

PUBLIC LAW BOARD NO. 4104

Case No. 41

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way
Employees
vs.
Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that

1. The dismissal of Machine Operator T.L. Vincent for alleged violation of Rule G was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (System File Reg. Gang/Gr GMWA 85-4-16).

2. The Claimant shall be reinstated with seniority and all other benefits unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, Machine Operator, T.L. Vincent , was dismissed for violation of Rule G. On November 11, 1984 Claimant was found guilty of being under the influence of alcohol while on Carrier's property.

Claimant was found by Special Agent Banning in the first floor rest room of the North Kansas City Hump Tower. At that time, Special Agent Banning and Trainmaster L.E. Freeman detected the odor of alcohol, slurred speech along with statements from Claimant admitting that he had drank the night before. Claimant was withheld from service and was scheduled for an investigation on November 19, 1984. As a result, Claimant was dismissed from service on December 17, 1984.

The Organization timely appealed Carrier's decision. Carrier rejected the appeal. Thereafter, the Organization advanced the claim to this Board for adjudication.

The Organization contends that a different Carrier Officer responded to the initial claim than the Officer to whom the

Organization had directed that claim. It argues that an appeal letter was sent to Superintendent W. Macormic and response was made by Chief Engineer Leeper. In the Organization's view, a response was not received by W. Macormic within the time limits of Rule 42, thereby violating that rule. Therefore, it asks that the claim be sustained on procedural grounds alone.

As to the merits, the Organization asserts that Claimant had used cough medicine that morning which may have contained a degree of alcoholic content; or the alcoholic odor could have been present since he drank 4-5 beers the night before. The Organization argues that Claimant travelled to North Kansas City Yard on his scheduled rest day to obtain transportation for the future work weeks. Since he had to wait 4 hours for an outbound train, he went to the Hump Tower janitor room and fell asleep. It states that he was off duty and that he did not consume or possess any alcoholic beverages on Carrier's property. It further alleges that the odor of alcohol on Claimant's breath is not sufficient evidence to establish that Claimant was under the influence of alcohol. Additionally, it states that Carrier did not request Claimant to submit to any type of blood/alcohol test for the purpose of determining whether he was under the influence of alcohol. For all of the above reasons, the Organization asks that the claim be sustained.

Carrier, on the other hand, asserts that it did not violate the Agreement. Assistant General Chairman, P.S. Swanson, submitted an appeal to Superintendent, W. Macormic, on February 6, 1985. On March 15, 1985, Chief Engineer, J.A. Leeper, denied the appeal.

It contends that Rule 42(A) requires that "the Company" shall respond within sixty (60) days. Since the time limits were correctly applied, and the rule does not specify the individual who must respond to the claim, it avers that the rule was not violated.

As to the merits, Carrier argues that the fact that Claimant was off duty on the date of the incident is not determinant in this case. It contends that Rule G applies to any employee on company property regardless of his status. It maintains that the testimony of two Carrier witnesses observed the following characteristics of Claimant - odor of alcohol, slurred speech and his own admission that he had been drinking the prior evening. It states that the testimony of the two witnesses is clear and convincing and supported the discipline imposed. Carrier avers that Claimant is not required to submit to an alcohol test; statements of Claimant to the two witnesses revealed that he would test positive if he took such a test. It argues that the observations of the two witnesses and Claimant's own admission, supports the charges of being under the influence of alcohol. For the foregoing reasons, it asks that the claim be denied.

A careful review of the transcript of the investigation reveals that the procedural argument raised by the Organization has no merit. Rule 42(A) of the Agreement set forth the appeal procedure in discipline cases, such as the one before us. According to that rule, "...the Company shall, within sixty (60) days from the date same is filed, notify whoever filed in writing of the reasons for such disallowance." The language does not

restrict Carrier as to the officer that responds; the denial from the Chief Engineer is a notification from the Carrier.

As to the merits of the claim, the presence of Claimant on Carrier's property renders him subject to Carrier's rules. As such, the argument of the Organization that Claimant was off duty does not apply in this case. All Carrier witnesses testified to the fact that Claimant was observed under the influence of alcohol. It is well known that in cases of Rule G, laymen are competent to testify as to outward manifestations, physical actions and activities, and conclusions of intoxication. We can not ignore the testimony of the Carrier officials as it related to a violation of Rule G. Substantial and credible evidence was presented at the investigation, including Claimant's own statement, to support the charges against him.

We will not disturb the penalty unless Carrier's decision was so arbitrary, capricious or discriminatory or unreasonable. Such is not so in this case. Accordingly, the claim must be denied.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

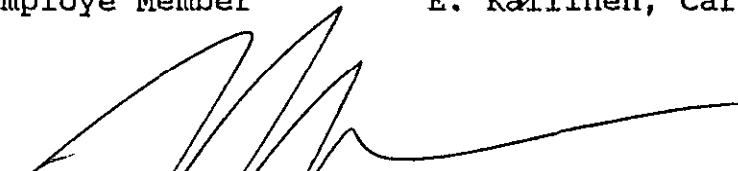
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD: Claim denied.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

1/20/96