

PUBLIC LAW BOARD NO. 2206

AWARD NO. //

CASE NO. 32

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- "(1) The dismissal of Machine Operator R. D. Lay, March 22, 1978, was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File 33-R-3 MW-20 5/11/78).
- "(2) Machine Operator R. D. Lay be reinstated with all seniority and other rights unimpaired and be compensated for all time lost."

OPINION OF BOARD:

This case involves the dismissal of Machine Operator Roger Lay following hearings and investigations on March 8, 1978, into two separate but related charges of misconduct. Claimant, a four-year employee of Carrier, is charged with use of alcoholic beverages while on duty on February 27, 1978, and also with claiming pay for time not worked on February 27 and February 28, 1978. Following agreed-upon extensions of time, two separate investigations were held on March 8, 1978. Carrier found Claimant guilty of both charges and on those grounds terminated his employment. After reviewing the record we find no support for the Organization's assertions that Claimant received less than the fair and impartial investigation to which he was entitled under Rule 41.

Turning to the merits, we have reviewed all of the record evidence, including direct testimonial conflict between Claimant and the Trainmaster who

was Carrier's chief eyewitness regarding the alleged Rule C violation. We are persuaded that the Trainmaster did see Claimant taking a drink from an open bottle of beer on the bar at Haveners Country Tavern on February 27, 1978. This occurred while Claimant and two other Carrier employees were playing pool in the bar during their lunch break. There were three open cold bottles of beer on the bar but only Claimant was observed drinking from one of them. When confronted, Claimant told the Trainmaster in the presence of the Mechanic Foreman, "It's your word against mine." After analyzing the conflicting testimony of the two chief witnesses and their respective corroborating witnesses, with respect to specificity, consistency and motive for prevarication, we are persuaded that Carrier did not err in finding the Trainmaster's evidence believable. Carrier has demonstrated by substantial and probative evidence on this record that Claimant did drink some beer on the lunch hour on February 27, 1978.

The second charge, upon which Carrier also relied in dismissing Claimant, stands on less firm footing. The record establishes that Carrier requires employees in outlying points, like Claimant in this case, to forward their time rolls several days in advance of the close of the pay period. The time records at issue herein for the days February 27 and February 28, 1978, had to be received in Carrier's District Accounting Office by 10 a.m. on March 1, 1978. In accordance with those instructions and by established practice, Claimant and other employees at West Alton were required to estimate in advance the time they would work on February 27 and February 28, 1978. For the two days in question Claimant estimated that he would work eight hours each day, signed the pay records and forwarded them to the Accounting Department on February 27, 1978, prior to going to work that morning. Later that day the beer-drinking incident described above occurred, and at 2:30 p.m. Claimant was taken out of service, given a Notice

of Investigation regarding Rule G violation, and ordered to stay off Burlington Northern property by the Trainmaster. Three days later Claimant was served with another Notice of Investigation reading as follows:

"Please arrange to attend investigation....for the purpose of ascertaining the facts and determining your responsibility in connection with your allegedly claiming pay for February 27 and February 28, 1978, when you did not perform compensated service while assigned as Machine Operator, West Alton, Missouri."

After reviewing the transcript and documentary evidence on the payroll falsification charge, we are convinced that it cannot stand. The practice of advance estimates is firmly established and condoned if not required by Carrier. Under ordinary circumstances an employer should amend his time record after the fact if the estimated time turns out to be incorrect. But this can hardly be considered an ordinary circumstance. Claimant was removed from service, ordered off the property and charged with a serious rule violation on the afternoon of February 27, 1978. His failure or forgetfulness to amend his previously submitted time card immediately is understandable in the face of that traumatic experience. The rush to judgment of supervision in charging him with payroll falsification in those circumstances was inappropriate, unsupported by evidence and smacks of an unseemly haste to buttress the charge already pending against him. The finding of guilt on the payroll falsification charge is unwarranted and arbitrary and it must be set aside. See Awards 3-13306, 3-14479, 3-16166, and 3-17228.

Carrier promised Claimant's dismissal on findings of guilt on both charges but he was not guilty of both charges. The Rule G violation was a serious matter and serious discipline is warranted, but dismissal from service is, in the circumstances, excessively harsh. See Awards 3-18016, 3-19037, and 3-19559. We shall reduce the penalty to a suspension and return Claimant to service but without back pay for the time lost.

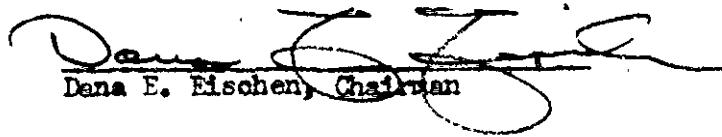
FINDINGS:

Public Law Board No. 2206, upon the whole record and all of the evidence, find 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 penalty of dismissal was excessive.

AWARD

Claim sustained to the extent indicated in the Opinion. Carrier is to comply with this Award within thirty days of its issuance.


Dana E. Eischen, Chairman


F. H. Funk, Employee Member


L. K. Hall, Carrier Member

Date: 