

PUBLIC LAW BOARD NO. 4104

Case No. 8

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 Foreman R.L. Arnold for alleged violation of General Rule "G" and Rule 702 of the Maintenance of Way Department was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement. (System File 6Gr MWA 82-12-2C).
2. The Claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: By letter dated July 16, 1982, Claimant was ordered to appear for an investigation to determine his responsibility concerning his "alleged possession of alcoholic beverages and your alleged being under the influence of alcoholic beverages on duty on the Company property...on the evening of July 14, 1982." The investigation was held on July 23, 1982. Carrier dismissed Claimant from its service August 18, 1982.

The Organization timely appealed Carrier's action. Carrier rejected the appeal. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that Carrier violated Rule 40(c) by failing to provide Claimant with five days' written notice

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of the investigation. Thus, the Organization submits that the claim should be dismissed on this basis alone.

As to the merits, the Organization insists that Carrier has not met its burden of establishing Claimant's guilt. It notes that no individual saw Claimant consume any alcoholic beverage during the incident in question. In fact, the Organization asserts, Claimant simply was ill when seen in the bed of the truck and was not under the influence of any alcoholic beverage. Thus, the Organization contended that Carrier has not met its burden of demonstrating Claimant's guilt. Therefore, it asks that the claim be sustained on its merits as well.

Carrier urges that Claimant had sufficient notice to arrange for representation and witnesses at his investigation. As to the merits, Carrier argues the testimony of its witnesses conclusively establishes that he was under the influence of alcohol on July 14, 1982. Therefore, Carrier seeks dismissal of the claim in its entirety.

The record evidence convinces us that the claim must be rejected. While Claimant did not receive his five day written notice, he had sufficient advance notice to secure representation and a witness for the investigation. As such, Claimant was not prejudiced by Carrier's technical violation of Rule 40(c).

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This does not mean Carrier is always free to give less than five days' notice of an investigation. It means simply that under the facts of this case, Carrier's error does not warrant sustaining the claim. (See Third Division Award No. 25451, for a similar finding).

As to the merits, Carrier witnesses testified at the investigation that they observed Claimant in the prone position in the bed of the truck, his breath smelling of alcohol and empty beer cans at his side. Moreover, they testified, Claimant could not be roused as they tried to wake him. Given this testimony, which Carrier's Trial Officer chose to credit, the record contains overwhelming evidence that Claimant was under the influence of alcohol while on duty and on Carrier premises. As such, the penalty of discharge is clearly reasonable for serious misconduct such as this. Accordingly, and for the foregoing reasons, the claim must be denied.

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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;

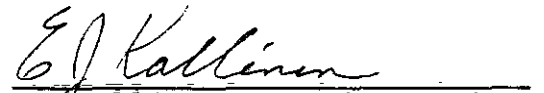
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and


That the Agreement was not violated.

AWARD:

Claim denied.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

Feb. 7, 1989