

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

NEW ORLEANS PUBLIC BELT RAILROAD

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Carman Inspector J. F. N. DuTreil was unjustly dealt with and unjustly dismissed from the service of the Carrier on March 6, 1967, at New Orleans, Louisiana.

2. That accordingly, the Carrier be ordered to reinstate Mr. DuTreil with all rights unimpaired including seniority, vacation, health welfare and life insurance benefits, also compensate him for all time lost because of being unjustly dismissed.

EMPLOYEES' STATEMENT OF FACTS: Carman J. F. N. DuTreil, hereinafter called the claimant, was employed by the New Orleans Public Belt Railroad, hereinafter called the Carrier. At the time of the occurrence of this dispute, the claimant had eighteen (18) years of service with the Carrier. His assigned hours were from 3:00 P. M. to 11:00 P. M.

On February 8, 1967, at approximately 8:00 P. M., the claimant had an accident and was taken to a hospital where he was treated and released on February 11, 1967.

On February 10, 1967, Mr. J. R. Coates, Master Car Builder, wrote the claimant charging him with being intoxicated, failing to perform his duties as instructed and with being involved in an accident. A copy of the letter is attached as Exhibit A.

Master Mechanic R. B. Hecker, under date of February 15, 1967, directed a letter to certain employes, including Master Car Builder J. R. Coates, directing them to be present as witnesses at the hearing. A copy of the letter is attached as Exhibit B.

The hearing was held on February 24, 1967. A copy of the hearing record is attached and identified as Exhibit C.

Master Car Builder J. R. Coates appeared at the hearing and testified against the claimant in support of the charges contained in Exhibit A. His testimony appears on pages 12, 13 and 14 of Exhibit C.

Notwithstanding the fact that Mr. Coates testified against the claimant, on March 6, 1967, he notified the claimant that:

"I find you guilty as charged * * *. You are therefore dismissed from the services of this Railroad effective Monday, March 6, 1967."

A copy of the letter is attached and identified as Exhibit D.

On March 19, 1967, appeal was handled with Master Mechanic R. B. Hecker,

A copy of the letter is attached as Exhibit E.

Mr. Hecker's reply is attached as Exhibit F.

Subsequent correspondence exchanged with Officials of the Carrier is attached as Exhibits G through I.

This dispute was properly handled on the property with all Carrier Officers authorized to handle disputes of this kind, with the result that all of them declined to adjust it. The Carrier's highest officer, likewise, refused to adjust this dispute in conference.

The Agreement effective March 16, 1947, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: The claimant was an employe of this Carrier subject to Rule 26 reading:

"Should any employe subject to this Agreement believe that he has been unjustly dealt with or any of the provisions of this Agreement have been violated, the time claim or grievance shall be handled as follows:"

and not only believes that he was unjustly dealt with, but that the provisions of the Agreement were violated.

Rule 28 of the Agreement provides in pertinent part that:

"No employe shall be disciplined without a fair hearing by the Carrier. Suspension in proper cases (the proper case is one where leaving the man in service pending an investigation would endanger the employe or his fellow employes) pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and the duly authorized representative will be appraised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

The hearing was held on February 24, 1967, on the charges made by the claimant's supervisor, Master Car Builder J. R. Coates (Exhibit A). Mr. Coates appeared at the hearing at the instructions of his supervisor, as a Carrier witness, which he had a right to do. He testified at the hearing that, in his opinion, the claimant was intoxicated. After testifying as a witness, he

should not have participated thereafter in judging the innocence of the claimant and assessing of discipline. It is clear from his testimony at the hearing that he had formed an opinion. How, then, could he fairly render judgment after the hearing? He (Master Car Builder Coates) states unequivocally that:

“After carefully reviewing the transcript of the investigation held at the office of the Master Mechanic on February 24, 1967, I find you guilty as charged in my letter of February 10, 1967.” (Emphasis ours.)

