

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN RAILROAD COMPANY	*	
	*	
-and-	*	CASE NO. 16
	*	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	*	AWARD NO. 16
	*	

Public Law Board No. 2746 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the Burlington Northern Railroad Company (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

- "1. The dismissal of Track Laborer G. L. Cox, October 8, 1979, was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File S-S-189C).
2. Track Laborer G. L. Cox now be compensated for all lost wages until returned to work with all seniority and rights unimpaired."

At the time of his dismissal Claimant Glenn L. Cox was employed as a Track Laborer at Whitefish, Montana. By letter dated September 4, 1979, Claimant was notified to attend an investigation on September 11, 1979, in connection with his alleged

violation of Rule G. The investigation was held on that date. Claimant was present and was accompanied by a duly designated representative of the Organization. By letter dated October 8, 1979, Claimant was notified that he was dismissed from the Carrier's service, effective that date, as a result of his violation of Rule G.

Rule G states:

"The use of alcoholic beverages or narcotics by employees subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on company property is prohibited. The use or possession of alcoholic beverages or narcotics while on duty or on company property is prohibited. Employees shall not report for duty under the influence of any drug, medication, or other substances, including those prescribed by a doctor or dentist, that will in any way affect their alertness, coordination, response, safety, or ability to perform their work properly."

The record shows that Claimant's work week was Monday through Friday, 8:00 a.m. to 4:30 p.m. On September 4, 1979, Claimant was interviewed by his Roadmaster concerning an incident which had occurred on Friday, August 31. At the investigation, the Roadmaster stated that Claimant told him that he had had one beer at 7:00 a.m. on August 31, prior to coming to work, something that he does from time to time. Claimant's testimony is more confusing. He agreed that he had told the Roadmaster that he had drunk one beer at 7:00 a.m. on August 31, but was evasive about whether or not he had actually had a beer at that time.

A witness to the interview corroborated the Roadmaster's story. That, plus the rather transparent evasions of the Claimant convinces this Board that Claimant did have a beer at 7:00 a.m. on August 31, 1979. Also, despite attempts to deny knowledge of the Safety Rule Book, it is clear to this Board that Claimant was well aware of the substance of Rule G.

Having said that, it is the view of this Board that the Carrier has fallen short of its burden of proving by substantial evidence that Claimant was in violation of Rule G. Claimant was not shown to have used or possessed alcohol on the property, nor to have reported to work or been on duty while under the influence of alcohol. In fact, he produced numerous witnesses who testified that there was no odor of alcohol about Claimant that morning, that he was a safe worker, and that his speech and actions on the job that morning were not at all unusual. Among the witnesses was his Foreman, who Claimant and his co-workers referred to as one who would invariably send home a person who reported to work under the influence of alcohol.

In view of the fact that there has been no showing that Claimant either reported to work under the influence, or that he was under the influence while at work, this Board cannot agree with the Carrier that, by itself, Claimant's drinking a beer prior to reporting to work constituted a violation of Rule G. Accordingly, the claim must be sustained.

AWARD: Claim sustained.

F. H. Funk
F. H. Funk,
Organization Member

W. Hodynsky
W. Hodynsky,
Carrier Member

Richard R. Kasher
Richard R. Kasher,
Chairman and Neutral Member

6-22-73

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN RAILROAD COMPANY	*	* Interpretation
	*	of
-and-	*	Award
	*	Nos. 16 & 17
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	*	
	*	

By order dated March 28, 1984 the Honorable Edward Leavy, United States Magistrate for the United States District Court for the District of Oregon, directed that this Board clarify the application of its Award Nos. 16 and 17, which were issued respectively on April 22, 1982 and August 23, 1983.

The below-signed Chairman and Neutral Member of the Board received and reviewed the order of the District Court, a copy of Plaintiff Glenn Cox's complaint filed in the District Court (No. 83-1662), a copy of Defendant Burlington Northern's Motion to Remand, the Affidavit of its Attorney, Defendant's Memorandum of Authorities regarding such Remand, and statements of position regarding the dispute from both the Carrier and Organization Members of the Board.

