

PUBLIC LAW BOARD NO. 2206

AWARD NO. 68

CASE NO. 71

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Machine Operator Thomas W. Marcotte, September 25, 1979, was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File T-D-130C)
- (2) Machine Operator Thomas W. Marcotte be paid for all time lost and reinstated to Carrier service with all seniority rights unimpaired.

OPINION OF BOARD:

In August 1979 Claimant was employed as a Machine Operator in the Curb Gang working out of BN outfit cars located at the Roundhouse in Minot, North Dakota. In the early morning hours of August 3, 1979 Claimant and another employe, Brian Hedman, had a fight in the outfit car where they were living, as a result of which Hedman was taken to the hospital with injuries and Claimant was detained by the Minot Police Department.

Under date of August 16, 1979 Carrier addressed a joint notice to Hedman and Marcotte, copy to the BMWE Local Chairman, reading as follows:

Minot, North Dakota
August 16, 1979

Mr. B. Hedman, Extra Gang Laborer
Mr. T. Marcotte, Extra Gang Laborer

Attend investigation in Old Superintendent's Office, General Office Building, Minot, North Dakota, at 1:30 PM, Tuesday, August 21, 1979, for the purpose of investigating your alleged violation of Rule G and fighting while on company property at Minot, North Dakota, at about 1:30 AM, August 3, 1979, Arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter.

T. E. Hudson
Terminal Superintendent

cc: Mr. R. D. Selfors, Local Chairman, BMWE, Minot

Mr. Hedman requested a postponement of the initial hearing and, by wire dated August 20, 1979, Carrier notified both employes, with copy to the Local Chairman, that the investigation was postponed until August 28, 1979. However, on August 26, 1979 Claimant requested another adjournment of the hearing and, by wire dated August 27, 1979, Carrier notified Claimant, with copy to the Local Chairman, that the hearing was again postponed until September 6, 1979. The hearing finally was held on September 6 and Claimant Marcotte and Hedman both were represented at that hearing by BMWE Local Chairman Reule. At the outset of the hearing, the Local Chairman made a request for the sequestration of witnesses which was granted by the hearing officer. No objections to proceeding with the hearing were raised by Claimant, Hedman nor their BMWE

representatives. Testimony was taken from several witnesses, through interrogation in which Local Chairman Reule and the two accused employees fully participated. The record shows that the Local Chairman objected frequently and vociferously to the contents of that testimony but made no procedural objections at any time concerning the timeliness of the hearing or the propriety of the two adjournments. At the conclusion of the substantive testimony, the Local Chairman was asked if he had any further statements to make whereupon he responded as follows:

STATEMENT BY REPRESENTATIVE REULE

I'd like to protest this investigation under Rule 49(C). It says here in Rule 40(C) that "At least five working days in advance a written notice of the investigation shall be given the employees and the appropriate local organization representatives, in order an employee may arrange for representation by a duly authorized representative or employee of his choice and for the presence of the necessary witnesses he may desire. The notice must be specified the charges for which investigation is being held. Investigation shall be held, as far as practical, at the headquarters of the employees involved." According to what I got out of them messages, you quoted only one rule - G, and you prosecuted under two rules, 701 and 702, that's my protest.

* * *

Claimant Marcotte then asserted an objection regarding a malfunctioning of the tape recorder at one point during the proceeding. The hearing officer again asked the Local Chairman to state for the record his grounds for objecting to the hearing and investigation, in the following exchange:

QUESTIONS BY MR. HUDSON

ANSWERS BY REPRESENTATIVE REULE

234. Q. Is your only objection due to the fact that the tape was not operated during the partial testimony of one witness and it was required for him to come back?
A. That's part of it.
235. Q. What's the rest of it?
A. You come up with only one rule in that telegram, then you come up with two more and that's what I'm impartial against.