This procedure, under any stretch of imagination, cannot result in the conclusion that the claimant was fairly dealt with. Therefore, under the provisions of Rule 28, reading in pertinent part:

“If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.”

including the provisions of Rule 26, there is no escaping the conclusion that the claimant was unjustly dealt with and unjustly dismissed from Carrier's service.

CARRIER'S STATEMENT OF FACTS: Claimant DuTreil was assigned as Carman-Inspector, Race Yard District, hours 3:00 P. M. to 11:00 P. M. On February 8, 1967, at approximately 8:30 P. M., Carman-Inspector J. Tabony telephoned Mr. J. R. Coates, Master Car Builder, who was Mr. DuTreil's immediate supervisor, and informed him that he had just received a message that Mr. DuTreil had been involved in an automobile accident on Tchoupitoulas Street and was being taken to Touro Infirmary.

Mr. Coates telephoned Mr. Marinello, Claim Agent, who stated that he had called Touro Infirmary Emergency Room and inquired about Mr. DuTreil's injuries. The nurse told him she was unable to give out any information and that he should talk to the doctor; however, she stated that Mr. DuTreil was very uncooperative.

Mr. Coates arranged to pick-up Mr. Marinello at his residence to go to Touro Infirmary. Upon arrival at the hospital, Mr. Marinello spoke to Mrs. Lamberson, the nurse in charge, who advised him that Mr. DuTreil was not cooperative, that he was talking out of his head and that he was drunk. Mr. Coates and Mr. Marinello were brought to the X-ray room, where they both observed Mr. DuTreil's condition. He had scratches on his face and was bleeding from his mouth and nose. He was belligerent, very incoherent, smelled of alcohol on his breath and was retching and trying to throw up. They tried to talk to him but he rambled so much and did not make any sense, other than that he had an accident in the 1400 block of Tchoupitoulas Street. A traffic citation attached to the hospital records revealed that Mr. DuTreil was charged with reckless operation, failing to keep his vehicle under control.

Dr. Racca stated that he could not examine Mr. DuTreil until he sobered up, as he was under the influence of alcohol. Also his urge to vomit made it difficult to X-ray him.

By letter dated February 10, 1967, Mr. Coates charged Mr. DuTreil with being intoxicated during his tour of duty on Wednesday, February 8, 1967,

between the hours of 3:00 P. M. and 11:00 P. M., with failing to perform his duties as instructed by the Assistant to the Superintendent of Transportation, Mr. J. Laigast, namely, coupling of air in the Brown Ball District, and with being involved in an accident while traveling on Tchoupitoulas Street in a direction away from the above named district.

An investigation of these charges was set for 10:00 A. M., February 17, 1967. A copy of this letter is attached and identified as Carrier's Exhibit A.

The investigation was postponed until 10:00 A. M., February 24, 1967, at the request of Mr. DuTreil.

Mr. R. B. Hecker, Master Mechanic, conducted the investigation, copy attached and identified as Carrier's Exhibit B, because it was necessary for Mr. Coates to appear as a witness. The investigation developed that Mr. DuTreil was guilty of being intoxicated during his tour of duty on Wednesday, February 8, 1967, between the hours of 3:00 P. M. and 11:00 P. M., and with failing to perform his duties as instructed by the Assistant Superintendent of Transportation; namely, coupling of air in the Brown Ball District. As a result, Mr. DuTreil was notified by letter dated March 6, 1967 from Mr. Coates, that he was dismissed from the services of this Railroad effective Monday, March 6, 1967. A copy of this letter is attached and identified as Carrier's Exhibit C.

Mr. Reuther, General Chairman of Brotherhood of Railway Carmen of America advised Mr. Coates in letter dated March 19, 1967, copy attached and identified as Carrier's Exhibit D, that he was not satisfied with his decision and was appealing it to the next designated officer. In his letter of appeal to Mr. Hecker, dated March 19, 1967, copy attached and identified as Carrier's Exhibit E, Mr. Reuther alleged that Mr. Coates was prejudiced and was the chief witness against Mr. DuTreil, and should not have rendered a decision and that the decision should be rendered by the man conducting the investigation.

