

PUBLIC LAW BOARD NO. 4104

Case No. 5

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

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

1. The dismissal of Section Laborers M.D. Douglas and S.A. Knotts for alleged violation of Rule 565 was arbitrary, capricious and on the basis of unproven charges (System Files 3 Gr MWA 82-12-38 and 3 Gr MWA 82-12-28).
2. The claimants shall be reinstated to service with seniority and all other benefits unimpaired, their records cleared of the charge leveled against them and they shall be compensated for all wage loss suffered."

OPINION OF BOARD: By letter dated August 6, 1982, Claimants were ordered to appear for an investigation to determine their responsibility in connection with their alleged violation of Rule 565 concerning an incident at the "Seventh Ward Tap" on that date. The investigation was held on August 13, 1982. Thereafter, Claimants were dismissed from Carrier's service.

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

The Organization contends that Claimants were not afforded a fair hearing. It points out that the Hearing Officer did not permit its representative to ask certain questions deemed essential by him. In the Organization's view, this constituted reversible error warranting sustaining the claim.

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On its merits, the Organization argues that no substantial evidence exists by which Claimants could have been found guilty of violating Rule 515. At most it suggests, beer was found on the table at which Claimants and other employees sat. However, the Organization stresses, no Carrier agent smelled either Claimant's breath or otherwise ascertained that Claimants had consumed alcohol or were under its influence where the agents entered the bar.

Finally, the Organization points out that the other employees involved in this dispute were restored to service, while Claimants were not. Thus, it submits, Carrier engaged in disparate treatment under the facts of this case. Therefore, the Organization asks that the claim be sustained and that Claimants be restored to service with full back pay and benefits.

Carrier, on the other hand, maintains that Claimants were properly dismissed. It insists that its agents specifically testified that each individual had a beer in front of him (except for one seated in a vehicle outside the bar) when they entered the establishment. Furthermore, Carrier notes, the Agents also testified that they smelled alcohol at Claimants' table. In Carrier's view, then, the conclusion is inescapable that Claimants violated Rule 565 under the facts of this case.

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Furthermore, Carrier asserts that it is not guilty of disparate treatment. It contends that certain individuals were offered reinstatement on a leniency basis provided they agreed to enroll in Carrier's Employee Assistance Program and to other related conditions. Claimants, Carrier insists, did not so agree thereby rendering meaningless any claim of disparate treatment.

Finally, Carrier points out that the claim was not advanced to this Board until some three years after Carrier's highest designated officer rejected the Organization's appeal. Therefore, Carrier argues that the claim must be rejected on this basis alone, as well as on its merits.

After reviewing the record evidence, this Board is convinced that the claim must be sustained in part. Rule 565 prohibits the possession, use and being under the influence of alcoholic beverages. However, even crediting the Hearing Officer's findings of fact does not lead to the conclusion that Claimants used or were under the influence of alcohol on the disputed day. No Carrier agent saw Claimants consume beer. No sobriety test was conducted. Nothing in the record suggests that Claimants' speech or gait was impaired. The only evidence that approaches a finding of consumption is the following interchange:

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Tr.P.16:

Questions by: L.W. Pendergrass
Answers by: M.L. Havelock

Q. Of the other men that were in the Seventh Ward at that time could you smell any alcoholic beverages on their breath?

A. Yes sir, faintly.

Q. On all of them or individually, certain individuals or what?

A. On all as a group.

Thus, at most, there was a faint smell of alcohol "on all as a group:." Clearly, this evidence does not support a finding that Claimants consumed alcohol. Three or four other employees were seated at the table. They could easily have consumed the alcohol which produced the faint, alcohol smell. As such, the record is devoid of substantial evidence to support a finding of consumption or being under the influence of alcohol on the day in question.

Under these circumstances, Claimants are entitled to restoration to service. However, this Board is equally convinced that no back pay is warranted. Carrier agents tested that Claimants had a beer in front of them. As such, they were in possession of alcohol in violation of Rule 565.

This violation is serious. Carriers have a right to expect its employees to neither consume nor possess alcoholic beverages during their tours of duty. Safety considerations make Rule 565 an important rule which must be strictly observed. Thus, while Claimants should be reinstated, no back pay is justified.

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Finally, we note Carrier's contention that the Organization excessively delayed the appeal of the claim to this Board. Since we have not ordered any back pay, Carrier has not been prejudiced by this delay. Nonetheless, we remind the Organization that such practices are not condoned and that future similar occurrences may lead to dismissal of otherwise valid claims. However, and for the foregoing reasons, the claim is sustained to the extent indicated in this Opinion.*

*In light of this finding, the Organization's procedural arguments need not be decided since the disputed questions do not relate to our determination.

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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

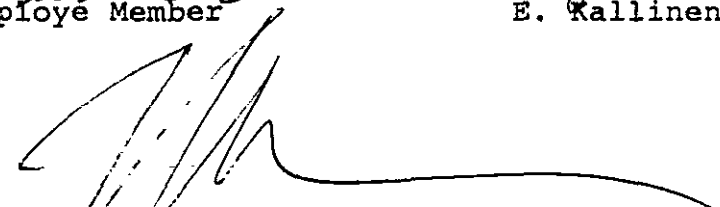
That the Agreement was violated.

AWARD:

Claim sustained to the extent indicated in the Opinion.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

Feb. 7, 1989