

PUBLIC LAW BOARD NO. 2960

AWARD NO. 47

CASE NO. 90

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of G. A. Simsik for alleged violation of Rule G was without just and sufficient cause and in violation of the Agreement. (Organization File 8D-2855; Carrier File D-11-8-569).
- (2) Claimant G. A. Simsik shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and the Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

On January 20, 1982, the Carrier directed a letter to the Claimant advising him to attend an investigation on the following charge:

"Your responsibility in connection with your violation of Rule 'G' (Chicago & Northwestern Railway Company General Regulations and Safety Rules Effective June 1, 1967) while employed as an Assistant Foreman Truck Driver on January 19, 1982 at approximately 8:00 P.M. at Mitchell Yard, Wisconsin."

The investigation was held on February 3 after a postponement. On February 12 the Carrier directed a letter to the Claimant which read in pertinent part:

"In connection with the hearing held on February 3, 1982 enclosed is Discipline Notice No. 487 advising you the discipline administered has been dismissal from the service of the Chicago and North Western Transportation Company effective February 12, 1982. Please acknowledge receipt of the Discipline Notice, Form 1185, by signing and returning a copy. A self-addressed, stamped envelope is enclosed for your convenience. The original of the Form 1185 may be retained by you."

It is also noted that the General Chairman was advised on March 14, 1983, that the Claimant would be offered reinstatement without prejudice to and with the right to progress the portion of the Claim relating to time lost. The Claimant was advised by the Carrier on March 24, 1983, that he was eligible for reinstatement. The Claimant failed to respond to the March 24, 1983, letter. On April 28, 1983, as a result of failure to respond to the March 24, 1983, letter, the Carrier advised the Claimant his name was being removed from the seniority roster.

First, the Organization contends that the discipline is defective, because the Carrier failed to provide the Grievant a copy of the transcript within ten days of the hearing. They contend that the Carrier agreed to do so in a letter of understanding.

In regard to the Organization's procedural objection, the Board can find no sound basis in the record to overturn the discipline on this point. While they assert the transcript was not included with the discipline decision which was timely, there is no substantiation of such an assertion. Procedural objections cannot be sustained on assertion alone.

In regard to the merits, it is noted that the Claimant was off duty but on the Carrier's property at the time of the incident. Rule G has been held to apply when an employe is on the Carrier's property even when he/she is off duty.

The critical question is whether the Claimant was under the influence of alcohol. There is no dispute that the Claimant had been drinking off the Carrier's property prior to the incident. The Claimant admitted this but contended he was not under the influence of alcohol. However, there must be more than mere admission that he had been drinking prior to appearing on the Carrier's property to establish that there was substantial evidence that he was under the influence of alcohol.

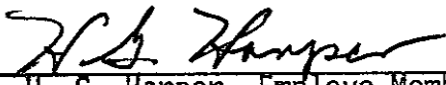
The Board concludes that when other evidence is considered in addition to the admission that the Claimant had been drinking, there is substantial evidence to support the Carrier's finding. It should be noted that the record is not without some elements of doubt as to whether he was under the influence. However, under the substantial evidence test. The Carrier is not required to show the employe is under the influence of alcohol beyond a reasonable doubt as would the State in a criminal matter.

The Board notes that the Claimant refused to take a blood test and was observed to have glassy and bloodshot eyes in addition to performing less than normal on two ability tests administered at the time of the incident. When these factors are considered, as a whole, in connection with his admission he had been drinking, the Board believes there was substantial evidence that he was under the influence of alcohol although not to a great degree. In view of the foregoing, the Claim is denied.

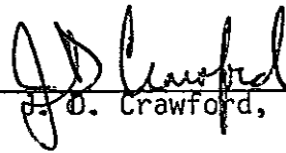
AWARD: The Claim is denied.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. O. Crawford, Carrier Member

Dated:

Jan 3, 1984