PUBLIC LAW BOARD NO. 2960

AWARD NO. 30

CASE NO. 30

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator Mark Cunningham for alleged violation of Rule G was without just and sufficient cause and on the basis of unproven charges. (Organization's File 3C-1667; Carrier's File D-11-1-452)

(2) The Carrier violated Rule 19(a) when it utilaterally postponed the initial investigation.

(3) Claimant Mark Cunningham shall be allowed the remedy prescribed in rule 19(d) of the effective Agreement.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employes and the Carrier involved in this dispute are respectively employes and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On January 21, 1981, the Carrier directed the Claimant to attend an investigation scheduled for January 28, 1981, on the following charge:

"Your responsibility, if any, in connection with the violation of Rule G of the Chicago & North Western Transportation Co. General

Regulations and Safety Rules effective June 1, 1967, while in possession of Company vehicle #21-2953 on 1/20/81 and 1/21/81."

On January 27, 1981, the investigation was postponed and rescheduled for February 3, 1981. The manner in which the postponement occurred is subject to a procedural dispute. The Board must first consider this procedural dispute before it considers the merits.

The Organization argues that a timely objection was registered at the February 3 investigation by the Union representative protesting the unilateral rescheduling of the hearing. They direct attention to Rule 19(a) which indicates investigations will be "postponed for good and sufficient reasons upon a request of either party." They assert that the phrase, "on request of either party," mandates that an investigation be postponed not unilaterally but by request. In this case, there was no request made by the Carrier to postpone the investigation, but instead, the Carrier unilaterally notified the employes of a postponement. The employes also direct attention to Award No. 41 of Public Law Board 1844 which involved the same parties and the same rule. That Award upheld the Organization's interpretation of Rule 19.

Regarding the procedural issue, the Carrier argued that it is evident that no objection was made by the Claimant or his representative at the time the postponement was directed by the Carrier. Therefore, the Carrier argues that the Organization acquiesced in the postponement and cannot now be heard to object. It is also pointed out that the transcript (page 2) indicates that the Claimant himself was attempting to request an extention based on the first scheduled date of the investigation.

In considering the Organization's procedural argument, the Board must first state that it has no dispute with the Organization's interpretation of Rule 19(a). Award 41 of Public Law Board 1844 clearly established that

which is apparent from the language of the rule. The language of the rule requires that an investigation be postponed based on a request of one party to the other. This is not a matter of semantics as suggested by the Carrier. The language must be given its clear meaning. The Carrier should not be allowed to unilaterally postpone an investigation without making a request of the Union no more than the Union should be able to write the Carrier and unilaterally dictate a postponement. While this Board has no dispute with the Organization's interpretation of 19(a), it believes the facts in the instant case differ from the facts which led to Award 41 of Public Law Board 1844. It is apparent from the transcript that the Claimant was seeking an "extension" of the original investigation schedule. It is apparent from his comments regarding the trouble he was having getting an extension that had the Carrier not postponed the investigation, the Claimant would have submitted a request for postponement anyway. It is noted that Carrier made this argument in the Claim handling prior to the case being appealed to the Board. The Board believes that time limits should be strictly upheld. It also believes that the merits of a dispute should not be ignored where there is reasonable basis to believe that no procedural error occurred. In light of the Board's conclusion that the Claimant would have requested a postponement anyway, the Carrier's action in postponing the investigation did not constitute a clear-cut violation of the rule.

Regarding the merits, the Organization argues that the Carrier has failed to meet its burden of proving the charges leveled against the Claimant. Specifically they direct attention to numerous contradictory statements made by the Carrier's supervisors investigating the incident. The discipline should not be allowed to stand as it is excessive, arbitrary, and capricious.

On the merits, the Carrier directs attention to the investigation which bears out that on January 21, 1981, Assistant Roadmaster W. D. Lagan was informed that a truck owned by the employer was in the ditch along Highway 157 near Madison, Illinois. Mr. Lagan went out to investigate and observed that the truck was tipped on the side of the road and that Machine Operator Kalfas was asleep in the truck. Mr. Lagan also observed that there were two bottles of alcoholic beverages at the scene, one in the cab of the truck and one outside the truck. Mr. Lagan then proceeded to the Collinsville, Illinois, police station where he found the Claimant. At the time Mr. Lagan observed that there was an odor of alcohol on the Claimant's breath and that he was shaky and red eyed. He concluded that the Claimant was under the influence of alcohol. They also direct attention to Railroad Police Captain Greening who also observed the Claimant at the police station and observed that the Claimant had a strong odor of alcohol on his breath, was red eyed and shaky. They also note that in questioning subsequent to the incident, Mr. Kalfas told the two Company police officers that he and the Claimant had been drinking beer from approximately 9 p.m. to 2 a.m. The Claimant was also questioned and admitted that he had been drinking.

In reviewing the evidence contained in the transcript of the hearing, it is the Board's conclusion that there is substantial evidence of both the Carrier's findings. Although the Claimant denies having consumed any alcohol on the night in question, there is more evidence in the record to conclude that he had been consuming alcoholic beverages. It is not the Board's prerogative, duty, or privilege to resolve conflicts in evidence so long as they are supported by substantial evidence. In this case, the Carrier's hearing officer resolved the conflicts in evidence in favor of the Carrier witnesses and it is concluded that there is substantial evidence to support the hearing officer's determination. There was no evidence produced at

the hearing which would lead to the hearing officer to disbelieve the observations of the Carrier's police officer or their testimony that the Claimant had admitted he had been drinking or that employe Kalfas had admitted that he and the Claimant had been drinking.

Regarding the appropriateness of the discipline, the Board notes that the Claimant was reinstated to service on May 20, 1982. The consumption of alcoholic beverages while operating company equipment is an extremely serious offense one for which discharge is held to be appropriate. In this respect, it is the Board's conclusion that the period of suspension was not arbitrary, capricious, or discriminatory.

AWARD

Claim denied.

Gil Vernon, Chairman

J. D. Crawford, Carrier Member

H. G. Harper, Employe Member

Date: Feb. 15, 1983