Mr. Hecker denied Mr. Reuther's appeal by letter dated March 27, 1967, copy attached and identified as Carrier's Exhibit F. In his reply, Mr. Hecker stated that the investigation was conducted by him because Mr. Coates was a witness (not necessarily the chief witness) and that Mr. Coates rendered the decision after a careful study of the investigation and discussions with him. He pointed out that Mr. Coates was the proper officer of the Carrier to render the decision because he was Mr. DuTreil's immediate supervisory officer. In reply to Mr. Reuther's accusation that Mr. Coates was prejudiced, Mr. Hecker stated that he felt that the testimony given by Mr. Coates at the investigation was a true statement of what he witnessed and that his testimony is substantiated by the testimony of Mr. A. C. Marinello, Claim Agent, and written statements of Drs. Espanan and Racca; also Police Investigation Report signed by Patrolman J. McCall, all of which are part of the investigation.

The claim was then appealed to Mr. M. Dumas, Jr., Chief Clerk to General Manager, by letter dated May 8, 1967, from Mr. Reuther, copy attached and identified as Carrier's Exhibit G. In addition to issues previously raised by Mr. Reuther, he objected to Mr. Hecker's statement regarding Mr. DuTreil's previous history of alcoholism which was used in determining the discipline assessed. He also alleged that Rule 26 of the Agreement, as amended, had been violated.

By letter dated June 5, 1967, copy attached and identified as Carrier's Exhibit H, Mr. Dumas declined Mr. Reuther's appeal advising him, among other things, that Mr. DuTreil's previous history was not made a part of the investigation, but was used in determining the discipline assessed Mr. DuTreil. Further, that the Agreement was not violated by the Carrier.

POSITION OF CARRIER: The Organization notified Mr. Coates that they were not satisfied with his decision (see Carrier's Exhibit D) of investigation held by Mr. Hecker, and were appealing his decision to the next designated officer. In their appeal to Mr. Hecker, they alleged a procedural defect because they felt the decision should have been rendered by Mr. Hecker in lieu of Mr. Coates.

Mr. Coates was not notified by the Organization that they felt a procedural defect existed, but only that they were not satisfied with his decision.

This alleged procedural defect did not prejudice claimant's rights in any manner. It is Carrier's position that Rule 26 of the Agreement is controlling in the instant case and that Carrier complied with the provisions of the rule, which reads as follows:

"RULE 26.

TIME CLAIMS AND GRIEVANCES

Should any employe subject to this agreement believe that he has been unjustly dealt with or any of the provisions of this agreement have been violated, the time claim or grievance shall be handled as follows:

CARMEN: Carmen's claims or grievances shall be filed with the Master Car Builder, appealed to the Master Mechanic, and then appealed to the highest officer designated by Carrier to handle claims and grievances.

ALL OTHER CRAFTS EXCEPT CARMEN: Claims or grievances shall be filed with either the Master Mechanic or Assistant Master Mechanic and then appealed to the highest officer designated by Carrier to handle claims and grievances.

If stenographic report of investigation is taken, the committee shall be furnished a copy.

All conferences between local officials and local committees to be held during regular working hours without loss of pay to committeeman.

Each craft is permitted to progress to conclusion their own claims or grievances.

The August 21, 1954, National Agreement shall apply to all claims and grievances."

Had Mr. Hecker rendered the decision, this would have prevented proper appeal in accordance with the Agreement. The decision was rendered by Mr.

Coates, who was claimant's immediate supervisor, after a careful study of the transcript of the investigation and discussions with Mr. Hecker. Carrier fails to see where this matter would have any bearing on this case. After all, **claimant's right to appeal to the Master Mechanic, who was the hearing officer, was exercised, and a decision was rendered by him.**

Quoted below are excerpts from various awards of the Third Division, National Railroad Adjustment Board, in support of Carrier's position:

THIRD DIVISION AWARD 8310

"Awards 7088, 8020 and others are cited on behalf of Claimant, to the effect that the official who conducts the investigation must make the decision as to whether the charged employe is guilty or innocent, and it is urged that that was not done here. The fact that the dismissal notice was signed by the Superintendent rather than by Miller does not alone support the conclusion that the Superintendent rather than Miller made the initial determination of guilt."