236. Q. In other words, your objection is the fact that only one rule was stated in the investigation notice; however, the incident did not bring up rules and it's your position that the rules should have been quoted rather than the incident?
- A. Well it says you're supposed to do that. It says you're supposed to quote the rules in the investigation notices.
237. Q. Is that the only basis for your objection of the investigation?
- A. That is the basis.

Following the hearing, the Claimant was notified on September 25, 1979 of his discharge from service by the following letter:

Minot, North Dakota
September 25, 1979

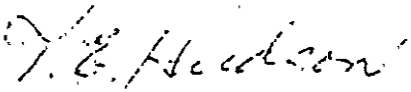
File: 301-14 (103).

Mr. Thomas W. Marcotte
Machine Operator
Jamestown, North Dakota

Effective this date, September 25, 1979, you are dismissed from the service of the Burlington Northern Inc. for violation of General Rules G, 701(A), 701(B), of the BII Rules of the M/W Department, Form 15125, for being under the influence of intoxicants, entering into argument and scuffle while on Company property in the outfit cars in Gavin Yard about 1:30 AM, August 3, 1979, at Minot, North Dakota, as per testimonies developed at investigation held at Jamestown, North Dakota, on September 6, 1979.

You are to relinquish any and all Company property, including free transportation, that may have been issued to you.

Acknowledge receipt of this letter by affixing your signature on the attached copy of this letter.


T. E. Hudson
Terminal Superintendent

cc: Mr. J. D. Reule, Local Chairman, BMWE, Medina
Personal Record

In handling on the property, the Organization appealed the dismissal on procedural grounds that: 1) the hearing notice improperly cited only Rule G whereas the discharge notice cited both Rules G and 701; 2) the malfunctioning of the tape recorder rendered the transcript fatally inaccurate; 3) the sequestration of certain witnesses was voided by playing back parts of the taped record in their presence; and 4) the evidence did not show that Claimant was guilty of violating Rule G. Carrier denied the claim on all these asserted grounds and the matter was appealed to this Board.

In its submission to the Board, the Organization raised for the first time the timeliness of the hearing scheduled for August 21, 1979 and the propriety of the first notice of adjournment issued on August 20, 1979. Boards of arbitration in this industry frequently have construed express time limits strictly and invalidated untimely proceedings where the defect was properly objected to and preserved in handling on the property. See Awards 3-11757; 3-22748; PLB 1844, Awards 19, 22, 58 and 62. In each of the cited cases, however, unlike in the present matter, the Organization and/or the Claimant properly and unequivocally preserved its objection to the untimely proceedings. Despite every opportunity to do so in the present case, the Claimants and their General Chairman failed to protest the fact that the hearing was originally scheduled to be held August 21, 1979, more than fifteen (15) days from the date of the occurrence; or that the August 20, 1979 adjournment was made without mutual agreement of Claimant or his representative. By remaining silent and proceeding with the investigation despite these manifest defects under Rule 40(A),(I),(J), Claimant and his representative waived any objection they might have had. Moreover, at no time in handling on the property were these blatant violations protested.

Carrier runs a significant risk of having disciplinary action rendered null and void under Rule 40(J) for such departures from the plain requirements of Rules 40(A) and (I). However, Rule 40(J) is not self-executing and failure of the aggrieved employee or his representative to invoke its protections, despite every opportunity to do so, must be deemed a waiver of those procedural defects.

Turning to the grounds for appeal which were properly raised and joined on the property, we find no actual prejudice to Claimant by the temporary malfunctioning of the tape recorder and the consequent compromising of the sequestration of witnesses. There was no reversible error in the wording of the hearing notices and the record amply supports Carrier's conclusion that Claimant, while under the influence of alcohol, precipitated and participated in a fight in Carrier's bunkhouse where he was living and working. We cannot find that the penalty assessed was unreasonably harsh in the circumstances and the claim must be denied.

AWARD

Claim denied.

F. H. Frank
Employee Member

W. H. Hadjipour
Carrier Member

Dana E. Eischen
Dana E. Eischen, Chairman

Date: November 30, 1982