Background Facts

The need for clarification arose when Mr. Glenn Cox, an employee of the Burlington Northern, was twice dismissed from the Carrier's service as the result of two separate

incidents which occurred on August 31, 1979. The first incident, which was addressed in Award No. 16 of this Board, involved an allegation that Cox had appeared on the Carrier's property under the influence of alcohol. This Board heard that case at a session where several other cases were also presented to the Board. Fortunately or unfortunately, depending upon one's perspective, the second case, Case No. 17 which involved Cox and several of his fellow employees, was not presented to the Board at that date. Accordingly, when this Board reviewed the record evidence in Case No. 16 we found that the Carrier had not met its burden of proof and ordered that Claimant Cox be reinstated with back pay. We should observe here that the exculpatory testimony offered by Cox's foreman, a Mr. Hanks, was most critical in this Board's view in terms of reaching our decision.

When this Board subsequently heard Case No. 17, it became clear that Mr. Hanks had a reason to testify in an exculpatory manner in Mr. Cox's behalf regarding the first incident addressed by Case No. 16, as Mr. Hanks along with Mr. Cox and other employees was charged in Case No. 17 with violating Carrier Rules regarding possession of alcohol on Carrier premises. The evidence in Case No. 17 supported the Carrier's finding of guilt and this Board so ruled.

Thus, only by the most fortuitous of circumstances

involving what might be considered logistical and/or administrative oversight, Cases 16 and 17 were not considered at the same time. Had they been so considered, this Board would have, in all likelihood, reached a different result in Case No. 16, having discredited Hanks' testimony in the process, and not have reinstated Mr. Cox to service.

Upon receipt of Award No. 16 the Carrier found itself in an interesting dilemma. It could run the risk of continuing to hold Mr. Cox out of service, in spite of the Award reinstating him, on the basis that he was still dismissed under the circumstances which were pending before the Board in Case No. 17. Had the Carrier run that risk then there would have been no back-pay liability at all as this Board concluded in Case No. 17 that the Carrier justifiably dismissed Mr. Cox from service on August 31, 1979. However, the Carrier chose to reinstate Mr. Cox and made an award of back pay to him which deducted certain amounts such as Railroad Unemployment Insurance, outside earnings, and local and Federal taxes among other items.

The Carrier and the Organization also determined that Mr. Cox would be entitled to certain overtime earnings had he been in service during the relevant time frame and they computed what his overtime would be, less deductions typically made from earnings. Mr. Cox refused this payment on the basis that he would be waiving other rights.

In this Board's view Mr. Cox made several substantial errors, over and above the error of engaging in activities on Carrier property that were clearly prohibited. His most significant error was bringing this case back to the Board for clarification. In our opinion his legal action smacks of greed. Mr. Cox was compensated by the Carrier for a period of time when the Carrier had justifiably held him out of service. He seeks in excess of \$50,000, when review of both Awards indicates that he was not entitled to one cent.

However, in view of the hardship that would be imposed upon the Claimant it would be inappropriate in our view to authorize the Carrier at this late date to recover the monies paid to Claimant Cox. On the other hand, we find that the Carrier justifiably made proper deductions from the back pay award including those deductions for outside earnings which are typically made in cases where employees are returned to service with an entitlement to back pay, particularly among employees in the non-operating crafts in the railroad industry. Additionally, since we have found that Mr. Cox was justifiably held out of service beginning on August 31, 1979 until our Award reinstating him in Case No. 17, there is no basis to grant him any additional seniority on operator's or machine operator's seniority rosters which he now claims. Additionally, as Mr. Cox determined not to take the check for the alleged overtime earnings and as we

have concluded that he was justifiably out of service during the relevant time frame, in this Board's opinion Mr. Cox is not entitled to any additional monies from the Carrier.

Upon clarification, this Board concludes that the Carrier has met its full obligations, and more, to Claimant Cox and no further relief is granted by this Board.

This clarification was signed this 15th day of February 1985 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher
Chairman and Neutral Member
Public Law Board 2746