Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Case 7/Award 7**
	)	
Burlington Northern Santa Fe	)	

Statement of Claim

1. The dismissal of Foreman D. J. Claus for alleged violation of Rules 1.5, 1.6 and 1.7 of the Maintenance of Way Operating Rules on October 8, 1997 was arbitrary, capricious and it was based on unproven charges. The dismissal was also in violation of the Agreement.

2. Relief requested is that the Claimant be allowed to place himself in the EAP program and that the be given the opportunity as other employees to return to service after successfully completing same. Relief requested is also that the Claimant be paid all losses suffered which he would not have incurred had he been allowed to have placed himself in the EAP.

Background

The Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with allegedly striking another employee. This incident took place at approximately 6:15 AM on October 8, 1997 in the vicinity of Aurora, Nebraska. The Claimant was also charged with violation of Maintenance of Way Operating Rules at or near St. Michael, Nebraska at approximately 1:00 PM on that same date. The investigation was held on November 17, 1997. Thereafter on December 11, 1997 the Claimant was advised that he had been found guilty as charged and he was discharged from service. This discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to hear such. Absent

settlement of the claim on property it was docketed before this Board for final adjudication.

Discussion & Findings

There are two issues at bar in this case. The first deals with the alleged striking of a fellow worker by the Claimant on the morning of October 8, 1997. The second involves the discovery of alcoholic beverages and illegal drugs in the Claimant's company truck on that same day.

The Claimant is a member of the craft with 23 years seniority.[1] On October 8, 1997 he was assigned to supervise gang No. 29 which was doing some resurfacing work. This gang, which was working in conjunction with a track undercutting gang, had three (3) Machine Operators assigned to it. The Claimant was Foremen of the gang and he reported to two Roadmasters, one of whom testified at the investigation.

According to the record Machine Operator Valderaz arrived at work at about 5:45 A.M. on the morning of October 8, 1997 and started his machine. He was supposed to start work at 6:00 AM under the supervision of the Claimant. According to testimony by Mr. Valderaz the Claimant had not arrived at work by 6:00 A.M. So Mr. Valderaz and a fellow worker left at approximately 6:05 A.M. to go to the rest room at a near-by depot and Valderaz returned at 6:15 A.M. By that time the Claimant, who had arrived at the site, was in Valderaz's machine and was moving it down the track. Valderaz testified that he jumped up on his machine and asked where

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[1]In its submission to this case the Organization states that the Claimant had 22 (or 23 depending on where one reads) years of "...blemish free service for this Carrier...". As the Board will note later in this Award, this is incorrect. The Claimant had, in fact, according to the standards of this industry, a fairly extensive record of discipline prior to the discharge involved in this case. See Carrier's Exhibit 8. The appropriateness of including such record in a case such as the instant one has been well established by arbitral precedent, not as a matter relating to merits, but as a matter related to the appropriateness of discipline assessed in the event of a guilty ruling. See numerous Awards on this issue such as Second Division 5790, 6632; Third Division 21043, 22320 inter alia.

the Claimant wanted him to set his machine. There was an exchange of words after the Claimant asked Valdarez why he was not at work at 6:00 A.M. as instructed. Valdarez told the Claimant that he had been at work at 6:00 A.M. as he had been instructed but that the Claimant was not there when it was time to start so Valdarez stated that he had gone to the bathroom. According to his own testimony Valdarez then asked the Claimant: "...where in the fuck were you at... (6:00 A.M.)? The Claimant answered that Valdarez was not to worry about where he was. According to Valdarez the next thing he knew his baseball hat had been knocked off. Valdarez testified that the Claimant had struck him. According to Valdarez: "there was a strike to my face like a slap". Thereafter Valdarez called both of the Roadmasters and explained what had happened. In response to whether his comment to the Claimant had upset him Valdarez testified that the Claimant had already been upset before he made the comment to him, apparently, because he thought that Valdarez was not at work on time. According to testimony by the Claimant Mr. Valdarez continued to be argumentative with him about why he had not been there also at 6:00 A.M. "...so (he) just went to clip the bill of his hat just to get his attention..." . The Claimant stated that he was irritated by the actions of Mr. Valdarez. He testified he did knock off Mr. Valdarez's hat and that Mr. Valdarez was "...struck accidently...".

The Board will deal with this issue first. The record supports that the Claimant went further than a supervisor is allowed in dealing with a subordinate. First of all, it should have been obvious to the Claimant that Valdarez had been at the site before he arrived, shortly after 6:00 A.M., because Valdarez's machine had already been warmed up. Valdarez could not have started his machine if he had not been at work. Secondly, the Claimant acted improperly in physically laying his hands on Valdarez, even if the latter was irritating him. If Valdarez was behavior

insubordinate or disrespectfully to the Claimant he should have dealt with this as a disciplinary matter. The Claimant had no authority to physically hit Valdarez. On merits, the Claimant is guilty as charged with respect to ill treatment of a subordinate.

