PUBLIC LAW BOARD NO. 1844

AWARD NO. 4

CASE NO. 15

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Supervisor D. L. Sammons was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File D-11-24-16)

2. Track Supervisor Sammons be reinstated with all rights unimpaired and paid for all time lost because of the violation referred to within Part (1) of this Claim.

OPINION OF BOARD:

This case involves the dismissal of Mr. D. L. Sammons, Track Supervisor, on the basis of charges that he was responsible for a motor vehicle accident involving a company vehicle on May 16, 1975, at Mankato, Minnesota. The facts out of which the dismissal arose are for the most part not contested on the record. On May 16, 1975, Claimant was assigned to inspect track from Tracy to Mankato, Minnesota. As a track supervisor he worked largely without supervision and on that date he was operating a company truck. He arrived at Mankato, Minnesota, where he was to lay over for the night, at approximately 4 p.m. Claimant secured a room at a local motel and did paper work until about 9 p.m. when he went to dinner. During the course of his meal at a local restaurant Claimant consumed two or three beers. On leaving the restaurant he became violently ill and began to vomit. He got into the

company truck and was driving back to his motel when he was involved in a motor vehicle accident at an intersection in downtown Mankato. Claimant states without contradiction on this record that he continued to be very sick and vomited in the truck while making a turn at the intersection of Main and Pike Streets. The right front fender of the truck struck the left front of another vehicle in the intersection. Claimant stopped and there was a brief exchange with the other driver but Claimant did not get out of the truck. He then continued on his way to his motel, where he was followed by the other driver and the latter's two passengers. Claimant stated that he continued to be sick and just went to bed. The next morning, May 17, 1975, Officer William Fitzpatrick of the Mankato Police Department called on Claimant at his motel. Claimant testified without contradiction that he called the police upon arising the next morning in order to report the accident. A police officer had the keys to Claimant's truck in his possession and turned them over to Claimant after interviewing him. Later on the afternoon of May 17, 1975, Claimant wired a property damage report to the company, giving the time, date and location of the accident, reporting $150 damage to each vehicle involved, and stating the assumed cause of the accident in his own words as follows: "I was turning onto Main Street from Pike Street, was watching traffic and failed to see vehicle in time. To avoid collision, striking left front fender of other vehicle." (Sic.)

Thereafter, by notice dated May 30, 1975, Claimant was advised to appear for a formal investigation into a charge framed in the following words: "Your responsibility in connection with motor vehicle accident involving Transportation Company vehicle No. 21-1123 on May 16, 1975, at Mankato, Minnesota." At the investigation held June 4, 1975, Claimant was the only witness. He testified to all of the facts described in detail supra which may be summarized as follows:

1. He did have a couple of beers with his dinner;

2. he became violently ill and vomited following the meal;

3. he struck the other vehicle while being sick in the cab of the truck;

4. he did not linger at the scene of the accident but proceeded to his motel;

5. the occupants of the other vehicle followed him to his motel; and

6. He spoke with the police officer on the morning of May 17, 1975.

In addition to the basic facts, Claimant was asked what in his judgment caused him to be sick. He at first suggested that he had eaten some "bad food or something" but later said he thought he might have been coming down with the flu. In this latter connection he did testify that his family had been ill with the flu at this time. The only other evidence introduced at the hearing consisted of the reports of the investigating officer from the Mankato Police Department and Claimant's wire report of property damage. The latter document has already been summarized supra. The Mankato Police Department report contains answers to a series of preprogrammed questions concerning each driver. With respect to Claimant, under the heading of "Apparent Contributing Factor" is the notation, "Failed to yield right of way." With respect to the other driver under the same heading is the notation, "Beyond driver's control." Under the heading of Physical Condition the report indicates that Claimant "apparently had been drinking," and that the other driver "apparently had not been drinking." It is significant to note that the report does not state that either driver was "apparently under the influence," although that was one available answer on the pre-programmed report under the heading of Physical Condition. The report goes on to indicate that the driver of the other car stated Claimant turned in front of him while making a wide left turn and struck his vehicle. When interviewed on May 17, 1975, Claimant told the officer he did not know how the accident happened.

Of final significance the report indicates that Claimant was charged with leaving the scene of an accident, but that charge was pending at the time of the hearing and investigation on June 4, 1975, and this record does not indicate the outcome.

