

The Second Division consisted of the regular members and in addition Referee Kay McMurray when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen and Oilers
{ Seaboard Coast Line Railroad Company

Dispute: Claim of Employees:

1. That under the current and controlling agreements, as amended, Laborer Paul H. Newkirk was unjustly dismissed from the service of the Seaboard Coast Line Railroad Company on December 26, 1979, after a formal investigation was held in the office of Mr. F. A. Gray, Conducting Officer, on December 11, 1979.
2. That accordingly Paul H. Newkirk, Laborer, be restored to his regular assignment with all seniority rights unimpaired, vacation, health and welfare, hospital and life insurance and dental insurance be paid, and compensated for all lost time, effective December 26, 1979, and the payment of 6% interest rate added thereto.

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, Mr. Newkirk, was notified by letter dated November 7, 1979 to appear for an investigation on November 27, 1979. He was charged with failure to carry out instructions of his foreman, insubordination and being asleep while on duty on November 4, 1979. The investigation was performed at the request of the Organization and held on December 11, 1979. Following the hearing, which we find was conducted in accordance with contractual requirements and past practice the penalty herein complained of was assessed.

The claimant's supervisor testified that on the morning in question at 7:30 A.M. he assigned Mr. Newkirk to clean up the washroom. At about 9:30 A.M. he attempted to find him but had a difficult time. He inquired of another Foreman relative to whether or not he had seen claimant and was advised in the negative. He finally located Mr. Newkirk in the bathhouse some distance from his assigned location. He was lying on his stomach on a bench, asleep. The supervisor left the scene and returned some time later with the foreman previously contacted. Claimant was still in the same position allegedly asleep. The elapsed time from

first observation to the return was approximately five to ten minutes. The foreman testified that they observed claimant for approximately one minute before the foreman awakened him by shaking him by the elbow. The foreman's testimony corroborates that of the superintendent. Contra the foregoing we have the self-serving statement of Mr. Newkirk who responded in the negative when queried as to whether or not he was asleep. However, in other portions of his testimony he responded differently. In response to question he responded: "I finished that job, I went to the next job to the bath house and I sat down for a few minutes and the next thing I knew I was getting woke up by Mr. Chadwick". Later in his testimony the following response appears: "I felt drowsy ... I was about ready to go home but I didn't, so the next thing I knew, Mr. Chadwick was waking me up as he says, and I woke up". Claimant's testimony validates the information provided by the supervisor and foreman. The preponderance of credible testimony supports the position of the Carrier that claimant was asleep as charged.

It should be noted that the Organization claims that Mr. Newkirk was under medication and therefore should not be punished. Claimant introduced in the record a note which he claimed was a letter written by his personal physician. That letter stated that Mr. Newkirk was taking medicine which made some people drowsy. However, questions by the hearing officer and responses cast considerable doubt on the validity of the letter. It was not on letterhead stationery, content lacked professionalism and serious doubt was raised about the signature. No effort was made in the record to substantiate the letter or obtain more credible information. We conclude that claimant was asleep and some form of corrective action was warranted. The Carrier points out that Mr. Newkirk's past record was taken into account in determining the severity of penalty. That record included a 90-day suspension for violation of the rules under consideration in this case. In view of the foregoing and the entire record we find that the Carrier was within its legal rights to dismiss claimant.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of April, 1982.