PUBLIC LAW BOARD NO. 1844

AWARD NO. 30

CASE NO. 34

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. Max W. Schindler was without just and sufficient cause and based upon unproven charges.
(2) Mr. Schindler should be returned to service with all rights unimpaired and paid for all time lost.

OPINION OF BOARD:

At the time this matter arose, Claimant was working as a Machine Operator running a Ballast Regulator on a surfacing crew under the supervision of Track Foreman L. D. Mohnson near Inman, Nebraska, hours of service 8 A.M. to 4:30 P.M. On July 30, 1976 Claimant was running his machine alone some three miles up the track from the rest of the gang. At about 10:45 A.M. Foreman Mohnson came upon the scene and found Claimant asleep at the controls. The machine was still running and smoke was pouring out from the torque converter because the wings of the machine were caught against a crossing and the clutch was burning out. The machine was damaged extensively and cost Carrier several thousand dollars to repair and return to service. The Foreman woke Claimant, turned off the machine and sent Claimant home. Under date of August 3, 1976 Claimant was directed to appear at a formal investigation on August 7, 1976 regarding the following charges.

> Your responsibility for being under the influence of alcoholic beverages and sleeping while subject to duty at M.P. 148.8 located approximately two miles west of Inman, Nebraska, while you were assigned as Ballast Regulator Operator on surfacing crew, assigned various headquarters at approximately 10:45 A.M., Friday, July 30, 1976.

In the meantime, Claimant had enrolled for the treatment of alcoholism in Carrier's Employee Assistance Program. On August 4, 1976 he was admitted to a hospital for the treatment of alcoholism by arrangements of the manager of Carrier's program. The formal investigation was postponed pending Claimant's release from the rehabilitiation program. He was released from the Chemical Dependency Unit on September 14, 1976. The Medical Director of that Unit upon releasing him indicated that Claimant could resume his usual work immediately but recommended that he attend meetings of Alcoholics Anonymous on a regular basis. So far as the record shows Claimant has been in attendance at such meetings.

On September 16, 1976 Claimant wrote to Carrier as follows:

> Dear Sirs:
>
> I am writing you about returning to my job on the railroad. I am a Section Laborer and Ballast Regulator Operator. I returned from the hospital September 14, 1976. I wish to go back to work after the investigation. As you know, I entered the hospital August 4, 1976, in Omaha.
>
> I wish to go back to work as soon as possible. I wish to retain my rights on the railroad. I have 10 children, 4 still at home in school. I wrote earlier that I was dismissed September 14. I promise I'll do the best I can. I have been attending AA meetings regularly and will continue to do so. But I'd like to return back to work now that I've gotten back home.

The investigation was convened on October 1, 1976. At the hearing, Foreman Mohnson testified to the above-described circumstances of his finding Claimant on July 30, 1976 and stated further that he smelled alcohol on Claimant's breath at that time. He also testified that he had spoken to

Claimant briefly at 8 A.M. that morning noticed nothing out of the ordinary in his condition. Claimant testified that he had taken a "nerve pill" before leaving home at approximately 7 A.M. and also admitted drinking a bottle of beer on the way to work in his car at about 7:30 A.M. Claimant admitted to being asleep at the controls of the machine but denied that he was under the influence of alcohol.

The hearing officer then asked Claimant for the record why he was hospitalized for some 30 days after the incident. Claimant responded in words or substance that it was for treatment of alcoholism under a program administered by Carrier. The hearing officer then cross-examined Claimant as follows:

Q. Have you been hospitalized for alcoholism previously?

A. About two or three years ago.

Q. Prior to that time also?

A. I was hospitalized a time or two before that, yes.

Q. Our records seem to indicate that you have been hospitalized approximately once a year for the last six years for treatment of alcoholism, is that correct?

A. Well prior to the two years beyond this I hadn't been hospitalized for the last two years.

Q. Were you hospitalized in 1970?

A. Yes, I think I was.

Q. Also in 1971?

A. Could be, I just really don't remember the dates.

Q. And in 72 and 73 and 74 also our records indicate, would that possibly be correct?

A. That's about right.

Q. Are you now on antabuse?

A. No, I'm not.

Q. Have you been on antabuse before?

A. I was about five or six years ago.

Q. Do you feel that the treatment given you has been effective?

A. This last one, yes.

Q. Did you also believe that the prior treatments were effective?

A. Not as much as here at Ettley's, no. Ettley's, they say is just as good as Hazelden at Minneapolis.

We have examined the evidence in light of the charges against Claimant. In our judgment the record does not show conclusively that he was intoxicated on July 30, 1976. The record does persuasively establish that Claimant is culpable for the events of July 30, 1976. Even viewing that record most favorably to his cause, it shows that he consumed a sedative and a bottle of beer before reporting for duty as a heavy machine operator. Common sense, let alone adherence to Carrier's safety rules, should have told him that such a combination is dangerous and possibly deadly in its sleep-inducing effect. Yet Claimant, after ingesting the medicine and the beer, reported for duty and operated his machine with the predictable result that he fell asleep at the controls. But for the timely arrival of his Foreman he might well have destroyed the machine and himself. For this negligent and irresponsible behavior there is no doubt that discipline was warranted. The question remains, however, whether the ultimate penalty of dismissal from all service is appropriate. For several reasons we conclude that dismissal was an abuse of discretion and unreasonably excessive in the particular facts and circumstances of this case. We are troubled particularly by the way Carrier used Claimant's treatment record for the disease of alcoholism. At our Board hearing Carrier argued that Claimant's efforts at rehabilitation were not relevant to the discipline process. But this

does not square with the fact that hearing officer made those efforts a matter of record. Nor does it jibe with the assertion in Carrier's ex parte submission that Claimant might have been assessed a lesser penalty if this was a single isolated offense, but that dismissal was imposed because the hearing record showed that he was "unable to effect a permanent withdrawal from his problem." Thus the fact that Claimant sought treatment for his drinking problem in Carrier's own program as well as others was used as evidence to support a finding that he was intoxicated on July 30, 1976 and also to justify the imposition of the dismissal penalty.

In the first place, treatment for alcoholism is not probative in any accepted evidentiary sense of whether he was drunk on July 30, 1976, and its use for that purpose is inherently prejudicial. Secondly, a history of rehabilitation efforts is just that and it is not a history of prior discipline. There is no showing on our record that Claimant was ever disciplined for any reason, let alone for intoxication, during his sixteen year history of employment by Carrier. Nor is there any showing that his drinking problem interfered with his work performance during sixteen years of service. Finally, it is unreasonable, counterproductive and absolutely inconsistent with Carrier's avowed principles that discipline should be remedial rather than terminal, whenever possible, to use the fact of an employee's voluntary participation in a Carrier-sponsored rehabilitation program as a basis for increasing the quantum of discipline assessed against him for an offense.

We certainly do not condone Claimant's misconduct on July 30, 1976 but neither can we conclude in the facts of this record that he is liable to dismissal from all service. We hold that Claimant should be restored to service with seniority intact but without any back pay. In thus reducing the discharge to a suspension we admonish Claimant that this may well be

his last chance to prove he can be a responsible and reliable employee of Carrier.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act:

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the penalty imposed was excessive.

AWARD

Claimant is to be reinstated with seniority rights unimpaired but without back pay. Carrier is directed to comply with this Award with thirty (30) days of its issuance.

Dana E. Eischen, Chairman

H. G. Harper, Employee Member

R. W. Schmiege, Carrier Member

Dated: 12/6/78