

Public Law Board No. 4161

Parties to Dispute

| | | |
|-------------------------------|---|--------------|
| Brotherhood of Maintenance of |) | |
| Way Employees |) | Case No. 30 |
| |) | |
| vs |) | Award No. 34 |
| |) | |
| Burlington Northern Railroad |) | |

STATEMENT OF CLAIM

1. Claim of the Brotherhood that the dismissal of Laborers D. B. Bowers and J. C. Maruska for alleged violation of Rule 564 was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges, an abuse of the Carrier's discretion and in violation of the Agreement.
2. The Claimants shall be reinstated to service with seniority and all other rights and benefits unimpaired, their records cleared of the charge leveled against them and they shall be compensated for all wage loss suffered.

FINDINGS

On May 24, 1983 the Carrier notified the two Claimants to this case, and two other fellow employees, to attend an investigation to determine facts, and place responsibility if any, in connection with their "... alleged engaging in an altercation on May 18, 1983 at about 1:45 AM at Junction City, Oregon". On May 26, 1983 the following article appeared in the town's newspaper, the Junction City Times. This article is quoted in full here for the record:

Four Burlington Northern Railroad construction crew members were arrested early last Wednesday morning after the bar manager at the Pumphouse Tavern, 160 West 6th, said they assaulted him.

Arrested by Junction City police, with help from the Lane... County Sheriff's departments were: John Maruska, 28, Aberdeen, Washington; David Bowers, 25, Vancouver, Washington; Ronald Tift, 28, Rainier, Washington; and William B. Young, 23, Ridgefield, Washington.

Public Law Board No. 4161 (Award No. 34; Case No. 30)

They were charged with striking and kicking Richard A. Holmes after he asked one of the four to leave the tavern about 1:45 AM.

Holmes told police he had just made his last call for drinks and said no more would be served when one of the men reached across the bar and poured a drink. When Holmes tried to escort the man out of the bar, the other three jumped in and he told police he was struck and kicked several times.

Police officer Mike O'Brien responded immediately to a call from a tavern employee and saw the four rounding the corner at Greenwood Street. One of the four fled, but later returned and all were arrested.

The investigation was held on June 2, 1983. On June 30, 1983 all four employees who were charged received notice that they were found in violation of Rule 564 of the Burlington Northern Safety and General Rules of 1981. The notices were sent separately to each employee, and all four were dismissed from service. The Rule at bar reads as follows:

Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who conduct themselves in such a manner that the Railroad will be subjected to criticism and the loss of goodwill.

The disciplines levied against these employees were subsequently appealed by the Organization up to and including the highest Carrier officer designated to hear such before this claim was docketed before this Public Law Board for final adjudication. When appealing these disciplines the Organization appealed the dismissal of the two instant Claimants under one case, and the dismissal of the other two Claimants under another. These cases have been numbered Cases 30 and 31 before this Public Law Board No. 4161. This Board finds that the Carrier and the Employees involved in this dispute, and that involving Case 31 are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934 and that this Board has jurisdiction over both disputes.

Public Law Board No. 4161 (Award No. 34; Case No. 30)

Both Claimants to this case were assigned to the Carrier's Tie Gang No. 7 which was headquartered at Junction City, Oregon at the time that the alleged Rule violation took place. They held assignment as Laborers. According to testimony at the investigation by the Assistant Roadmaster on Tie Gang No. 7 it is a mobile gang and most of the members live in outfit cars. On May 17 & 18, 1983 the outfit cars were parked at Junction City, Oregon where the Carrier also has a depot. According to this witness the Carrier does business in this town which has a population of about 3,000. On the date of the incident, there were some 48 employees assigned to Tie Gang No. 7 and all four Claimants to this Case and to Case No. 31 were living in the outfit cars. According to testimony by the Manager of Regional Gangs of the Carrier's Seattle-Portland Region each "...railroad employee represent(s) the railroad company" whether on or off duty. Hours of service on the day in question for the Claimants was 7:30 AM - 4:00 PM. The alleged incident, as noted above, took place at 1:45 AM. Testimony by the Carrier's Division Special Agent, who investigated the incidents which allegedly occurred on May 18, 1983 in Junction City corroborated that of the Manager of Regional Gangs relative to the role of the Carrier's employees while not covering their assignments. According to this witness, each "...BN employee (is) a representative of the company" and since the Carrier is a service-oriented business its business is affected by "...its public image". The investigation conducted by this Carrier officer, upon request by the Regional Director of the Carrier's Police and Special Forces at Seattle, Washington revealed the following, in pertinent part:

