

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN RAILROAD COMPANY	*	
	*	CASE NO. 17
-and-	*	
	*	AWARD NO. 17
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	

Public Law Board No. 2746 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the Burlington Northern Railroad Company (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

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

- "1. The dismissal of Section Foreman J.B. Hanks; Track Laborers D.F. Vasquez, W.J. Vasquez, D.E. Williamson and G.L. Cox was without just and sufficient cause and wholly disproportionate to the alleged offense.
2. Claim is for all lost wages for Track Laborers G.L. Cox, W.J. Vasquez, D.F. Vasquez, D.E. Williamson from September 5, 1979, and Section Foreman J. Hanks from October 8, 1979, until the dispute is resolved."

The incident which gave rise to the dismissal of the Claimants occurred on August 31, 1979 while said employees were on duty and working in White Fish Yard, Montana. Each of the claimants was charged with an alleged violation of Rule G, drinking and/or in possession of alcohol while on Carrier property, as a result of the Carrier's belief that these five employees had alcohol in their possession and/or consumed same while they were in a van on Carrier property.

An investigation was conducted and the Carrier concluded that substantial evidence existed supporting the charges. The Claimants were dismissed from service. Subsequently the Carrier, the Organization and Claimants D. Vasquez and W. Vasquez agreed that they, the two Claimants, would be reinstated on a leniency basis. Accordingly the claims of the two Claimants Vasquez are not before this Board for adjudication.

This Board has reviewed the evidence in the record upon which the Carrier relied in concluding that Claimants Williamson, Cox and Hanks were in violation of Rule G. It is true, as the Organization contends, that there is substantial contradictory evidence in the record. However, this Board concludes that the Carrier could justifiably determine that there was sufficient probative evidence, both direct eye witness evidence as well as circumstantial evidence, to establish that Claimants Williamson, Cox and Hanks were in possession of alcohol (beer) on August 31, 1979 while they were on duty and on the Carrier's property. The Board recognizes that certain of the evidence upon which the

Carrier originally relied in finding sufficient cause to issue a notice of charge was later contradicted by those same employee eye witnesses when they gave testimony. However, in this Board's view there still remains sufficient and strong evidence in the record which supported the Carrier's conclusion that the employes involved had arranged for the purchase of beer off Carrier property and had the beer returned to Carrier property in anticipation of an early Labor Day celebration.

This Board also recognizes that in a prior case involving Claimant Cox (our Award No. 16) that we found that the Carrier had not sustained its burden of proving that the Claimant had appeared on the property in a state of intoxication. The Organization has contended that our finding in that previously decided case should dispose of the merits in the instant case insofar as Claimant Cox is concerned. We disagree. The facts in that case differ substantially from the facts in the instant case. There, the Carrier was charging the Claimant (Cox) with having consumed a beer prior to appearing for service. In that case this Board relied upon the evidence of record, including the testimony of the Claimant's Foreman (Hanks), who was not disclosed in the previous record as being a Claimant himself in the instant matter. In any event, the facts and evidence upon which the Carrier relied in the instant case differ entirely from the facts and circumstances in Case No. 16. Thus, we reject the Organization's contention that Claimant Cox is being exposed to double jeopardy by our considering his dismissal in the instant matter.

We will now address the procedural objections raised by the Organization as they would be applicable to the cases of Claimants Williamson, Hanks and Cox.

First, it has been contended that certain and/or all witnesses who were present or could have shed light on the incident were not made available. We agree with the Carrier that all necessary witnesses were present, and that the Claimants were given full opportunity to present witnesses to the incident who would corroborate their denials that they had possessed or consumed alcoholic beverages on the day in question. The record reflects that several witnesses were called by the Claimants and that they did offer such corroborative evidence, which led to our conclusion at the beginning of this opinion that contradictory evidence existed in the record.

Secondly, the Organization has objected to (1) the Carrier's conducting an informal investigation or conference with the Claimants and other employees when the incident was first discovered, and (2) that such pre-investigation or meeting was not attended by an Organization representative. There is no showing in the record that the Claimants, singly or collectively, requested the presence of an Organization representative; and additionally, this Board does not find that the conduct of such preliminary investigation was inappropriate where the Carrier was concerned about determining essential facts regarding a potentially dangerous situation. Had the claimants requested the presence of an Organization representative and had that request been denied, then the Organiza-

tion would have stronger footing for this argument. Absent those facts, we must reject the procedural objection raised by the Organization.

Finally, the Organization has contended that there was disparate treatment of the Claimants as Track Laborers Williamson and Cox were withheld from service prior to the investigation while Claimant Hanks was not. That action by the Carrier, in and of itself, does not in this Board's view constitute procedural error. For if the Carrier was better convinced by the evidence then before it that Claimants Williamson and Cox had engaged in improper activities, we see no significant defect in the application of the rules when the Carrier decided to withhold certain employees from service and not to withhold others. There is no dispute that the Carrier has the right under the terms of the agreement to withhold employees from service when certain major offenses are involved. This case meets that criteria.

In reviewing the entirety of the record, the Board finds insufficient evidence to prove that the Claimants were consuming alcoholic beverages while on duty and on Carrier property; there is, however, substantial and probative evidence that alcoholic beverages (beer) had been purchased and brought onto the Carrier's property and that the Claimants were technically "in possession" of same. In these circumstances, we find, without condoning the Claimants' atrocious lack of judgement, that they should be reinstated to service without back pay. To this extent the claims will be sustained.

