking about has nothing to do with FRA resting procedures, which you have attempted to violate before. It has to do with my contract. It also has to do with a man being physically tired. A man coming close to tying up here, very tired, understanding when he communicates with Bill operator that he's going to get on an entirely different train and continue an entirely different movement, westbound movement, again not provided for in his contract. I don't have grievance with that, but what I'm telling you is that I'm physically tired, as I came up to this terminal where I tie up enroute and I wanted to come here to get some rest to continue. That is my reason for being tired.

Supervisor: I understand -- do you understand what I'm saying.

Claimant: Do you understand what I'm talking about physically being tired, you understand concerns about -- you understand probably about why it was written into my contract.

Supervisor: Well do you understand what I'm saying, Mike?

Claimant: Okay, this is a recorded conversation, do you understand what I'm saying. I'm going up there and tying up enroute for needed rest. That's exactly what I'm doing.

Supervisor: Well, Okay, Mike."

Rule 56(b) states the following:

"No fault will be found with an engineer for tying up enroute for a needed rest."

It is evident from the extensive record in this case that the Claimant was not being insubordinate, but truly was exhausted and needed some time to rest. He stated that he was not unwilling to operate another train, but he just could not do it without some rest. He had been on the job for almost nine hours in the middle of the night and was incapable of performing.

This Board recognizes that the rules generally require that even when an employee feels that he is receiving an improper order, he must perform it and grieve it later. However, in this case, when a safety issue is involved, the Claimant cannot be expected to perform the work where there would be a risk to his life and the lives of others because of his inability to perform because of exhaustion.

Based upon its thorough review of the extensive record before it, this Board finds that the Carrier acted unreasonably and arbitrarily when it found the Claimant to be insubordinate on the evening of September 15-16, 1990. Therefore, the Carrier improperly found the Claimant guilty of insubordination, and the claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 8th day of November 1993.