Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
vs	)	**Case 20/Award 20**
Burlington Northern Santa Fe	)	

Statement of Claim

1. The dismissal of Mr. D. G. DeMoss for violation of Rules 1.5 and 1.6 was arbitrary, capricious and on the basis of unproven charges.

2. The Claim as presented by the Vice Chairman to the Division Superintendent shall be allowed as presented because the claim was not properly disallowed by the Carrier in accordance with Rule 42 (a).

3. As a consequence of violations cited above the Claimant shall be reinstated to service with seniority and all other rights unimpaired and his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

Background

The Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with his failure to comply with Maintenance of Way Rule 1.5 and his alleged destruction of personal property while on Company property while assigned to a grinding and welding crew at Burlington, Iowa. After an investigation was held the Claimant was advised that he had been found guilty as charged and he was dismissed from the service of the Carrier. The discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor

Act and the operant labor Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.[1]

Procedural Ruling

Prior to addressing the merits of this case the Board will rule on procedural objections made by the Organization. The Organization alleges that the Carrier violated Rule 40 (a) of the labor Agreement. This Rule reads as follows.

> **Rule 40 (a)**
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> All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officers of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified the claim or grievances shall be allowed as presented, but this shall not be considered as precedent or waiver of the contentions of the company as to other similar claims or grievances.

According to this objection the declination letter was not sent to the correct address of the Vice General Chairman of the Organization who had filed the appeal in the first place. According to the Carrier the letter was sent to the prominent address found on the letter head of the appeal letter. The reason for the alleged violation is because the declination letter was sent to the address of the BMWE Burlington System Division General Chairman's which address is prominently displayed on the letterhead of the appeal letter,

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[1]A joint investigation was held with both the Claimant to this case and his fellow employee in attendance. This case deals only with the narrow issues involving the Claimant to this case, D. G. DeMoss.

which letterhead is in quite large font, and not to the address of the Vice General Chairman who filed the claim whose name and address is found on smaller font on the right hand margin of the letter of appeal. The Board has already addressed objections of this nature which have surfaced on the Burlington System Division and it will follow here its earlier ruling in these matters. For the record the Board has ruled:

> "The Board hesitates to get involved in procedural disputes of this nature where the arguments presented have technical merit on both sides. On the one hand the Carrier should have sent the declination letter not only to the correct Organization representative, which it did, but also to that representative's address. On the other hand, responses to correspondence, of any kind, have normally led reasonable minds, as a matter of long-established practice, to send responses to the address on the letterhead of the correspondence in receipt. The position of the Board in this case is that it is wisest to allow the parties themselves to resolve this type of procedural issue raised in this instance in order that they might avoid such problems in the future. The instant objection will be neither denied nor sustained. The objection is dismissed".[2]

Discussion

On merits, the Rules at bar in this case are the following.

Rule 1.5 Drugs & Alcohol

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except

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[2]See Public Law Board No. 6204, Award 17 @ pp. 4-5. In its Submission to this Board the Organization cites various Third Division Awards dealing with declinations to the wrong person. See Third Division 22551 & 26732 inter alia. Such Awards are not on point since the issue here of a different nature.

medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.[3]

Rule 1.6 Conduct

Employees must not be:

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7. Discourteous

The Claimant held assignment as a grinder in the BMWE craft. His fellow employee whom he was with on the date when the alleged incidents which led to his discharge took place, held assignment as a welder in the craft.

At the time of the alleged incident the Claimant, D.G. DeMoss was with another employee who also works for the Carrier. The two of them had spent the night at a river boat casino gambling and drinking. When they left the casino they were intoxicated. According to evidence of record and arguments by the Carrier the Claimant, along with his co-worker, drove their vehicle to company property to relieve themselves after they left the casino. When they arrived on property the Claimant's fellow worker got out of the vehicle the Claimant was driving and kicked out the tail lights of two vehicles belonging to fellow employees. This took place in Burlington, Iowa. These actions were witnessed by an employee of the town's newspaper, which is called the Hawkeye Newspaper, who was working late in the newspaper's offices which are located just a

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[3]Burlington Northern Railroad Maintenance of Way Operating Rules, Effective --April 10, 1994 (Superseding the General Code of Operating Rules dated October 29, 1989 and the Maintenance of Way Rules dated November 1, 1991).

short distance from the Carrier's facility. This person was also able to take down the Missouri license plate number of the car which was the Claimant was driving. The person who witnessed the destruction to the vehicles' tail lights immediately reported what he saw to the Burlington, Iowa police. The vehicle being driven by the Claimant then left company property and was stopped a short time later in the city of Burlington proper by a deputy sheriff, who saw the vehicle being driven erratically. This deputy was quickly joined on the scene by a member of the Burlington police. There is no dispute that both men in the vehicle were given breathalyser tests and that both tested as being legally intoxicated. The police were told then told that the Claimant and his fellow, intoxicated worker were railroad employees. The Claimant was not arrested on a DUI but was told by the officers to pull the vehicle on company property. This was done. Once on company property a search of the vehicle was made and it was discovered that there were eight warm cans of beer in the car in a cooler.

The arguments made by the Organization are that the Claimant to this case never engaged in any destruction of private property, and that while he may have been inebriated on the day in question, he was never on company property while in such a state.

