

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company (formerly The
Colorado and Southern Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Section Foreman W. L. Jackson for alleged violation of Rule 565, as amended by Superintendent's Notice No. 48, on July 24, 1988 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File BN-88-28/DMWD 880928B CSR).

(2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, he shall have his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Claimant herein, a Section Foreman, was dismissed by Carrier, following an Investigation, for violation of Rule G. The incident leading to his dismissal took place on July 23 and 24, 1988. The record indicates that he had just been reinstated, on a leniency basis, from a prior dismissal for violation of the same Rule and for theft.

The record reveals, from Carrier's point of view, that the Roadmaster supervising the section on the weekend in question, had received a phone call from the dispatcher at about 3:20 A.M. indicating that the dispatcher had received a call from Claimant asking permission to operate a Hy-Rail vehicle on the main line. The dispatcher, according to the Roadmaster stated that Claimant didn't seem to know exactly why he was out in the remote area of Horse Creek, Wyoming. The Roadmaster instructed Claimant to meet him at the Cheyenne Depot. When the two met at the Depot Claimant stated that he had been called out earlier to investigate cattle which had been spotted on the right of way in the vicinity of Horse Creek. The Roadmaster at that time smelled the odor of alcohol on Claimant's breath. Two other Carrier officials were called and appeared at the Depot and also smelled alcohol on Claimant's breath. He admitted to these officials that he had had a beer on Saturday afternoon before being called out. He was then asked to take a urine or blood test to verify the issue but refused stating that he wished to consult his Union representative first. He did not call his representative and refused a ride home, preferring to walk. He did act belligerently to the three Supervisors in the parking lot prior to leaving.

Claimant, admitting to having a beer on Saturday afternoon, his normal rest day, said he was called out due to the alleged cattle problem first at about 7:00 P.M. and later at about 11:00 P.M. He denied that he was under the influence of alcohol at the time of his interview with the various Supervisors. He stated that he had been phoned by a particular Carrier clerk with respect to the cattle problem, and was merely trying to fulfill his responsibilities.

The Board believes that Claimant's version of what transpired on the evening in question is not credible or supported by the testimony adduced at the Investigation. He had no corroboration of his story of being called out by the clerk and there was no refutation of Carrier's witnesses' evidence with respect to their investigation of the matter. Further, as this Board has said on many prior occasions his failure to submit to a blood or urine test gave Carrier the right to draw a negative inference. These facts, together with Claimant's prior record of violation of the same Rule, supports Carrier's decision to terminate the Claimant. For the foregoing reasons, the Claim must be denied.

A W A R D

Claim denied.

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Award No. 28580
Docket No. MW-28806
90-3-89-3-203

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Nancy J. Dever*
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1990.