

PUBLIC LAW BOARD NO. 2774

Award No. 8

Case No. 14

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

- "1. That the dismissal of Illinois Division Trackman N.K. Slaughter was unjust.
2. That Claimant N.K. Slaughter be reinstated to service with seniority, vacation, all benefit rights unimpaired, pay for wage loss and/or otherwise made whole."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was dismissed after an investigation for allegedly reporting for duty under the influence of an intoxicant and failure to devote himself exclusively to his duties during his tour of duty on April 9, 1980.

The record indicates, without contradiction, that on the day in question the Claimant reported for work at about 7:30 A.M. At that time, no one saw anything unusual about his appearance or demeanor. He was asked shortly thereafter to get the tools and get into the truck. The crew rode (those in the truck) about half way to the work site when Claimant became ill and was permitted by the Foreman to get out of the truck and be sick. Shortly thereafter when the truck reached the job site and it was raining, the Foreman instructed Claimant to stay in the truck until he felt better. At approximately 9:30 A.M. by virtue of an anonymous phone tip the Division Engineer and Special Agent Safety Supervisor went out to try to find Claimant who they heard was asleep in a Company vehicle. They found him in a Company vehicle, awakened him and took him to the office.

The testimony indicated that when Claimant had been awakened the officials found that his eyes were bloodshot and that they could smell alcohol on his breath. In the office, they asked him if he would take a blood test with respect to the alleged alcohol use. He asked to talk to a Union representative before making that decision and was refused. He then signed a refusal to take a blood alcohol examination. Claimant was thereafter sent home and subsequently disciplinary action was initiated.

Carrier states that the testimony at the investigation establishes conclusively that Claimant was under the influence of an intoxicant and asleep in the section gang truck at approximately 9:30 A.M. on the date in question. Further, Carrier's witnesses corroborated the fact that he had the odor of alcohol on his breath and his appearance indicated that he was under the influence of an intoxicant. Carrier states further that Claimant was offered the opportunity to present other witnesses on his own behalf and further, he was not refused the right to call his Union representative. Carrier also indicates that Claimant had been dismissed from Carrier's service on two prior occasions for a related infraction but reinstated subsequently on a leniency basis. Carrier concludes that since none of Claimant's procedural rights were violated and he was clearly guilty of the charges, under all the circumstances and in view of his previous record, the discipline assessed was appropriate.

Petitioner argues that Carrier was in error since it had failed in its burden of proving that Claimant reported to duty under the influence of an intoxicant and secondly, failed to devote himself exclusively to his duties during his tenure on the day in question. In addition, the Organization insists that Claimant was denied due process when it failed to accord him consultation with the Union representative as he requested before submitting to a blood alcohol test. Additionally, the Organization insists that he was denied due process when the Carrier failed to call witnesses who might have been able to shed some light on the circumstances with respect to the charges.

The testimony adduced at the investigation reveals that there was apparently no problem

with Claimant when he reported for work on the day in question at 7:30 A.M. This is attested by the Foreman and Assistant Foreman for the day in question. Further, the record is clear that although Claimant was sick on the way to the work site, he went and stayed in the truck and rested at the instruction of his Foreman. There is also no question but that Claimant asked to consult with a Union representative before signing the blood test form and was refused such consultation and hence, refused to take the blood test. The Board states, however, that it is also quite clear from the testimony that at least two Carrier officials found that they smelled alcohol on Claimant's breath at the time he was in the office after being awakened and furthermore had the other indicia of being under the influence of alcohol. Claimant himself admitted that he had had a substantial amount of beer during the night prior to coming to work.

It seems clear to the Board based on long and well established criteria that the Carrier correctly concluded from the testimony of its supervisors and officials that Claimant was under the influence of intoxicants on the morning in question. By his own admission Claimant had drunk a substantial number of beers during the night prior to the morning when he came to work and had not eaten anything that morning. On the other hand, the evidence is also clear that he was in the truck at the specific instructions of his Foreman and was not improperly asleep away from his position as charged by Carrier. It is also apparent that he was indeed ill on the way to the job site after reporting in apparently adequate condition. It is also apparent without contradiction that Claimant did request consultation with his Union representative before signing the form, either accepting or refusing to take the blood test and was denied that right. Subsequently, of course, he was allowed to consult with his Union representative. Thus, the Board is confronted with an ambiguous situation at best. Carrier was correct in being extremely concerned about Claimant's condition on the day in question and the risks inherent in an employee being at work under the influence of alcohol are so clear and well known as to require no comment. Also it is apparent that Carrier's concern was exacerbated by the knowledge of Claimant's prior infractions involving the same type of problem.

The Board is aware that this relatively young employee had a number of years service with this Carrier (approximately five years prior to the incident). Additionally, based on the record, he apparently has a problem with respect to alcohol. In the Board's view however, the circumstances surrounding this particular infraction are simply too equivocal to warrant the ultimate penalty of dismissal. The anonymous tip, the fact that he was considered to be in good condition by his Foreman prior to becoming ill, the refusal to permit him to consult with his Union representative, among other things convince the Board that dismissal was an inappropriate penalty in this instance. However, it is also apparent that Carrier need not tolerate the type of conduct which is implicit in the events on the day in question. Therefore, it is the Board's view that the Claimant shall be reinstated to his former position on a last chance basis. Any further similar type infraction must be considered of sufficient significance to warrant immediate and permanent dismissal. Furthermore, his reinstatement (without compensation) must be accompanied by his submission to some type of rehabilitation program approved by Carrier. It is only through this type of approach that the working career of this employee may be salvaged.

AWARD

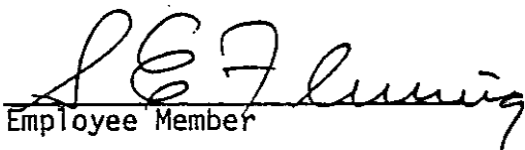
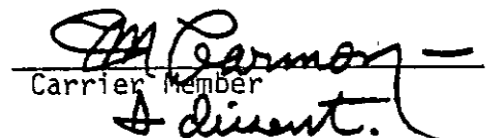
Claim sustained in part; Claimant will be reinstated to his former position with all rights unimpaired but without compensation for time lost in accordance with the provisions indicated above.

ORDER

Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I.M. Lieberman, Neutral-Chairman


Employee Member
Carrier Member
A dissent.

Carrier's Dissent to Award No. 8 of Public Law Board No. 2774

The Award is based at least in part on the erroneous conclusion that Claimant was refused permission to consult with his Union representative before signing the form either accepting or refusing to take a blood test to determine the presence of alcohol. As the Carrier pointed out in its submission and at the Hearing, the Claimant was not refused permission to consult with his Union representative before signing the form. Claimant did not ask for permission to consult his Union representative before signing the form. This fact is evidenced by the testimony of Special Agent Struna on Page 21 of the transcript; i.e. -

"Q. Okay, let's enter the declination of a blood alcohol test by Mr. Slaughter as Exhibit A in the transcript of investigation. Was Mr. Slaughter denied . . well, let me rephrase this . . was Mr. Slaughter . . did Mr. Slaughter request a Union representative . . the presence of a Union representative before submitting to a blood alcohol test?

A. No, Sir, I don't believe he did. I had requested him to either accept or refuse the blood alcohol urine examination and he stated that he did not think that he would without consulting with his Union representative which I construed as a statement rather than a request.

Q. Did Mr. Slaughter ask you at any time while in your office for the use of the telephone to make a phone call to any Union representation?

A. No, Sir, he didn't." (Emphasis supplied.)

In view of the above, I dissent to Award No. 8.


Carrier Member