THIRD DIVISION AWARD 8503

"This Division's Award No. 8431 set forth a summary of principles that the Board, in a long series of awards, has developed and applied to various kinds of discipline cases. To those set forth should be added the following: In applying said principles the Board does not operate with the strictness and rigidity of criminal courts in respect to possible technical defects in procedure on a carrier's property. Where such defects may exist, the compelling question is: Were the accused's rights actually prejudiced thereby? Was he thereby denied due process of law, his 'day in court,' or other substantive rights properly his as a citizen in an industrial democracy?

. . . (7) The degree of discipline imposed was reasonably related to the seriousness of the proven offenses and to Claimant's past record."

THIRD DIVISION AWARD 8711

". . . (1) Trainmaster Maguire presided over the hearing but also made the formal charges against claimant; (2) the Superintendent rendered the dismissal decision, although he did not preside over or even attend the hearing, and (3) the first step in the appeals procedure was from the decision to the Superintendent.

. . . (It is advisable that Carrier correct the condition complained of in (2) above, although there is some question as to its invalidity inasmuch as there is no showing that Maguire did not make the initial decision and then recommend it to the Superintendent.)

Nevertheless, in the setting of the facts before us, these shortcomings do not constitute reversible error, for claimant was not unduly prejudiced by them since all relevant facts, upon which our finding of insubordination is predicated, are admitted and there is no material way in which claimant's case was injured by those defects."

THIRD DIVISION AWARD 9102

"Objection was made also to the decision being made by Mr. Wolfe, he being a subordinate officer to Mr. Parks, who conducted the examination. That ground of objection was not valid."

THIRD DIVISION AWARD 9819

"From a review of the record here we have no authority to read into Rule 8 of the Agreement, that which would require the Hearing Officer designated by Carrier to make the decision as argued by the Organization. Such a requirement can only be reached by negotiation and conference between the Organization and Carrier."

The investigation definitely revealed that Mr. DuTreil was intoxicated during his tour of duty. In fact he admitted that he had been drinking prior to and during his tour of duty. It also revealed that he did not perform his assigned duties.

At no time has the Organization denied that Mr. DuTreil was guilty of being intoxicated during his tour of duty on February 8, 1967, and failing to perform his duties as instructed by the Superintendent of Transportation. They have attempted to rely upon technicalities which they allege occurred, but are emphatically denied by this Carrier.

The Organization has also stated that they felt the decision was drastic due to Mr. DuTreil's clean record of 18 years of service.

A review of Mr. DuTreil's service record revealed that he had previously been treated for "Acute Alcoholism" by his personal physician from September 25, 1965 to October 2, 1965. A copy of this report signed by Dr. H. W. Prater is attached and identified as Carrier's Exhibit I. Mr. DuTreil was required to undergo an examination by Carrier's Physician before returning to work. The examining Physician, Dr. T. S. Dunn, Jr., felt that Mr. DuTreil had overcome his bout with alcoholism and stated that he was physically able to return to work at that time, and detected no psychological abnormalities at that time. This is evidenced by copy of Dr. Dunn's report dated October 5, 1965, attached hereto and identified as Carrier's Exhibit J.

According to Dr. Espenan's report (included in Carrier's Exhibit B), Dr. H. Colomb gave Mr. DuTreil a psychiatric evaluation and said that in essence he was a chronic alcoholic, had some family difficulties, and had some psychotic behavior. He said that Mr. DuTreil was a poor candidate for rehabilitation and had a pessimistic outlook on his recovering from his alcoholic activity.

Attached and identified as Carrier's Exhibit K are reports received by this Carrier from the Veterans Administration Hospital, which were furnished to us at the request of Mr. DuTreil. The Doctor's Progress Notes for March 9, 1967 state, "On February 8, 1967 had auto accident while drinking and got fired."

