

PUBLIC LAW BOARD NO. 3460

Award No. 49
Case No. 49

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Burlington Northern Railroad Company

STATEMENT
OF CLAIM

- "1. The dismissal of Section Laborer J. D. Torell, for alleged violation of Rule 661 of the Burlington Northern Safety Rules, was excessive and in violation of the agreement.
2. The claimant shall be reinstated with seniority and all other rights and benefits unimpaired and he shall be compensated for all wage loss suffered."

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, a section laborer, was working on a curved relay gang and living in an outfit car at the time of the incident herein. On October 12, 1980, at approximately 4:30 A.M., after a night out at taverns, claimant returned to his bunk car and entered the bunk car next to his where Section Laborer Annis was sleeping. Claimant had been drinking and had with him a beer which he proceeded to pour into Mr. Annis' face, waking him. Claimant then began to play with Annis's alarm clock and broke it. At this point Annis got up and was confronted by claimant who punched him three times in the mouth causing severe injuries (almost \$370 in medical bills resulting therefrom). Claimant was cited for an investigation dated October 15, 1980, to be held on October 22, 1980. A copy of the investigation notice was received by claimant by registered mail on October 20. Following the investigation, claimant was dismissed from service, having been found guilty of the charge.

Carrier argues that petitioner permitted over three years to lapse, following the conference with Carrier's highest officer, before this matter was submitted to a public law board. Thus, the dispute having lain dormant for a long time which the Carrier thinks is unreasonable, Carrier believes that the doctrine of laches should govern and the matter should be dismissed. Carrier argues that, in fact, petitioner by its lack of diligence has abandoned the claim. With respect to the merits, there is no doubt but that claimant was guilty, he, having admitted the fact that he was drunk, started the fight at that time. Carrier insists that an unprovoked serious attack on a fellow employee is intolerable and warrants dismissal.

Petitioner argues, first, that claimant did not receive proper notice of the investigation in the course of Rule 40c. That rule provides that at least five days' advance written notice of the investigation shall be given to the employee so that he may arrange for representation, as well as for the presence of necessary witnesses. This issue was raised by the Organization during the investigation. Thus, petitioner argues that the lack of proper notice denied claimant due process as contemplated by Rule 40c. As an additional position, the Organization argues that the ultimate penalty of dismissal is excessive.

With respect to Carrier's argument concerning the inordinate delay in the handling of this matter and the applicability of the doctrine of laches, the Board believes that both sides bear some culpability for the delay. For that reason, therefore, the critical issue in this dispute may not be disposed of by virtue of the doctrine promulgated by Carrier.

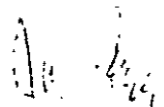
Petitioner makes much of the lack of due process accorded claimant by the lack of due notice. First, it must be observed that the notice was mailed to claimant some seven days prior to the date the hearing was scheduled. There is no explanation of why it took so long for the mail to be delivered. More significantly, at the outset of the hearing petitioner was afforded the opportunity through adequate representation by a competent organization officer to request a postponement. He did not do so and indicated that he was prepared to proceed. He was subsequently asked whether he had any other witnesses who he desired to appear and he indicated that he did not. Thus, at this late stage of the game for

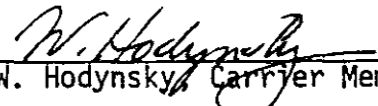
petitioner to argue that he was not allowed the time requisite to prepare his defense is simply untenable. The purpose of Rule 40c, as in other agreements, is to make sure that claimant is afforded ample opportunity to prepare his defense and is not prejudiced by too short a span of time between the notification and the investigation. In this instance, Carrier in good faith addressed the notification within the appropriate time span but it was not received until late. Petitioner did not request a postponement when offered the opportunity to do so. Furthermore, he indicated that he did not wish to delay the hearing for any reason and had all witnesses present whom he wished to call. He was well represented in the course of the hearing. Thus, it must be concluded that, even though the notice was received late (although mailed in timely fashion), it in no sense prejudiced claimant in his defense.

With respect to the merits, there is no doubt but that claimant was guilty of an unprovoked drunken attack on a fellow employee. This conduct need not be tolerated by Carrier. The penalty of dismissal was obviously appropriate. The claim must be denied.

AWARD

• Claim denied.


I. M. Lieberman, Neutral-Chairman


W. Hodynsky, Carrier Member


F. H. Funk, Employee Member

St. Paul, Minnesota

August 8, 1986