

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

v.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

1. The dismissal of Group 5 Machine Operator R. J. Denny for alleged violation of Rule '576 and Rule 'G' was unwarranted and on the basis of unproven charges (System File REG-SP-120C).
2. The Claimant shall be reinstated to service with seniority and all other benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

On July 3, 1984, the Claimant, Mr. Rodney J. Denny, did not report for scheduled work. At about 8:50 a.m., Roadmaster Balgaard and Timekeeper Boltz found Mr. Denny asleep in his bunk in a Carrier outfit car. When asked why he was not at work, Mr. Denny replied that he had injured his ankle. In the course of subsequent events, Mr. Denny was charged with failure to comply with instructions from proper authority to fill out a personal injury report, and with being under the influence of alcohol while on company property and subject to duty.

First, we address the charge of insubordination (Rule 570). The record is clear that Mr. Denny was asked several times and then directly ordered by Mr. Balgaard to complete the personal injury form. Mr. Denny knew what was expected of him, yet he repeatedly refused to comply. Shortly after the first instance of his refusal to comply with Mr. Balgaard's order, Mr. Denny had a second opportunity to comply (in the office car). Again, Mr. Denny failed to complete the personal injury report and instead left the Carrier property. The sustained failure by Mr. Denny to complete the report as ordered by Mr. Balgaard is a clear violation of Rule 576.

At the investigative hearing, Mr. Denny admitted to drinking during the night of July 2, 1984. When asked about the quantity of beer consumed, he replied "too many." Mr. Denny could not remember how long he had been drinking, or when and how he returned to the outfit car. Mr. Balgaard and Mr. Boltz testified that Mr. Denny's movements were unsteady and that his breath contained a smell of alcohol. Mr. Denny was offered an opportunity to determine his sobriety with a blood alcohol test. Mr. Denny refused to be tested, which is his right. However, in the context of Mr. Denny's admission that he had been drinking the night before and his physical condition the next morning, a negative inference is properly drawn from his refusal to be tested. The Carrier has provided substantial evidence from which this Board concludes that Mr. Denny was under the influence of alcohol while on company property and subject to duty.

There is nothing in the record of this case that warrants modifying the discipline imposed by the Carrier. Given the circumstances, the dismissal was not excessive discipline and the Carrier did not abuse its discretion.

AWARD

Claim denied.

ORGANIZATION MEMBER DISSENT

The Organization respectfully dissents because (1) the level of authority of Roadmaster Balgaard ^{in this factual situation} is not sufficient to permit the finding of insubordination and (2) in the context of the factual situation herein, the finding departs from the historical application of "subject to duty" language in the railroad industry.

1. Claimant Denny was not on duty or under pay at the time of this incident. As such, he was not subject to the direct orders of Roadmaster Balgaard in the capacity of an employee. Because the Carrier furnished an outfit (bunk) car to Claimant Denny in lieu of its obligation to provide contractually stipulated lodging expense payments, at the moment of the incident in question, Claimant Denny was in a de facto tenant-landlord relationship with the Carrier. As such, the authority of Roadmaster Balgaard is circumscribed and confined to the authority of landlord under applicable landlord-tenant law rather than the more persuasive authority of an employer in an employer-employee relationship subject to industrial discipline.

2. The evidence of record shows that Claimant Denny could not be "subject to duty". Both Claimant Denny's injury and local Carrier policy concerning on-time reporting for duty proscribed Claimant Denny from working on that date. Because Claimant Denny could not work he could not be "subject to duty" under any understanding of that language. In handling the investigation, the proper questions for the Carrier to have addressed were those of absenteeism and failure to report an injury rather than insubordination and Rule G. The Organization respectfully avers that evidence of record does not support the conclusions of this Board.

Ronald L. Miller

Ronald L. Miller
Chairman and Neutral Member

Maxine M. Timberman

Maxine M. Timberman
Carrier Member

Karl P. Knutsen

Karl P. Knutsen
Organization Member

See Below
Dissent

4-5-88

Date