...Investigation revealed one of our four employees as being ejected from the Pump House Bar at Junction City, Oregon by...(the)...manager of the (bar)..at about 1:45 AM. ...When (the manager) opened the door to eject the man who reached across the bar this man shoved (the manager) outside and started beating him. The other three came out of the bar and started beating (the manager) also.

According to information provided to the Special Agent, the employee whom the manager was trying to eject from the tavern was identified as David

Public Law Board No. 4161 (Award No. 34; Case No. 30)

Bowers, one of the Claimants to the instant case. The preliminary report by the Special Agent, after consultation with the Junction City Police Department also states the following:

...The police officer advised that upon his arrival the men tried to leave the area and were very belligerent, hostile and appeared to be intoxicated. The police further advised that Mr. Bowers tried to fake an epilepsy attack. They called for a Rescue truck. After the medical personnel checked Mr. Bowers he and the others were transported to Junction City Police Department....the extent of the (manager's) injuries is cuts and bruises about the head...

This investigation conducted by the Special Agent is corroborated by the police report itself of the incident which contains additional details which are quoted here for the record. This "incident report" was filed by a certain Officer O'Brien of the Junction City Police Department. This report states:

(On May 18, 1983) I was informed by the dispatcher of fight in progress in front of the Pump House. I responded and upon my arrival I observed four subjects crossing 6th Avenue and heading south on Greenwood Street. I heard a male say, 'There they go!' The male was later identified as (the manager of the tavern). I pursued after the subjects. I stopped three of the males on the west side of Greenwood Street. The remaining subject was walking on the east side of Greenwood Street. I yelled for him to stop twice. On the order to stop the subject later identified as Tift started running south on Greenwood Street turning east on 5th Avenue. I was then confronted by the remaining three subjects. They were all very belligerent, hostile, verbally abusive and appeared to be somewhat intoxicated.

The report then goes on to detail how the manager claimed that Claimant Bowers was the one who "...hit (him) first", how Claimant Bowers then hit his head on the police car while trying to enter it, how he emerged again from the car, and then apparently feigned an epilepsy attack, how Claimant "...Maruska got very verbal and threatening" and how Claimant "Tift returned (to near where the officer was dealing with Claimant Bowers) and started yelling". This incident report also states that the manager informed the officer that when "...Bowers had knocked (the manager) down the other three had started to strike and possibly hi(t) (him)". Lastly,

Public Law Board No. 4161 (Award No. 34; Case No. 30)

from an evidentiary point of view the report states that "... (w)hen talking to Bowers, Tift and Maruska I could smell a moderate to strong odor of some type of alcoholic beverage on their breaths as they spoke. Young had a light odor of alcohol on his breath and was the most cooperative of the four (who) had been arrested". The report concludes, for purposes of this Board, with the following:

None of the four stated that they had even touched (the manager), but when I informed them that (the manager) had been beaten and had a scalp abrasion, they all became quiet and didn't say anything else pertaining to the assault.

The Special Agent also obtained a medical report on the manager of the tavern which corroborated his own statement for the record wherein he states that he received a cut on his head and various bruises on his body and face as a result of the incident.

At the investigation both Claimants Bowers and Maruska (*) deny that they physically assaulted the manager of the tavern in any manner. Claimant Bowers testified that he did, however, put the manager "...to his knees" after the manager "...struck (him) once" after both of them left the tavern after Claimant Bowers had helped himself to a beer across the counter. Claimant Bowers also testified that the manager must have hurt himself: "... (the manager) might have hurt himself", as this Claimant put it on p. 36 of the transcript. He also stated that he did not agree with the police report: "... (it was) all a fabricated lie"; that he did not fake an epileptic seizure, and that he did not remember being treated by fire personnel at the scene. Claimant Bowers testified that he felt justified in helping himself at the tavern because the woman bartender had permitted him to do that that evening. Likewise,

(*) In the record this Claimant also refers to himself as John Craig.

