

The Fourth Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(United Transportation Union - Yardmasters Department

PARTIES TO DISPUTE: (

(New Orleans Public Belt Railroad

STATEMENT OF CLAIM:

Claim that former regular yardmaster Alfred W. Cupit be reinstated to service with all rights coming under the current controlling Yardmaster Agreement, both local and national, to include all or any insurance programs and to include all payments to Railroad Retirement and Unemployment under Railroad Retirement. All monies and rights are included and claimed for July 31, 1989 and all subsequent days until Yardmaster Cupit is reinstated to service as a yardmaster.

FINDINGS:

The Fourth 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 employes 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.

On June 9, 1989, the Claimant was directed to attend an investigative Hearing under the following charge:

"You are hereby charged with reporting at the Cotton Warehouse Yard Office for your assignment as Yardmaster, Entire Railroad, 4:00 P.M. to 12:00 Midnight, on Friday, June 2, 1989, under the influence of alcohol.

Asst. General Superintendent S. Schuler refused to allow you to work and advised you he was calling an Extra Unassigned Yardmaster for your assignment. After being advised of this, you left the property.

You are further charged with violation of the New Orleans Public Belt Railroad Operating Rules, Rule G, which became effective February 1, 1977, and General Order No. 220, dated March 31, 1971, Paragraphs 1 and 14."

Following the Hearing, the Claimant was notified by letter dated July 31, 1989, as follows:

"The testimony presented at the investigation held on July 14, 1989, on these charges, clearly indicates to this hearing officer that Mr. Schuler's assessment of your condition on June 2, 1989 when you reported to work was accurate, and that you are guilty of violation of Rule G. Your actions of leaving the property, without permission, on June 2, 1989, when advised that you would not be allowed to work account your condition is a further indication that you were in violation of General Order No. 220, dated March 31, 1971, paragraphs 1 and 14."

The Claimant was thereupon dismissed from service.

The Organization raises a number of objections appearing to have substantial support. These include: finding of guilt beyond the original charge (i.e., "leaving the property without permission"); multiple roles performed by the Hearing Officer; failure to provide convincing proof that the Claimant was under the influence of alcohol; and failure of the Carrier to hold a final conference on the matter.

The Board notes, however, that the Claimant marked off sick on June 5, 1989 (prior to the notice of investigative Hearing). A note from his physician dated August 25, 1989, stated:

"The reason for treatment is acute anxiety which began on June 5, 1989. Follow up treatment is required until further notice.

The date he may return to work is undetermined at this time."

The Claimant died on November 6, 1989.

The circumstances involving the disciplinary action were described in the testimony of the Assistant General Superintendent as follows:

"Mr. Schuler: On June 2, 1989 which was a Friday I guess around 4:15 in the afternoon, Mr. Cupit [the Claimant] showed up at the Engine Terminal and he said something about he saw somebody just pass and waved at him but he did not know who it was and I looked at Mr. Cupit and Mr. Cupit looked a little like he was moving slow, like he wasn't sure of himself, and I got the impression that he had been drinking.

Mr. Dugas: What did you tell Mr. Cupit at that time?

Mr. Schuler: I told Mr. Cupit that there was no way I was going to let him go to work that afternoon in that condition and as soon as Dick Sager, who is the Security Agent gets there that he was going to be in trouble.

Mr. Dugas: Did Mr. Cupit make any reply to your accusation?

Mr. Schuler: No, not really.

Mr. Dugas: What did Mr. Cupit do after?

Mr. Schuler: Well, when I grabbed the telephone, I said I was going to call somebody in his place and when I grabbed the telephone I thought he went in the other office but apparently he left the building altogether.

* * *

Mr. Dugas: Do you feel certain that your accusation of being under the influence of alcohol was correct and just?

Mr. Schuler: I think he was under the influence of something, yes sir.

Mr. Dugas: How soon would you tell Mr. Cupit did he leave the property?

Mr. Schuler: Within 5 or 10 minutes it was normal.

Mr. Dugas: Did you have an opportunity to get another supervisor to witness and assess Mr. Cupit's condition?

Mr. Schuler: No sir I didn't."

This is the only information on which the Carrier determined the Claimant's guilt. There was no smell of alcohol reported. There was no direct questioning as to whether the Claimant had been drinking. There was no order to the Claimant to remain available for alcohol testing. He was simply told that he would not be permitted to work; not surprisingly, he left.

The Board finds there was insufficient proof that the Claimant was in "violation of Rule G." Nor can it be reasonably concluded that the Claimant's "actions in leaving the property" were any "further indication" that he was under the influence of alcohol.

In its dismissal letter, the Carrier referred to the Claimant's continuing "problem with alcoholism." Previous warnings to the Claimant would be of significance in determining the severity of penalty if guilt had been established as to the incident here under review. In the absence of such finding, the previous disciplinary record is not before the Board for consideration.

It is further apparent, as charged by the Organization, that the Carrier failed to respond to requests for a final conference on the property, as required by law and established procedure. Previous Awards vary as to whether this is sufficient to require that the disciplinary action be set aside. Combined with the circumstances described above, however, this further weakens the propriety of the Carrier's action.

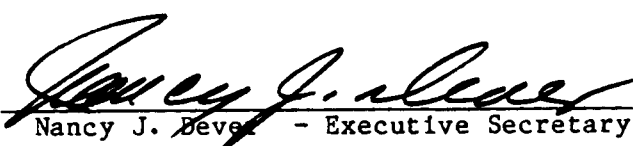
As to the remedy, the record shows that the Claimant was off sick from June 5, 1989, until his death. Thus, there is no basis for claim for lost pay. The Award will sustain the Claim but without payment of wages.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1991.