

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of	)	
Way Employees	)	Case No. 31
	)	
vs	)	Award No. 35
	)	
Burlington Northern Railroad	)	

STATEMENT OF CLAIM

1. Claim of the Brotherhood that the dismissal of Laborers R. Tift and B. Young 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

This is a companion case to Case No. 30 which has already been heard and ruled upon by this Board. The evidence and conclusions applicable to Case No. 30 apply here by reference. The two Claimants to this case appeared at the same investigation on June 2, 1983 as the Claimants to Case No. 30 and the same transcript of the investigation is presented as evidence in both cases. In this case, as in Case No. 30 the testimony given by witness Tim Lester is found wanting for the same reasons presented in Case No. 30. The two Claimants to this case, as Claimant Maruska in case No. 30, were acquitted of assault charges by the Junction City (Oregon) municipal court. Such dismissal of charges is not determinative of conclusions arrived at by this Board since the issues at bar, and the evidentiary criteria used by the court and this Board, are different. The evidentiary criterion used by this Board, as in all arbitral forums in the railroad industry, is that of substantial evidence.

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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 305 197, 229). The issue here, as found in the Statement of Claim, is whether the Claimants were in violation of Rule 564 of the Burlington Northern Safety and General Rules of 1981 because of the alleged involvement on their part in the incidents which took place in Junction City, Oregon in the early morning hours of May 18, 1983. This Rule states:

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 record before the Board shows that the manager of the Pumphouse Tavern located in Junction City, Oregon received "...cuts and bruises about the head" at about 1:45 AM on the morning of May 18, 1983. According to information of record provided by this tavern manager he had asked one of the Carrier's employees to leave the premisses of the tavern after the latter had helped himself to a beer across the counter. This employee was Claimant Bowers who was one of the Claimants to Case No. 30 before this Board. After Claimant Bowers and the manager of the tavern vacated the bar through the front door the manager claimed that Claimant Bowers hurt him, and that three other Carrier employees then came outside the tavern and struck and kicked him. Two of those other employees are Claimants to this case No. 31. The evidence of record provided by the Carrier also states that all four of the employees were "...belligerent, hostile and verbally abusive" to the police after the latter had been called and after the police arrived on the scene. According to a report filed by the Carrier's Special Agent who had been called to investigate the incident after the fact, and who had interviewed the local police,

"...the other 3 (employees besides Bowers, who include the instant Claimants) came out of the bar and started beating (the manager) also..." (emphasis added)

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The report filed by this Special Agent also states the following:

"...the men tried to leave the area and were very belligerent, hostile and appeared to be intoxicated..."  
(emphasis added)

"...The men" here indisputably refers to the three employees in question who include the two Claimants to this case. The police report filed by the town's police officer O'Brien states that after he arrived on the scene, he

"...was then confronted by the remaining three subjects (including the instant Claimants). They were all very belligerent, hostile, verbally abusive and appeared to be somewhat intoxicated..." (emphasis added).

There is no doubt from the evidence of record that the Claimants had been drinking rather heavily and were intoxicated. The police officer in his report stated that he could smell "...a moderate to strong odor of some type of alcoholic beverage on (all of) the" (the four employees). That officer did qualify this statement for one of the four employees who is one of the Claimants to this case. The officer stated that Claimant Young only had a "...light odor of alcohol", as far as he could determine, "on his breath". This Claimant, however, clarifies his condition by his own testimony at the investigation. He stated that he was "...somewhat intoxicated, maybe".

The two Claimants to this case, and the two Claimants to Case No. 30 all deny, at the investigation, that they hit or in any way physically abused the manager of the tavern on that early morning of May 18, 1983. Yet the fact remains that this person sustained cuts and bruises around the head, and he claims, bruises on other parts of his body. The manager provides a statement to the effect that all four employees contributed to his condition. There is an obvious conflict of evidence here. This Board has underlined in its conclusions to Case No. 30 that it cannot be a trier of fact in its appellate role as mandated by the Railway Labor Act so long as evidence provided by a Carrier is not clearly devoid of credibility (See Third Division 10791, 16281, 21238 inter alia for precedent). The same conclusion must hold in this case. There is simply nothing in the record before the Board to warrant

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the conclusion that the manager of the tavern would have implicated the Claimants if they had not been involved in the incident at bar. And the fact remains that the manager was hurt. Claimant Bowers, in Case No. 30 before this Board, explained that the manager "...might have hurt himself". The Board finds such explanation less than credible.

Rule 564, cited in the foregoing, addresses not only the issue of whether employees of the railroad are careless of the safety of themselves or others, but it also addresses the issue of whether employees are "...quarrelsome, or otherwise vicious". There is substantial evidence of record to show, from the report by the Special Agent, and from the police report, that all four of the employees in question were "...quarrelsome...belligerent" and hostile. Again, the Claimants to this case, as those to Case No. 30, simply deny this. Again, when confronted with this conflict of evidence the Board must resort to the evidentiary criterion cited in the foregoing. If the Claimants are all correct, the Special Agent, and the local police officer, simply fabricated their reports. Nothing in the record supports such conclusion.

A close study of the transcript of investigation, and of the full record before the Board shows that the Claimants' recall of the events of the early morning of May 18, 1983 must be put in the context of the fact that all were considerably inebriated. That is never really disputed. Even Mr. Young, who may have been the least inebriated, states "...maybe" he was "somewhat" inebriated. It is reasonable to conclude that whatever happened on that May morning is related to that fact. The "facts" of record are the result of statements by the victim, and the police. If the Claimants deny these facts, and they do, it is not unreasonable to conclude that their distorted view was also the result of their states of inebriation. That is an unfortunate conclusion from the Claimants' point of view, but no other is warranted from the record. On merits the claim cannot be sustained.

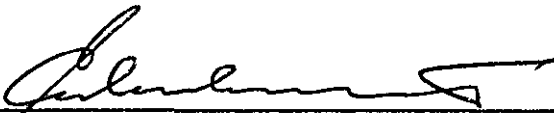
A procedural objection entered by the Organization alleges that the investigation was not fair and impartial because non-employees of the railroad who presented evidence for the record were not present at the investigation. The National Railroad Adjustment Board has precedentially

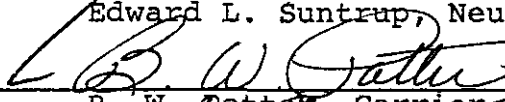
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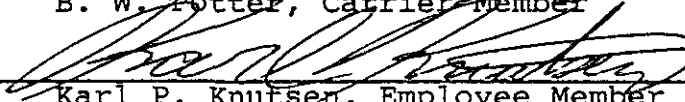
ruled that such persons need not be present in order that depositions or documents presented by them for the record retain evidentiary status (Second Division 6332; Third Division 16308 inter alia). This objection by the Organization is respectfully dismissed by the Board.

AWARD

Claim denied.

  
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Edward L. Suntrup, Neutral Member

  
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B. W. Potter, Carrier Member

  
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Karl P. Knutsen, Employee Member

Date: December 11, 1987