

PUBLIC LAW BOARD NO. 2206

AWARD NO. 78

CASE NO. 76

PARTIES TO DISPUTE:

BURLINGTON NORTHERN RAILROAD

and

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The forty (40) days suspension of Extra Gang Laborers J. E. Trujillo and R. L. Gibson, August 3, 1979, through September 11, 1979, both dates inclusive was without just and sufficient cause. (System File 22-3 MW-20 3/10/80C)
2. That Extra Gang Laborers J. E. Trujillo and R. L. Gibson be paid for all wages lost, including overtime.

OPINION OF BOARD:

On August 2, 1979 Claimants were Gangmen on Extra Gang 911 working at 96th Street and Highway 2 crossing. Each has a seniority date of October 21, 1978.

During the noon hour the Gang traveled to Commerce City, Colorado to have lunch at Lydia's Cafe. Located downstairs in the same building is Noah's Bar. In the latter emporium Foreman B. T. Teal observed Claimants sitting at a table upon which there were two bottles of beer. He immediately removed them from service pending investigation. By letter dated August 3, 1979 Claimants were notified to attend a hearing to determine their responsibility in connection with an alleged violation of Rule G. Following an

investigation on August 13, 1979 it was determined that Claimants violated Rule G when they were "observed drinking intoxicating beverage (sic) while on duty about 12:15 p.m.". By letter of September 10, 1979 Claimants were informed of disciplinary suspension effective August 3, 1979 through and including September 11, 1979.

The hearing transcript reveals that Carrier has failed to meet its burden of proving by a preponderance of evidence that Claimants were guilty as charged. At no time did Foreman Teal or J. Longo, Carrier's second witness, observe Claimants drinking intoxicating beverage. There is no testimony from Carrier's witnesses that either Claimant smelled of alcohol or acted as if intoxicated. Further, Foreman Teal at no time sought further to verify his suspicions that Claimants had purchased and consumed alcoholic beverages by speaking with any of the waitresses or bartenders at the establishment.

The fact that beer bottles were on the table occupied by Claimants does not alone prove that they violated Rule G. Carrier offers no additional persuasive evidence that the bottles even belonged to them. P.L. Board No. 2406 in Award 12 (Kasher) addressed a similar issue as follows:

In order for the discipline to be enforceable, the Carrier must show at least a preponderance of substantive evidence that the Claimant actually had possession of an alcoholic beverage. It is not enough to show that he was in the same room as a half-empty bottle of beer; or even that he was sitting at a table in front of a half-empty bottle of beer; or even that, sitting at the same table, was a fellow employee with a half-empty bottle of beer in his hand.

When asked if he had observed the Claimant with an alcoholic beverage in his possession, the Project Engineer responded, "No. There was half-empty beer bottles, two of them, on the table in the tool house." Similarly, the General Foreman responded to the same question with a succinct, "No sir."

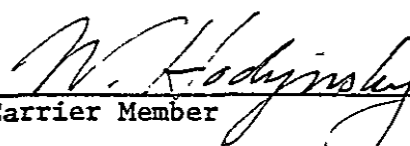
Possession of an alcoholic beverage is a serious offense. Although there was significant circumstantial evidence in this case, it must be demonstrated by substantial evidence that an employee charged with an offense did, in fact, have possession of the beverage. Admittedly the Claimant was found in suspicious circumstances. But suspicion is not possession. Accordingly, the claim must be sustained.

Refusal of Claimants to submit to a blood test cannot be held as sufficient proof of violation of Rule G; nor can the conflicting testimony that one of the Claimants asked: "What if we only had one?"

At no time does Carrier present sufficient proof, absent speculation and conjecture, to support its charge that Claimants were "observed drinking intoxicating beverages". Accordingly the claim must be sustained.

AWARD

Claim sustained. Carrier is to implement this decision within thirty (30) days of issuance.


Carrier Member


Employee Member


Dana E. Eischen, Chairman

Date: January 9, 1984