

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2329

BOSTON AND MAINE CORPORATION	*	
	*	
- and -	*	CASE No. 4
	*	
UNITED TRANSPORTATION UNION	*	AWARD No. 4
	*	

Public Law Board No. 2329 was established pursuant to the provisions of Public Law 89-456. The parties, the Boston and Maine Corporation (hereinafter the Carrier) and the United Transportation Union (hereinafter the Organization) are duly designated carrier and organization representatives as those terms defined in Section 1 and 3 of the Railway Labor Act.

After hearing and upon the record this Board finds it has jurisdiction to resolve the following claim:

"Request that Passenger Conductor R.F. Abbott be paid for all time lost, plus deadheading to and from Boston Division Superintendent's Office in North Station, Boston to attend Hearing."

In the spring of 1977, the Carrier had reason to be concerned about suspicions that employees in passenger service were involved in the use of alcohol while on duty or while they were subject to duty.

Because the Claimant was one of the employees who was under suspicion, the Carrier directed the Claimant on May 31, 1977 to report to the Passenger Trainmaster who advised the Claimant that he wanted him to take a blood test to determine if he had alcohol in his blood. The Claimant agreed to such an examination and a blood sampling was taken. While the blood sample was in the

process of being sent to the medical laboratory for analysis, the Claimant was directed to resume covering the remainder of his assignment.

At approximately 5:00 p.m. on the date in question, some 55 minutes prior to the Claimant's completing his tour of duty on an inbound train from Beverly, Massachusetts to Boston, Massachusetts, the Carrier was notified by the laboratory that the blood test indicated an alcohol concentration of .577 in the Claimant's blood. Accordingly, the Carrier determined that the Claimant was in violation of Rule G and the Claimant was removed from service. Rule G provides that the use of intoxicants or narcotics by employees subject to duty, or that possession or use while-on duty, is prohibited.

An investigation was conducted, the Carrier determined that the Claimant was guilty of the offense, and the Claimant was dismissed from service.

The parties have thoroughly and competently argued a great many issues before this Board regarding the facts and the principles in this case.

After a thorough review, this Board finds two significant reasons to conclude that the Carrier has failed to meet its burden of proof. First, there is significant and substantial doubt

regarding the results of the blood test. This Board does not have the scientific competence to determine when an employee would be considered "legally intoxicated" based upon the percentage of alcohol in said employee's blood. We must, therefore, rely upon the scientific principles regarding such measurement. We are convinced that a reading of "577" would, as the Organization has established, render an individual who registered such a blood/alcohol reading comatose or near death. The record before this tribunal clearly establishes that the Claimant was not in such a condition. In fact, the Claimant's condition on the day in question presents the second reason that this Board finds that the Carrier has failed to meet its burden of proof.

It is undisputed that on the day in question the Claimant was viewed closely by several responsible Carrier representatives, including his Trainmaster, the Assistant Trainmaster and the Carrier's Medical Director. Their testimony, as well as the entirety of the record, establishes clearly that the Claimant demonstrated none of the ordinary and customary indicia of intoxication on the day in question. In fact, after a face to face meeting with the Claimant, the purpose of which was to elicit the Claimant's agreement to taking the blood test, the Carrier's Medical Director returned the Claimant to completion of his normal assignment. The only observation regarding the Claimant's condition and physical appearance, which might be considered out of the ordinary, was the conclusion

that he was walking "rigidly". However, upon questioning by the Organization the witness who observed the Claimant's "rigid" walking style, testified that this was the manner in which the Claimant walked naturally.

In the absence of any conclusive evidence that the Claimant was in possession of or using intoxicants while on duty or subject to duty on May 31, 1977, this Board finds that the claim should be sustained.

AWARD: Claim sustained.

E. F. Lyden

E.F. Lyden, Organization Member

B. E. Rice, Jr. (H. Dennis)

B.E. Rice, Jr., Carrier Member

Richard R. Kasher

Richard R. Kasher, Chairman
and Neutral Member

January 18, 1982
Boston, Massachusetts

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2329

*
BOSTON AND MAINE CORPORATION *
* Interpretation
-and- *
* Award No. 4
UNITED TRNSPORTATION UNION *
*

On January 8, 1982 Public Law Board No. 2329 (hereinafter the Board) issued an Award involving Passenger Conductor R. F. Abbott (hereinafter the Claimant).

The award found that the claim of Conductor Abbott should be sustained as the Carrier did not have conclusive evidence regarding the Claimant's alleged possession of or use of intoxicants while on duty or subject to duty.

The Claimant had been removed from service on May 31, 1977. On April 26, 1979 the Claimant, who was nearly 64 years of age at the time, applied to the Railroad Retirement Board for retirement benefits based upon his more than thirty-five years of service. At the time that the Claimant applied for Railroad Retirement benefits he had been out of service for approximately two years and his claim for "reinstatement" was pending before Public Law Board No. 2329.

The Board heard the claim for "all time lost" in calendar year 1981. The Award sustaining the claim, as previously stated, was issued on January 8, 1982.

Thereafter, the Carrier determined that the Claimant had lost earnings between the dates of June 1, 1977 and March 31, 1978 of \$19,229.18. The Carrier further computed that of the gross lost earnings a deduction of \$5,071.43 was properly made due to an outstanding lien payable to the United States Railroad Retirement Board (presumably due to the unemployment insurance which the Claimant had received during the relevant time frame); that a further deduction of \$2,831.55 was properly made for Federal income tax; and, that a final deduction of \$760.98 was properly made for indebtedness to the Commonwealth of Massachusetts for state income tax.

