

PUBLIC LAW BOARD NO. 3460

Award No. 11

Case No. 11

PARTIES
TO
DISPUTE

Burlington Northern Railroad Company
and
Brotherhood of Maintenance of Way Employees

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Sectionman, S. P. Kocur, April 18, 1980, was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Claimant Kocur be reinstated with all rights unimpaired, compensated for all lost time from first day withheld from service and his record cleared."

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 herein, together with two other members of his crew, was employed as a Sectionman on the White Bear Lake Section Crew in Minneapolis, Minnesota, in April of 1980. The normal working hours of the crew were from 8:00 A.M. to 4:30 P.M. with lunch from 12:00 Noon to 12:30 P.M. On April 3, 1980, at approximately 2:00 to 2:55 P.M., claimant herein, together with the other members of his crew, was found drinking beer in a bar in White Bear, Minnesota. Subsequently, Carrier's special agent asked them to leave the bar and return to the depot where they were questioned further and were withheld from service pending an investigation. Following an investigation, the three men were found guilty of the charges and dismissed. The other two members of the crew were subsequently reinstated to service on a leniency basis after having completed Carrier's alcohol treatment program.

As the threshold issue, the Organization insists that Carrier erred and violated

the agreement by withholding claimant from service prior to the investigation. The Organization alleges that the infraction involved was not serious enough to warrant being withheld from service and it was an abuse of the agreement on Carrier's part to take this action. Carrier does not agree.

Rule 40B of the agreement provides:

"In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of the rules, the investigation shall be held within ten (10) days after date withheld from service. He will be notified at the time removed from service of the reason therefor. "

The Board does not agree with the Organization's allegations on this count. First, it is apparent that a charge of violation of Rule G is a serious matter in this industry in particular. It may be characterized as a serious potential infraction of the rules. Furthermore, if the Organization's contention is to be supported it would nullify the meaning of Rule 40B. There is no prejudgment by virtue of withholding an employee from service after an alleged serious infraction. This would be a contradictory position with respect to Rule 40B. The employee is protected with this interpretation of the rule by virtue of the fact that if he is not guilty of the charges, he is compensated for all time lost including that time withheld from service prior to the investigation. The fact that it is Carrier's prerogative to withhold employees committing serious crimes or offenses from duty pending investigation is well established in this industry. As an example, Award No. 17 of Public Law Board No. 2746 involving the same parties supports this position, as well as First Division Award 16344 and many others. It is clear that withholding an employee from service pending an investigation does not involve a prejudgment of the employee's guilt. There is no prejudice with respect to an employee's rights under those circumstances.

With respect to the merits, claimant indicates that he and the other members of his gang were told by their foreman that he was leaving and that they had no further work, except miscellaneous functions, to perform and that they ought to "protect their asses". The testimony is clear (including that of claimant) that after lunch he and the other members of the gang put away their motor car and their tools and left the property. They were under the impression that not having a foreman present, they did not have any work that they had to do and,

therefore, they did not expect to be paid for the rest of the day. They admitted clearly being in the bar and drinking beer in the afternoon. Thus, the Organization insists that the claimant herein had removed himself from service, was off Company property at the time he was drinking beer and should not have been disciplined for that alleged violation. A decision to remove himself from service was that of the crew in the absence of a foreman and they felt they had made the right decision. The Organization also notes that Carrier did not call the foreman as a witness in this case.

Carrier notes that the claim of the employees that they were off duty at the time they were drinking beer is simply not correct. First, the testimony indicates clearly that neither claimant nor the other members of his group asked or received permission to be absent from duty after lunch or to be taken off the payroll at that time. From the testimony it is clear that the three men were expected to and had other duties they could have performed for the balance of the work day after their foreman had left. Furthermore, Carrier notes that claimant and the others were paid for the whole day because they theoretically performed services that day. Based on the facts in this instance, there was no question, as Carrier views it, that the discipline assessed was fully warranted.

The record indicates that claimant did not have permission to take off from his work after lunch. When he left the worksite and went to the bar, he was on duty and under pay and, therefore, was under the prohibition with respect to the consumption of alcohol. For that reason, the charges were fully supported by the evidence and there is no doubt but that claimant was guilty of the infraction. Thus, from the entire record, there is no question but that there is no indication of any improper, arbitrary or capricious actions on the part of Carrier in its findings of guilt or in its determination of the nature of the penalty. The question of disparate treatment which is dealt with only in passing is understood with respect to participation in the employee's counseling and alcoholic treatment program. Claimant chose not to participate and therefore the treatment accorded to the other members of the crew could, indeed, have been legitimately different than that accorded to him. Accordingly, the claim must be denied.

AWARD

Claim denied.

I. M. Lieberman
I. M. Lieberman, Neutral-Chairman

W. Hodynsky
W. Hodynsky, Carrier Member

F. H. Funk
F. H. Funk, Employee Member

March 29, 1985