AWARD: The Claimants shall be reinstated without back pay.

F. H. Funk
F. H. Funk
Organization Member

W. Hodynsky
W. Hodynsky
Carrier Member

Richard R. Kasher
Richard R. Kasher, Chairman
and Neutral Member

August 23, 1983
Saint Paul, MN

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2746

*
BURLINGTON NORTHERN RAILROAD COMPANY * Interpretation
* of
-and- * Award
* Nos. 16 & 17
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *
*

By order dated March 28, 1984 the Honorable Edward Leavy, United States Magistrate for the United States District Court for the District of Oregon, directed that this Board clarify the application of its Award Nos. 16 and 17, which were issued respectively on April 22, 1982 and August 23, 1983.

The below-signed Chairman and Neutral Member of the Board received and reviewed the order of the District Court, a copy of Plaintiff Glenn Cox's complaint filed in the District Court (No. 83-1662), a copy of Defendant Burlington Northern's Motion to Remand, the Affidavit of its Attorney, Defendant's Memorandum of Authorities regarding such Remand, and statements of position regarding the dispute from both the Carrier and Organization Members of the Board.

Background Facts

The need for clarification arose when Mr. Glenn Cox, an employee of the Burlington Northern, was twice dismissed from the Carrier's service as the result of two separate

incidents which occurred on August 31, 1979. The first incident, which was addressed in Award No. 16 of this Board, involved an allegation that Cox had appeared on the Carrier's property under the influence of alcohol. This Board heard that case at a session where several other cases were also presented to the Board. Fortunately or unfortunately, depending upon one's perspective, the second case, Case No. 17 which involved Cox and several of his fellow employees, was not presented to the Board at that date. Accordingly, when this Board reviewed the record evidence in Case No. 16 we found that the Carrier had not met its burden of proof and ordered that Claimant Cox be reinstated with back pay. We should observe here that the exculpatory testimony offered by Cox's foreman, a Mr. Hanks, was most critical in this Board's view in terms of reaching our decision.

When this Board subsequently heard Case No. 17, it became clear that Mr. Hanks had a reason to testify in an exculpatory manner in Mr. Cox's behalf regarding the first incident addressed by Case No. 16, as Mr. Hanks along with Mr. Cox and other employees was charged in Case No. 17 with violating Carrier Rules regarding possession of alcohol on Carrier premises. The evidence in Case No. 17 supported the Carrier's finding of guilt and this Board so ruled.

Thus, only by the most fortuitous of circumstances

involving what might be considered logistical and/or administrative oversight, Cases 16 and 17 were not considered at the same time. Had they been so considered, this Board would have, in all likelihood, reached a different result in Case No. 16, having discredited Hanks' testimony in the process, and not have reinstated Mr. Cox to service.

Upon receipt of Award No. 16 the Carrier found itself in an interesting dilemma. It could run the risk of continuing to hold Mr. Cox out of service, in spite of the Award reinstating him, on the basis that he was still dismissed under the circumstances which were pending before the Board in Case No. 17. Had the Carrier run that risk then there would have been no back-pay liability at all as this Board concluded in Case No. 17 that the Carrier justifiably dismissed Mr. Cox from service on August 31, 1979. However, the Carrier chose to reinstate Mr. Cox and made an award of back pay to him which deducted certain amounts such as Railroad Unemployment Insurance, outside earnings, and local and Federal taxes among other items.

The Carrier and the Organization also determined that Mr. Cox would be entitled to certain overtime earnings had he been in service during the relevant time frame and they computed what his overtime would be, less deductions typically made from earnings. Mr. Cox refused this payment on the basis that he would be waiving other rights.

In this Board's view Mr. Cox made several substantial errors, over and above the error of engaging in activities on Carrier property that were clearly prohibited. His most significant error was bringing this case back to the Board for clarification. In our opinion his legal action smacks of greed. Mr. Cox was compensated by the Carrier for a period of time when the Carrier had justifiably held him out of service. He seeks in excess of \$50,000, when review of both Awards indicates that he was not entitled to one cent.

However, in view of the hardship that would be imposed upon the Claimant it would be inappropriate in our view to authorize the Carrier at this late date to recover the monies paid to Claimant Cox. On the other hand, we find that the Carrier justifiably made proper deductions from the back pay award including those deductions for outside earnings which are typically made in cases where employees are returned to service with an entitlement to back pay, particularly among employees in the non-operating crafts in the railroad industry. Additionally, since we have found that Mr. Cox was justifiably held out of service beginning on August 31, 1979 until our Award reinstating him in Case No. 17, there is no basis to grant him any additional seniority on operator's or machine operator's seniority rosters which he now claims. Additionally, as Mr. Cox determined not to take the check for the alleged overtime earnings and as we

have concluded that he was justifiably out of service during the relevant time frame, in this Board's opinion Mr. Cox is not entitled to any additional monies from the Carrier.

Upon clarification, this Board concludes that the Carrier has met its full obligations, and more, to Claimant Cox and no further relief is granted by this Board.

This clarification was signed this 15th day of February 1985 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher
Chairman and Neutral Member
Public Law Board 2746