The Claimant was driving a company truck on this day which is known as a Danella truck. Later in the day on October 8, 1997 when Roadmaster Crisler was questioning Valdarez about the earlier incident the latter told the Roadmaster that he might want to check the Claimant's company truck for illegal drugs. It is quite possible that Valdarez told the Roadmaster this in retaliation of the Claimant's earlier treatment of Valdarez. But this changes little with respect to this case. Crisler then contacted a Special Agent and both went to see the Claimant and subsequently searched his company truck. In this search both marijuana and a drug known as methamphetamine, or crank, were found. Drug paraphanalia was also found, and a cooler in the truck contained five cans of unopened, iced beer. Law enforcement authorities were contacted and the Claimant was arrested for possession of illegal drugs.

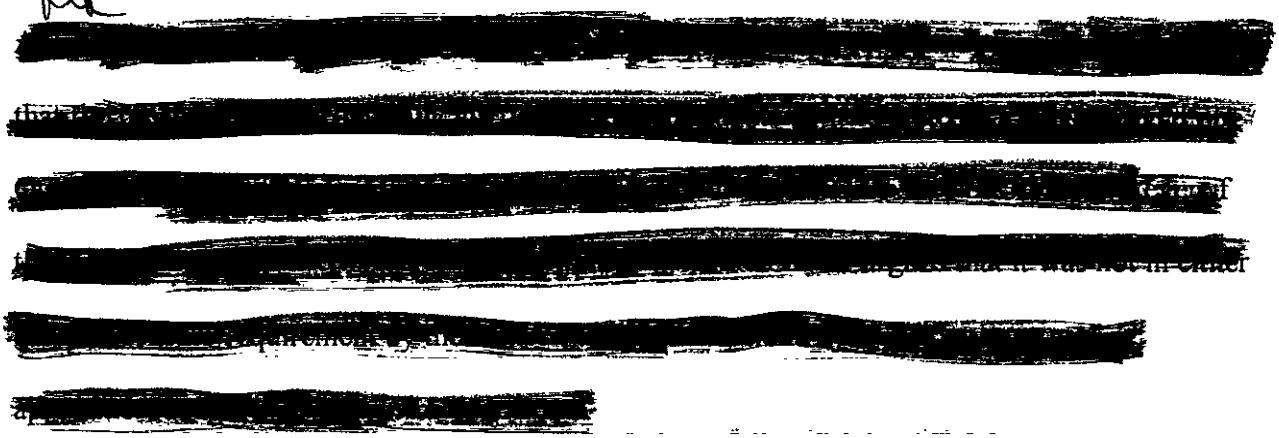
The above facts are not in dispute. The Organization argues, however, that instead of being disciplined for possession of illegal drugs and for possession of alcohol on company property the Claimant should have been permitted to voluntarily enter the Carrier's EAP program as a first time offender in accordance with the Carrier's policy on alcohol and drugs. According to the Organization it was never proven that the Claimant did other than possess illegal drugs and alcohol on company property in a leased company vehicle which he had for his use. It was never proven that he was under the influence of either drugs or alcohol while on duty. The Organization also points out that the Claimant had a recent tragedy in his family and that the death of a daughter in an accident weighed heavily on him and that he mistakenly, but understandably, may

have been seeking some relief in drugs and alcohol. According to the Claimant, at the investigation, he has had an "...empty hollow feeling..." since his daughter's death in an automobile accident. He admitted to using "...marijuana and crank...to help (him) through the initial shock of such a loss...".

In view of the evidence before it the Board cannot do otherwise but conclude that the Claimant was in violation of Rule 1.5. That rule states the following, in pertinent part.

Rule 1.5

The use or possession of alcoholic beverages while on duty or on company property is prohibited...The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property...



On merits, the claim cannot be sustained. There is sufficient evidence to warrant conclusion that the Claimant abused a subordinate, and that he was in violation of the company rule dealing with drugs and alcohol.

The only issue remaining is whether the quantum of discipline levied by the Carrier was appropriate. This Board has no authority to put employees back to work on leniency basis. Such

prerogative is reserved for management.[2] But a Board such as this can scrutinize extenuating circumstances in order to reasonably frame conclusions about whether a lesser discipline than that which has been assessed might be proper. A review of the Claimant's past record warrants conclusion that discharge was not improper in this case in view of the principle of progressive discipline. The Claimant had been discharged once before and then put back to work. He had also received a number of suspensions. The Board is cognizant, however, of the emotional duress which the Claimant was under because of the recent tragedy in his family although the Board cannot conclude that the route the Claimant took to address his feelings was either proper or healthy. Nevertheless, in view of this extenuating circumstance, as well as the length of service which the Claimant has in this industry, the Board will give the Claimant another, and a final, chance to prove his worth to the Carrier. The Claimant shall be put back to work on last chance basis, with seniority unimpaired, but with no back pay for time held out of service. He shall report for service and be subject to all company policies applicable to his return to service.

Award

The claim is sustained only in accordance with the Findings. The Claimant has sixty (60) days from the date of this Award to exercise his right to return to the service of the Carrier under this Award.

Edward D. Suntrup, Neutral Member

Thomas M. Rohling, Carrier Member

Roy C. Robinson, Employee Member

Date: November 11, 1999

[2]On this issue see Public Law Board 1490, Award 4; Public Law Board 2955, Award 1; Public Law Board 3715, Award 21 inter alia.