After the hearing and investigation Claimant was informed on June 12, 1975, that he would be dismissed from all service. There is no copy of the Discipline Notice but we do note that the original charges were responsibility in connection with the motor vehicle accident. Subsequent to the dismissal, by letter dated June 17, 1975, the Organization processed this claim, seeking Claimant's reinstatement with seniority and vacation rights unimpaired and compensation for all time lost. That claim was denied at all levels of handling on the property and has accordingly been appealed to this Board for resolution.

We have reviewed carefully the record in this case, bearing in mind the Employer's three-fold responsibility in disciplinary arbitrations to demonstrate (1) that Claimant was afforded the fair and impartial investigation to which he is entitled under the Agreement, (2) that substantial record evidence supports the charges against Claimant, and (3) that under all of the circumstances the discipline assessed is appropriate. The Organization raised certain procedural objections to the timing of the hearing but we note that these matters were nowhere raised on the property and they may not be presented de novo at this appellant level. Accordingly, we must dismiss with prejudice these procedural objections of the Organization.

Turning to the merits of the case, we find that the company on the property argued primarily that Claimant should be dismissed for consuming alcoholic beverages and operating a company vehicle while under the influence of intoxicating beverages and for violating various municipal and state ordinances by leaving the scene of the accident. This position is succinctly stated by a letter from the Division

Manager dated July 14, 1975, reading in pertinent part as follows:

> "The point at issue of the entire investigation is that Mr. Sammons violated the various municipal and state ordinances relative to motor vehicles while operating a company vehicle. Secondly, he operated a Company motor vehicle while under the influence of intoxicating beverages.
>
> "I am sympathetic with Mr. Sammons feelings but I am sure that Mr. Sammons was well aware of the risk he took when he decided to drive a Company vehicle after consuming an alcoholic beverage. I cannot believe that Mr. Sammons was doing anything else by leaving the scene of an accident but conceal the fact that he had consumed an intoxicating beverage prior to the accident! He did both by his own admission."

The Carrier's position was reinterated in the final denial letter on the property dated October 24, 1975, over the signature of the Director of Labor Relations as follows:

> "At the investigation Mr. Sammons admitted drinking intoxicating liquor, admitted his consumption was subsequent to eating dinner at 9:00 p.m. and that the accident occurred some time between 11:00 and 11:45 p.m. There can be no doubt whatsoever that the accused violated the law by leaving the scene of an accident. His excuse for doing so is extremely strained and lacks credibility."

The entire thrust of the Carrier's position and handling on the property was that Claimant was in fact intoxicated and operating the company truck under the influence of the alcohol he had consumed with dinner, thereby causing the accident. In our considered judgment, however, this contention must be rejected for two important reasons, to wit., (1) Absent conjecture and hearsay thrice removed, there is no evidence that Claimant was intoxicated or operating the vehicle while under the influence of alcohol, and (2) at no point in this disciplinary action was Claimant ever charged with operating the vehicle while intoxicated. There are no witnesses to gainsay Claimant's assertion that he was violently ill to the point of vomiting while trying to drive the vehicle. The police report is ambiguous and standing alone is absolutely insufficient evidence upon which to base a conclusion that Claimant was operating the vehicle while under the influence of alcohol. At

most on this record, a disinterested reviewer might find that Claimant exhibited poor judgment by driving while violently sick and also in departing the scene of the accident. Carrier claims this latter action violated municipal and state law but fails to specify its statutory reference, nor is there any evidence that state or local officials pursued this charge to prosecution. Carrier bears the burden of persuasion by substantial record evidence that its conclusions as to culpability and its judgment as to quantum of discipline are not arbitrary and unreasonable. This record supports the finding that Claimant was culpable of bad judgment but this does not warrant dismissal of a 13-year employee with an apparently otherwise satisfactory record. We are compelled to reduce the discipline assessed from dismissal to a suspension of six months without pay. Accordingly, the claim shall be sustained to the extent of reinstating Claimant with seniority and other benefits unimpaired and with compensation at his straight time hourly rate for all time lost from January 12, 1976, until such time as he is reinstated, less outside earnings if any.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was violated.

AWARD

The claim is sustained to the extent indicated in the Opinion of the Board.

Dana E. Eischen, Chairman

O. M. Berge, Employee Member

R. W. Schmiege, Carrier Member

Dated: Dec 2, 1977