

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13016
Docket No. 12998
96-2-95-2-22

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

(International Brotherhood of Electrical
(Workers
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Remote Towerman Alhan B. Burnham of Douglas, Wyoming, was unjustly dismissed from service following an unfair and biased investigation held on November 2nd, 1993;
2. That the investigation held on November 2nd, 1993, was not a fair and impartial hearing, as required by the rules of the controlling Agreement and, that the discipline assessed was unjust and unwarranted, and;
3. That accordingly, the Burlington Northern Railroad Company should be directed to compensate and restore all wages, rights, benefits, and privileges denied Remote Towerman Alhan B. Burnham; in addition, the entry of investigation and discipline to be removed from his personal record and for Mr. Burnham to be restored to service with the Burlington Northern Railroad Company."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On October 1, 1993, Claimant was notified to attend an Investigation,

"... for the purpose of ascertaining the facts and determining your alleged responsibility in connection with violation of Rule G on January 30, 1991 in St. Roberts MO, and failure to report the incident to the proper Burlington Northern authority."

After a postponement, the Investigation was held November 2, 1993. On November 19, 1993, Claimant was advised that Carrier found him guilty as charged and that he was dismissed from Carrier's service.

Testimony adduced at the Investigation clearly established that Claimant was, on January 23, 1991, while driving a Company vehicle, arrested for two traffic violations, i.e., driving while intoxicated and careless and imprudent driving.

Claimant was given a field sobriety test which failed to satisfy the arresting officer, and was taken to the station for a breathalyzer test which registered a .13 level.

Claimant, through his lawyer, plea bargained the charges with the DWI being dismissed but was fined \$500 plus court costs for careless and imprudent driving. Needless to say, Claimant did not report these incidents to his Supervisor.

The Organization has challenged the procedural handling of this case, contending the charges were not precise and that the notice was not timely.

The charges were precise enough that neither Claimant nor his Representative were in any way surprised. In fact, Claimant had sufficient time to contact the individual who was with Claimant when he was arrested to attest to the events of the evening. Namely, that Claimant was not drinking and that he kept using a cotton swab to place medication on the sore spot in his mouth.

The Organization also challenged the timing of the Notice of Investigation contending it was beyond the 20 day window contained in the Rule. The Rule, however, is so constructed that for "personal conduct cases" the 20 day window does not commence until "the date information is obtained by an officer of the Carrier...."

Carrier complied with the "personal conduct" portion of the Rule. Claimant was timely charged.

In reviewing the merits of the case, there is the testimony of an expert Carrier witness, its special agent who had been, prior to employment with the Carrier, a police officer who was trained in the use of the breathalyzer. Claimant registered .13 which earned him the ticket for driving while intoxicated. Claimant contends that said reading must have come from the Ambisol he was using to deaden the pain in his mouth following a root canal.

The Special Agent testified that the meter used to determine blood alcohol content filters out any such possible misreading for any over-the-counter medication, and with prescription medicines, the only problem the meter has is with diabetics on insulin.

Since Claimant is not a diabetic on insulin, the evidence substantiates that Claimant was driving a Company vehicle while intoxicated.

Regarding the second charge of not reporting this incident, Claimant stated since he was found innocent of the driving while intoxicated charge, he did not think he was obligated to report it. The Court's resolution has no bearing on the Company charges. There are many and varied reasons for a plea bargain that has no bearing on a contract matter such as here concerned. The substantial evidence criteria is the norm in disciplinary cases, and in this instance, Carrier has met that criteria.

A review of Claimant's record develops that in the seventeen years (at the time of the Investigation) that he has been with the Carrier, he has had no other disciplinary charges assessed. It is also noted that Claimant, about eleven months after the dismissal, was offered reinstatement on a leniency basis. He should have accepted the offer as he would have been working since that date.

Under the circumstances, it is the opinion of this Board that Carrier did substantiate the charges it filed against Claimant, but in view of Claimant's clean record, he is to be reinstated to Carrier's service with all his seniority rights unimpaired, but with no pay for time lost. Claimant's return is contingent upon his passing the usual return to work physical and drug screen. Plus, Claimant also must satisfy one other criteria to gain reemployment. He is to place himself in the hands of the Employee's Assistance Program, and he is to fully cooperate in any recommended treatment if necessary.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 10th day of July 1996.