

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37436
Docket No. MW-36956
05-3-01-3-587

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. D. C. Munsch on September 6, 2000 for alleged violation of Maintenance of Way Operating Rules 1.5 and 1.6 in connection with an investigation on August 15, 2000 regarding his conduct on July 14, 1999 was without just cause, excessive and in violation of the Agreement (System File T-D-2156-W/11-00-0593 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. C. Munsch shall now ‘. . . be reinstated to service with the Carrier, with his seniority unimpaired, paid for all lost time, including lost overtime, promotional benefits, beginning with September 7, 2000 and continuing until Claimant is returned to service, we also request that Mr. Munsch be made whole for any and all benefits, and his record cleared of any reference or any mention of the discipline set forth in the September 6, 2000 letter from A. J. Cawson, Terminal Manager.’”

FINDINGS:

The Third 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 were given due notice of hearing thereon.

Some background is necessary to understand the instant dispute. By letter dated July 19, 1999, the Claimant was instructed to appear for an Investigation in connection with his alleged failure to report for duty on July 14, 15, and 16, 1999, his alleged failure to comply with traffic laws while operating a company vehicle on July 14, 1999, and his alleged failure to comply with proper notification procedures associated with a suspended driver's license. The Claimant signed a waiver in lieu of Investigation, agreeing to a five day suspension and one year probation for failing to report for duty. The waiver does not address the two other charges for which he was cited.

The Claimant subsequently pled guilty to a DWI charge and petty misdemeanor theft arising out of the same July 14, 1999 incident that had earlier prompted the Investigation notice and waiver. A second Notice of Investigation was issued. After the August 15 Hearing, the Claimant was dismissed on September 6, 2000 based on the Carrier's determination that the Claimant operated a Carrier vehicle under the influence of alcohol and stole property while staying at a Carrier provided lodging facility.

On October 4, 2001, the Carrier offered to reinstate the Claimant upon his successful completion of the Carrier's drug and alcohol program. The Claimant reported for treatment and did participate in the program but, for reasons not disclosed on the record, he failed to continue the program. The Carrier thereafter reaffirmed his termination on January 25, 2002.

We find, based on the particular circumstances set forth above, that the Claimant was subjected to a measure of double jeopardy when the Carrier charged him twice for the vehicular charges arising out of the July 14, 1999 incident. Although the Carrier argues that it properly elected to await the outcome of the

DWI charges to cite the Claimant for a second Investigation, it would appear that when the Claimant signed a waiver on the lesser charges, he reasonably could have believed that the Carrier would not charge him again for the vehicular incident.

Because of the unique facts on this record, this claim will be sustained in part. The Claimant will be given another chance to show the Carrier that he can be a valuable employee. However, his reinstatement is conditioned upon meeting with an Employee Assistance Counselor, following any prescribed treatment or counseling program as deemed necessary, and receiving a favorable recommendation from the EAP counselor concerning the Claimant's return to work. Upon compliance with all the terms and requirements of the EAP, the Claimant is to be reinstated, without compensation for time lost, and with contractual benefits fully restored.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division

Dated at Chicago, Illinois, this 22nd day of March, 2005.