The Claimant accepted the balance of \$10,565.22 on or about May 10, 1982. Sometime during the year 1982 the below-signed Chairman of the Board resigned. Subsequent to the Chairman's resignation a dispute arose between the parties (the Claimant and his Organization on the one hand and the Carrier on the other) regarding the nature of the Claimant's entitlement.

Therefore, a request was made to the below-signed Chairman to retain jurisdiction to interpret and/or clarify Award No. 4 of the Board and this request was granted by the Chairman as well as by the offices of the National Mediation Board.

Accordingly, the Chairman received statements of posi-

tion and rebuttal statements from the Claimant/Organization and the Carrier regarding the question of remedy under Award No. 4.

Positions of the Parties

The positions of the parties, although they are stated in extensive detail in the submissions made to the Board, focus essentially on one significant issue. That is, was the Carrier obligated under the terms of Award No. 4 to treat the Claimant's prayer for relief as one which would entitle him to back pay subsequent to his actual retirement. The Claimant, through his Attorney and Organization, has contended that his retirement in mid-1978 was not a "voluntary one" because he was in the process of losing his entitlement to Railroad Unemployment Insurance and therefore he was financially "compelled" to retire from the Railroad. The Organization/Claimant also contends that the Carrier treated the Claimant in a callous and insensitive manner and that it was clear that the Claimant who had more than thirty-five years of unblemished service should not have been dismissed and placed in such onerous financial circumstances.

The Carrier essentially contends that the Claimant changed the nature of his claim during the handling in the

grievance procedure. That is, the Carrier contends that the claim for "reinstatement", which was initially filed on the property, was amended when the case was taken to the Board and merely sought reimbursement for lost earnings. The Carrier further argues that when the Claimant retired in mid-1978 that he did so voluntarily. The Carrier contends that it should not be obligated under any circumstances, but particularly not in the circumstances of the Award issued on January 8, 1982, to presume that the Claimant would have stayed in service longer than he actually did and therefore be obligated to pay him for time when he was not subject to the Carrier's direction and control. The Carrier further argues that case law before the various divisions of the National Railroad Adjustment Board and several Public Law Boards establishes that a voluntary resignation and/or retirement ends an employee's entitlement to continued wages and/or benefits from a carrier.

Findings and Opinion

It is significant to first note that the question of the Claimant's retirement in mid-1978, and how that retirement would impact upon the Claimant's entitlements in the event that he was successful in pursuing his claim, was not fully joined on the property or before the Board. As the Carrier

has correctly pointed out, the claim before the Board was for "all time lost, plus deadheading to and from ...". The Board did not consider the question of reinstatement. Although, the question of the Claimant's retirement was raised tangentially during an executive session of the Board, the issue of the extent of back pay was not specifically joined by the parties either in their submissions or in the oral arguments presented to the Board. Accordingly, this Board will clarify Award No. 4 in the context of the submissions, the rebuttal arguments, and the facts as established in the record below.

The purpose of the grievance procedure is to give both parties an opportunity to settle claims short of arbitration. When the Claimant retired, effective on or about April 1, 1978, and the claim continued to be processed in the grievance procedure, the Carrier could justifiably rely upon the fact that the Claimant had relinquished his claim to future employment. He certainly no longer had any employment nexus with the Carrier other than his pending claim for lost earnings. More importantly, there is no indication in the record that the Claimant put the Carrier on notice that he was (1) of the mind that he had been involuntarily retired by the action of the Carrier, or (2) seeking reinstatement to active service contrary to his stated intention to retire and his actions which effected a

proper retirement. Therefore, this Board finds that the Claimant, absent evidence to the contrary, voluntarily left the Carrier's employ as of April 1, 1978 and that any entitlement to lost earnings accrued only up and until that date.

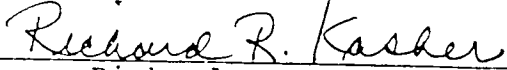
We also note that during the handling of the claim below that at times the Organization and the Claimant's counsel sought wage loss and "other contract benefits up to and at the time of his retirement" or "continuing until his retirement". The Board is therefore satisfied that the Claimant's prayer for relief was a specific claim covering a set period in time, and that the Carrier sought to satisfy this claim consistent with earnings records which would reflect what the Claimant would have earned had he not been improperly held out of service between the dates of June 1, 1977 to and through March 31, 1978.

Accordingly, this Board interprets Award No. 4 as entitling the Claimant to back pay and other contract benefits for the period of June 1, 1977 to and through March 31, 1978 only.

Finally, a significant portion of the brief/submission regarding this interpretation filed by the Organization/Claimant concerns the manner in which the Carrier computed the lost earnings to which the Claimant was entitled. We have, as stated above, limited the damages to the period of

removal from service to the date of retirement and thus any computations which are based upon subsequent general wage increases or other increases in pay which the Claimant might have enjoyed had he not been in voluntary retirement status subsequent to March 31, 1978 are clearly not appropriate for our consideration. The Carrier has represented that the computations of lost wages payable to the Claimant were based upon the actual earnings of individual(s) who covered the assignments that the Claimant would have covered had he not been suspended and subsequently dismissed from the Carrier's service effective June 1, 1977. The Carrier has further represented that these computations were based on its actual payroll records and this Board finds nothing in the Organization's submission to contradict the Carrier's statements and records. Accordingly, this Board finds that the Carrier complied with the language and intent of Award No. 4 and this Board finds no basis to increase the monetary settlement paid by the Carrier in satisfaction of the claim.

This Interpretation was issued this 13th day of March, 1985 in Bryn Mawr, Pennsylvania.


Richard R. Kasher,
Chairman and Neutral Member
Public Law Board No. 2329