

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

v.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

1. The dismissal of Track Laborer P. D. Calloway for alleged '... violation of Rule G of the Rules of the Maintenance of Way Department while assigned as a laborer, on August 20, 1985, at Interbay, Washington.' was without just and sufficient cause and on the basis of unproven charges (System File S-P-327/AMWB 85-12-11).
2. The Claimant shall be exonerated by clearing his record of the charge leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

The threshold issue... does the waiver signed by Mr. Calloway bar the Organization from appealing the claim... must be decided in favor of the Organization. The Organization has the right and the duty to police the Agreements to which it is a party. The Organization must assure that individual settlements do not adversely affect collective rights. It is not sufficient that Mr. Calloway discussed signing the waiver with the Organization. The Organization, as the collective representative, must retain the right to pursue the matter if it believes Mr. Calloway's waiver of rights is wrong. The duties of fair representation require the Organization to consider and to reconcile individual and collective interests. There is no evidence in this case that the Organization acted in an arbitrary or capricious or discriminatory manner by deciding to go forward with the appeal.

Before moving to the merits of this case, three procedural issues must be addressed. First, there is no double jeopardy in this matter. Mr. Calloway was served with one notice, there was only one investigation, and disciplinary action was taken against Mr. Calloway for violation of Rule G on one occasion. Second, the investigative notice was dated within the 15-day time limit starting from the date the Carrier first became aware of the violation of Rule G (receipt of the report from Dr. Boettcher). Third, given that Mr. Calloway admitted drinking beer shortly before being examined by Dr. Boettcher, the absence of Dr. Boettcher as a witness does not deprive Mr. Calloway of due process.

Prior to Mr. Calloway leaving work at about 10:00 a.m. on August 20, 1985, he was instructed to return to the section headquarters after seeing his Doctor to inform the Carrier of the diagnosis and to fill out a personal injury form. Mr. Calloway admitted during the investigation that he drank one or more beers at about 1:00 p.m. on August 20th prior to his 1:30 p.m. appointment with Dr. Boettcher.

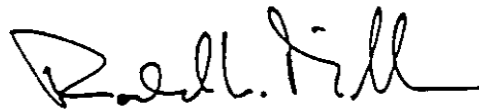
When Mr. Calloway did not receive the work release he expected from Dr. Boettcher, Mr. Calloway visited a hospital clinic. The Doctor at the clinic provided the same diagnosis (muscle strain) and estimated 2 or 3 days time loss from work. At approximately 3:20 p.m. (before the end of his tour of duty), Mr. Calloway returned to the section headquarters. The central issue is whether or not Mr. Calloway was in pay status (and therefore subject to discipline under Rule G) when he consumed the beer.

There is insufficient evidence in support of Mr. Calloway's assumption that when he left at 10:00 a.m. he was off the payroll and therefore he could drink beer on his own time. In fact, Mr. Calloway was paid for the whole day, and at no time prior to leaving work was he told that he was taken off the payroll at 10:00 a.m. When Mr. Calloway consumed the beer, he was in the process of going to a doctor's office to have an on-the-job injury diagnosed. When Mr. Calloway consumed the beer, he was still "subject to duty" (Rule G).

Mr. Calloway successfully completed the EAP Program and was returned to service with seniority unimpaired as of March 18, 1986. Discipline and the EAP Program have served their purposes. Therefore, no other action is warranted.

AWARD

Claim denied.



Ronald L. Miller
Chairman and Neutral Member



Maxine M. Timberman
Carrier Member



Karl P. Knutsen
Organization Member

Disseminating

4-5-88

Date