

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Mr. M. D. VanMatre for alleged violation of Rule 566 on February 17, 1985 was arbitrary, capricious and on the basis of unproven charges (System File C&S 2-85).

(2) The claimant shall now be allowed the benefits prescribed in Agreement Rules 11 and 26(c)."

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 employees involved in this dispute are respectively carrier and employees 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 established seniority in the Carrier's Track Department on October 4, 1976. On June 18, 1980, Claimant was promoted to a supervisory position. At the time of the incidents involved in this matter, Claimant held the position of Roadmaster at Ft. Worth, Texas. In accord with Rule 11, while in his exempt position Claimant was on a leave of absence but continued to accumulate seniority under the Agreement. By letters dated February 22, 1985, Claimant was relieved of his duties as an exempt employee for conduct unbecoming an officer and was further withheld from service pending an investigation for violation of various safety rules based upon Claimant's alleged intoxication on February 17, 1985. After investigation held on February 28, 1985, and by letter dated March 8, 1985, Claimant was dismissed from service.

The Carrier maintains the trackage over which a Missouri-Kansas-Texas Railroad train derailed on February 16, 1985. The record shows that Claimant was called to duty as a result of the derailment and reported to the derailment site shortly after midnight on February 17, 1985. Claimant worked until 4:00 a.m.

Trainmaster M. R. Evans testified that at approximately 9:00 a.m. on February 17, 1985, he was approached by two MKT officers who stated that "they wished to complain of ... [Claimant's] condition, specifically that they noticed that he had been drinking [a]nd they felt obligated to notify this company of the fact." Pursuant to instruction, Claimant returned to the derailment scene at 11:00 a.m. According to Assistant Superintendent of Roadway Maintenance R. G. Strong, he told Claimant that the MKT officials had accused him of being intoxicated "[a]nd I asked him if he had anything to drink." Strong testified that Claimant responded that "he had a few." Claimant agreed to Strong's requests for him submit to blood alcohol and urine tests.

Evans and Strong accompanied Claimant to St. Joseph's Hospital only to find that emergency room crowded. The three left St. Joseph's at approximately 12:30 p.m. and proceeded to Minor Emergency Clinic. According to Evans and Strong, upon an inquiry by Strong when leaving St. Joseph's Hospital concerning whether Claimant was drinking at or before his investigation of the derailment, Claimant stated that he "had quite a bit to drink."

Tests were conducted at Minor Emergency Clinic at approximately 1:00 p.m. The tests yielded negative results for alcohol and drugs. Both Strong and Evans testified that when they first saw Claimant that morning, Claimant showed no outward manifestations of intoxication or of being under the influence of drugs or alcohol, including glassiness of eyes, odor of alcohol, slurred speech, or uncontrolled movement. Further, both admitted that Claimant was not quarrelsome or insubordinate, but appeared cooperative.

According to Claimant, he was on call before 6:00 p.m. on February 16, 1985, but had performed no services for the Carrier between the hours of 6:00 p.m. and midnight. Claimant testified that while at the derailment site between midnight and 4:00 a.m. on February 17, 1985, he had no conversations with MKT officials wherein they indicated a problem existed concerning his conduct. Claimant testified as follows concerning his consumption of alcohol:

"Q. During the time frame before you reported to the derailment then, you had consumed alcoholic beverages, is that correct?

A. It was about two o'clock in the afternoon, I had a couple."

Claimant asserts that he had "maybe two beers" and had nothing to drink at least eight hours prior to reporting to the derailment site. Claimant attributes the behavior alluded to by the MKT officials as related to the effects of high blood pressure as "[i]t probably appeared that I had been drinking." Claimant further testified that he did not immediately leave the derailment site after 4:00 a.m., but went to sleep in his vehicle for two hours. With respect to the testimony of Strong and Evans that Claimant admitted to them that he was drinking and had "a quite a bit," Carrier testified that "the reason I said that was because I thought that was what they wanted to hear."

We are satisfied that substantial evidence exists in the record to support the Carrier's conclusion that Claimant violated Rule 566 which prohibits employees from reporting for duty under the influence. We recognize that the MKT officials did not testify and the testimony in the record concerning their observance of Claimant's condition was hearsay. However, Claimant's admissions to Strong and Evans at the derailment site and as they were leaving St. Joseph's Hospital that he was drinking and had consumed "quite a bit" makes the MKT officials' testimony unnecessary. Claimant's explanations that he was suffering from high blood pressure and a cold and "wasn't all together in my head"; that he did not consume the amount that he indicated to Strong and Evans and that he only made the admissions because he thought that was what Strong and Evans wanted to hear are insufficient to dictate a different result under the substantial evidence standard. The record shows that Claimant made those admissions and we find nothing in the record to persuade us that under the substantial evidence standard the Carrier's rejection of those explanations was without basis. Nor would the facts that Claimant showed no outward signs of being under the influence or that the test results were negative cause a different result. The testimony concerning Claimant's physical appearance was how he looked eleven hours after he reported for duty and after Claimant slept in his vehicle for two hours. Further, the test results were indicative of Claimant's blood alcohol level more than thirteen hours after he reported for duty and a negative result at that time is certainly understandable.

However, we believe that dismissal was excessive and was not warranted under the circumstances of this case. We note that the record evidences some confusion concerning an offer of reinstatement and the completion of an Alcohol Rehabilitation Program. We believe that the remedy formulated on this property in Public Law Board 2894, Award No. 4 fits the facts in this case:

"In the particular facts of this case the Board will direct Claimant to be returned to service, without pay, subject to the condition of completing, and complying with, the terms and conditions of Carrier's Alcohol Rehabilitation Program. We are not passing judgment on Claimant and concluding thereby that Claimant is an alcoholic. We do, however, recognize that

Carrier has an enormous burden of responsibility to the public and Claimant's fellow employees for their safety and well-being and in the circumstances of this case we are satisfied that Claimant cannot help but benefit from a passage through a Carrier-sponsored rehabilitation program to impress upon Claimant both the seriousness of the infraction of the particular rule and the enormous potential impact that mixing alcohol and duty can create."

We shall therefore return Claimant to service with seniority and other benefits unimpaired but without compensation for time lost. We obviously cannot return Claimant to his exempt Roadmaster's position since that position is not covered by the Agreement. Therefore, we shall permit Claimant to exercise his seniority under Rule 11 as requested in the Claim. Return to service is contingent upon Claimant's completion of the alcohol rehabilitation program and the satisfactory completion of a return to service physical examination.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.