On April 9, 1967, Mr. DuTreil was admitted to the Psychiatric Ward of Charity Hospital of Louisiana at New Orleans and was confined there until May 4, 1967. The Diagnosis was chronic alcoholism of many years' duration.

Upon discharge from the hospital, he was referred to Alcoholics Anonymous. This is evidenced by letter from Dr. L. Burroughs to Mr. Reuther, dated August 7, 1967, copy attached and identified as Carrier's Exhibit L, which was furnished this Carrier by Mr. Reuther.

Mr. Robert J. Fineran, Attorney representing Mr. DuTreil, submitted a letter to Mr. H. J. Kafoed, Acting General Manager of this Railroad, from State of Louisiana, Southeastern Alcoholic Clinic, dated January 4, 1968, copy attached and identified as Carrier's Exhibit M. At that time Mr. Fineran asked Mr. Kafoed to consider returning Mr. DuTreil to work. According to this letter, which is signed by Dr. Povilas Vitenas, Mr. DuTreil has been under Alcoholism Clinic care since May 11, 1967. Dr. Vitenas states that Mr. DuTreil's problem is "chronic alcoholism; passive-dependent personality, chronic anxiety reaction — moderate to severe." He was sent to the Alcoholism Treatment Service on October 16, 1967 for further evaluation and rehabilitation and returned to the Clinic for further treatment after his discharge from Alcoholism Treatment Service. We understand that Mr. DuTreil was confined at Alcoholism Treatment Service for approximately thirty days. While Dr. Vitenas states that Mr. DuTreil agreed to go on Antabuse Therapy on December 1, 1967 and is doing well as far as his alcoholic problem is concerned, he also states that the prognosis is guarded at the present time.

It is Carrier's position that Mr. DuTreil was guilty of being intoxicated during his tour of duty, and that he did not perform his assigned duties. The technicality relied upon by the Organization has no merit, and even if the alleged procedural defect did exist, which is emphatically denied by Carrier, the claimant's rights were not prejudiced thereby. Even if your Honorable Board should decide that a procedural defect did exist, this should not be a fatal defect. The fact that claimant was proven guilty and admitted he had been drinking alcoholic beverages prior to and during his tour of duty must be considered.

Further, a claim on behalf of Mr. DuTreil during a period that he was confined to a hospital or other institution, or while undergoing treatment by doctors, is improper, as he could not be considered available for work during this period.

On several occasions, Mr. DuTreil, his Attorney, and his representative have asked the Management of this Railroad to reinstate Mr. DuTreil to his former position. In view of Mr. DuTreil's previous history of alcoholism and various reports which have been made a part of Carrier's submission, the Management finds it impossible to justify reinstating Mr. DuTreil and has been unable to comply with their requests.

Carrier respectfully requests your Honorable Board to decline this claim.

(Exhibits not reproduced.)

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.

The record discloses that this is a discipline case involving the Claimant, who left the property without permission and was charged with failing to carry out his assigned duties and being intoxicated. The record further discloses that Master Carbuilder J. R. Coates investigated the case, filed the charges, testified against the Claimant, and then assessed the penalty of dismissing this Claimant from service.

In this type of case, the scope of our review is limited to: (1) was there a fair and impartial hearing on the property; (2) were the findings made on the property supported by substantial evidence; (3) if the employe is found guilty as charged, was the discipline imposed reasonable. We do not weigh the evidence de novo. (Award No. 13124, Dorsey, Third Division.) In view of the evidence, Master Carbuilder J. R. Coates, did prejudge the Claimant when he assessed the penalty after having testified at the hearing, after having investigated, after having filed the charges, and after having assisted in the prosecution. In view of this evidence, this Claimant should be returned to service with seniority and vacation rights unimpaired, because it can be implied from the record that he did not receive a fair and impartial hearing. However, in view of the fact this Claimant confessed, and for the reason that this claim was reviewed by other officers on the property, he should not have his pay restored.

Finding is that the Agreement was violated.

AWARD

Claimant should be returned to service with seniority and vacation rights unimpaired, but without restoration of pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1969.