Public Law Board No. 4161 (Award No. 34; Case No. 30)

Claimant Maruska testified that he neither struck nor kicked anyone that early morning, nor did he see anyone strike or kick anyone.

On the face of it the record contains considerable substantial evidence to warrant the conclusion that the Claimants are guilty of the Rule violation at bar. Substantial evidence has been defined as such "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). There are evident credibility issues here when one compares the documentary and testimonial evidence presented by the Carrier with that of the two Claimants. A close reading of their testimony permits the conclusion that both take the position that they neither did any bodily harm to the manager and, to a great extent, do not have ready recall to exactly what did happen. The latter appears reasonable since Claimant Maruska candidly testified that he was "...drunk" and "...intoxicated" at the time. From evidence presented by the police report it appears reasonable to conclude that both Claimants were heavily under the influence at the time. None of the testimony by these two Claimants explain exactly how the manager did get hurt to the extent that he did. Claimant Bowers' total denial of the veracity of the police report is particularly damaging to his case. Such must reasonably be interpreted by the Board as little other than an exercise in self-interest. This Board, by long established precedent, cannot be trier of fact when confronted with such conflict of evidence as is found in this record (Third Division 10791, 16281, 21238). So long as the evidence presented by the Carrier is not so clearly devoid of probity that its acceptance would be per se arbitrary and capricious this Board may not substitute its judgment in case of this type.

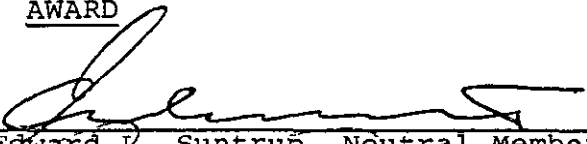
The Claimants present two last points of evidence which must be addressed by the Board. The first is testimony by a witness, Mr. Tim Lester who was a fellow worker at the tavern at the time of the incident on that early morning on May 18, 1983. The Board has closely studied the testimony by this witness. On evidentiary grounds his testimony must be dismissed as inconsistent and contradictory. On the one hand he testified that the manager "...evidently took a swing" at Claimant Bowers when the two left the tavern, but later he testified that he could not see anything

Public Law Board No. 4161 (Award No. 34; Case No. 30)

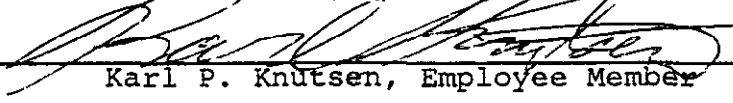
anyway because his "...view was blocked right there at the door". This witness could not consistently testify whether Claimants Tift and Young (Claimants involved in the alleged altercation who are Claimants to Case No. 31) left the tavern before him on the night in question, or after him after Claimant Bowers and the manager went out the front door. Secondly, the Board is presented with information that the Junction City Municipal court later dismissed charges against Mr. Maruska in October of 1983 and may have done the same thing for Mr. Bowers if he had appeared for trial. During that month the court issued a warrant for the arrest of the latter. The Board must underline that courts use different criteria of evidence than arbitral forums such as this one. The Board must also underline that the court in question had under scrutiny a different issue than that at bar in this case. The issue here is whether the Claimants were in violation of Rule 564. Since Mr. Bowers was not acquitted, the Board need consider here only the case of Mr. Maruska. By his own admission he was inebriated on the night in question. By his own admission he could not remember many of the incidents which took place. By evidence presented by the Carrier he was verbal and threatening. The manager states that he was one of those who hurt him. Whether this Claimant was acquitted or not by a court, therefore, there is sufficient evidence to warrant the conclusion that he was in violation of the Rule in question. On merits, this claim cannot be sustained.

AWARD

Claim denied.


Edward L. Suntrup, Neutral Member


B. W. Potter, Carrier Member


Karl P. Knutsen, Employee Member

Date:  December 11, 1987