Findings

The instant case deals with a discharge and the Organization is correct in observing that the burden of proof here must be borne by the Carrier as moving party. To

this effect the Organization references a number of Awards on this point. Such Awards are so numerous that they need not be cited here. Further, evidentiary rulings in arbitral forums such as this are guided by standards which are generally referred to as substantial evidence.[4] These standards are different than proof beyond the shadow of a doubt which is evidence of the type required in a criminal proceeding in a court of law.[5]

The Claimant to this case was discharged for both having violated Rule 1.5 and for having engaged in conduct unbecoming of an employee. The latter refers to the property destruction which occurred when Claimant DeMoss went to company property after having left the Fort Madison casino with his co-worker. There is no evidence that the Claimant himself engaged in acts of property destruction but he was certainly an accomplice to the fact. He drove his fellow employee to the property, he sat in the car while the property was being destroyed and reasonable minds could but conclude that he certainly witnessed what was going on and/or at least knew about it, and he drove the guilty party away and was later apprehended in the town of Burlington proper by the

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[4]See, for example, the Organization's correspondence to the Carrier's Labor Relations' Department (Employees' Exhibit A-4 & Carrier's Exhibit 6) citing Third Division Award 15582. Also, for arbitral purposes, substantial evidence has been defined as such "...relevant evidence as reasonable mind might accept as adequate to support a conclusion..." (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). Numerous arbitration Awards in the railroad industry cite the latter evidentiary criterion as the appropriate one (Second Division 6419, 7292, 8130; PLB 5712, Award 4 inter alia.).

[5]These issues, common knowledge in this industry, are only raised here in view of the Organization's arguments made in its handling of this case on property wherein it states, at one point, the following: "...The charges against Mr. DeMoss are very serious and the Carrier has a very high standard of evidence that (it) must present in order to prove these charges. The degree of proof required in these types of cases must be overwhelming and beyond any doubt...". As to the seriousness of the charges there can be no doubt. As to the evidentiary criteria required in this case, this statement, taken literally, misconstrues those criteria.

police.[6] Reasonable minds would conclude that the Claimant as accomplice was guilty of violation of Rule 1.6.

Secondly, whether the Claimant violated Rule 1.5 or not is determined by whether he engaged in the use or possession of alcoholic beverages while on company property. The Claimant was clearly inebriated on the date in question. That cannot be disputed. He failed the breathalyser test. And at the investigation he admitted that he was inebriated. A review of the record and the issue at bar here is not whether the Claimant was on company property but once while he was drunk, but whether he was there twice.

The first time was when the vandalism took place. According to information provided by Mr. Mitch Martin, who worked for the local newspaper, he observed the vandalism taking place on Carrier's property which was just adjacent to where he was working in the newspaper's offices, he identified the running car which was standing by which the Claimant drove off after the vandalism took place, and then called the police. There is no reason to doubt the veracity of this information which is supported by the fact that the police did, in fact, shortly thereafter, pick up the Claimant who was erratically driving the subject car nearby in the town of Burlington proper.[7] The veracity of Mr.

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[6]Much factual information in this case is provided by the Carrier's special agent who received it, after his investigation, from talking with local police, from witnesses, etc. Information from this investigative report and testimony by those doing such reports are acknowledged pro forma as reliable by forums such as this. It is not totally clear, but it appears that it is this evidence which the Organization in its Submission refers to as "hearsay".

[7]Arbitral precedent, some of which is cited in this case by the Carrier, holds that statements by witnesses not present at an investigation are not inappropriate. On this see Third Division 16308, 19558, 24273 inter alia.

Martin's information lay also in the fact that what he reported to the police was the vandalism on company property. A follow-up investigation showed that vandalism had taken place as he reported it. Later, a Carrier's special agent was contacted by the owner of one of the vehicles, after local police had done their investigation and left a note on owner's car, to the effect that his vehicle had been parked on company property when it was vandalized. It was parked in the Carrier's Burlington "Tip-Up" yard which is a rail storage yard just off of main street in Burlington, Iowa. The owner of this vehicle, a section foreman, also testified at the investigation. The Claimant's drunkenness was a separate matter which was determined by the breathalyser tests. The temporal sequence of events which included observations of the Claimant's car on company property and his being stopped driving while intoxicated a short time later also permits reasonable deduction that the Claimant was, in fact, intoxicated while on company property. The license plate of the car seen on company property reported to police by the newspaper employee who witnessed the vandalism was the same as that of the car driven by the Claimant which was later stopped by police.

Secondly, there is evidence that beer was found in the Claimant's auto while he was on company property after he agreed to go there after the breathalyser test. All witnesses at the investigation testified that the Claimant and his co-worker were on company property at this point in time. According to the record, the auto was parked "...south of the section house..." in the Carrier's Burlington yard. Information of record is that the Claimant at that point also used his key to enter the section house of the Carrier

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in order to go to the rest room.

On merits the Board concludes that the Claimant violated Rule 1.5 of Carrier's General Rules not once, but twice. The Claimant also violated Rule 1.6 as an accomplice to conduct unbecoming an employee of the Carrier. He engaged in conduct which was, to say the least, discourteous.

The Claimant's prior disciplinary record has been reviewed. In view of this, and the Board's conclusions on merits, the Board rules that the Carrier's determinations in this case were neither arbitrary nor capricious.

Award

The claim is denied.

Edward L. Suntrup, Neutral Member

Thomas M. Rohling, Carrier Member

Roy C. Robinson, Employee Member

Date: 7/30/01