

Joseph Lazar, Referee

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
TO ) and  
DISPUTE ) BURLINGTON NORTHERN RAILROAD (Former Fort Worth  
and Denver Railway Company)

1. That the Carrier violated the provisions of the current Agreement when it dismissed Trackman M. J. Berry from its service commencing September 2, 1982, based on charges not substantiated by the testimony adduced at the investigation, said action being in abuse of discretion and unwarranted.
2. That Claimant M. J. Berry be reinstated to the service of the Carrier with all wage loss suffered restored, including overtime, and with seniority rights and all other rights restored unimpaired.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and Carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Trackman M. J. Berry, an employee of this Carrier with seniority date of October 30, 1980, was notified of his dismissal from service by letter dated September 27, 1982, reading: "This is to notify you that you are hereby dismissed from the service of the Fort Worth and Denver Railway Company for violation of Rules 565 and 566 of the Burlington Northern Safety Rules on September 2, 1982 while assigned as Track Laborer on Extra Gang 1, working in the vicinity of Herman, TX, as evidenced by a formal investigation afforded you at Fort Worth, TX on September 10, 1982."

Burlington Northern Safety Rule 565 reads:

"The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controller substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited."

Burlington Northern Safety Rule 566 reads:

"Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance, or medication, including those prescribed by a Doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety."

The evidence of record is clear and undisputed that certain objective facts existed on the morning of September 2, 1982, about 9:00 A.M., on the basis of which the Carrier determined that the Claimant was under the influence of alcoholic beverage.

1. Claimant smelled of alcohol.

Claimant testified: "I told Mr. Hancock that we had had a couple or three beers the night before. That if he smelled anything on me that it was from the night before and not that morning." (Tr., p. 21).

Assistant Foreman Elvin Bowens, Jr. testified: "I smelled the fragrance of alcohol on his person. The Foreman, at the time, Mike Garrett, noticed it before I did and asked me would I verify, would I see if I smelled alcohol on the man because he didn't want to do anything to impute the man on his word alone. I walked up to and talked to the man and smelled the alcohol very strongly..." (Tr., pp. 3-4.)

Assistant Roadmaster Donald R. Hancock testified: Claimant "smelled of alcohol." (Tr., p. 5) "I asked him had he been drinking. He said he hadn't, that he had been drinking quite a bit the night before but that he hadn't been drinking that morning on the job." (Tr., p. 5). The testimony of co-worker, Trackman H. R. Jones, in response to the question, "Did you notice an alcohol smell on the breath of Mr. Berry?" was "No sir". (Tr., p. 13), while this question was not asked of Trackman S. A. Beasley.

The Board finds that Claimant smelled of alcohol.

## 2. Claimant stumbled and staggered.

Assistant Foreman Bowens testified: "...the condition he was in when he reported for duty, yes, he was staggering. ...I walked up to and talked to the man and smelled the alcohol very strongly, and his eyes were blood shot and he was staggering. He sit down by the water can for approximately 5 minutes, sit down by the water can. I'm not a doctor, I can't say what his condition was other than if it was me, I'd say I was pretty tight." (Tr., pp. 3-4).

Assistant Roadmaster Hancock testified that Claimant "was stumbling around the tracks...". (Tr., p.5).

The testimony of Trackman Beasley, in response to the question, "Did you notice any unexcusable loss of balance or staggering of Mr. Berry?", was "No, sir. No more than anyone else." Trackman Jones, asked the question, "Was Mr. Berry uneasy on his feet or staggering for any reason, such as intoxication?", answered: "No sir."

The testimony of Mr. Beasley, "No more than anyone else" implies that stumbling may have occurred and may have been correctly observed as such by Messrs. Bowens and Hancock, even though this may have been common among the employees as a consequence of the terrain or ballast. The statement by Mr. Jones: "If any staggering was done it would have been (from the terrain or ballast) because he didn't appear to be intoxicated to me...". (Tr., p. 14), in context with the statements of the other witnesses, does not negate the testimony of the other witnesses that Claimant staggered.

The testimony of Mr. Hancock that Claimant "sit down by the water can for approximately 5 minutes, sit down by the water can", is undisputed.

The Board finds that Claimant stumbled and staggered.

## 3. Claimant had bloodshot eyes.

Assistant Foreman Bowens testified: "The man's eyes were red and very blood shot." (Tr., p. 3). Assistant Roadmaster Hancock testified: "...and when I went to talk to him his eyes were bloodshot." (Tr., p. 5). Trackman Beasley responded, "Not that I could tell" to the question, "Was Mr. Berry's eyes abnormally blood shot out there that morning?" (Tr., p. 11). Trackman Jones, asked: "Did you notice whether Mr. Berry's eyes were blood shot or

or not?" answered: "I didn't. I never noticed." (Tr., p. 13). The responses, "Not that I could tell" and "I never noticed" are, at best, a weak contradiction to the testimony that Claimant's eyes were "red and very blood shot".

It is, of course, quite possible that dust kicked up in the work setting may have gotten into Claimant's eyes, and ballast dust might cause one's eyes to redden; but the testimony that Claimant's eyes were blood-shot is not disputed.

The Board finds that Claimant's eyes were blood-shot.

The transcript of the investigation includes the following questions, answered to by Assistant Roadmaster Hancock:

"Q. You stated you offered a blood alcohol test to Mr. Berry?

A. Right.

Q. Did he agree to take such test?

A. Yes

Q. And, did you take him for such test?

A. No.

Q. You said you took him to the Clinic for a test?

A. I took him to the Clinic, and then called my superiors and they said it was unnecessary.

Q. But, Mr. Berry was willing to take such a test?

A. Yes." (Tr., p. 7).

The testimony of Claimant regarding the trip to the Clinic for the blood test is as follows:

"Q. Previous testimony by Mr. Hancock, he stated that he requested you take a blood alcohol test or sobriety test, is that correct?

A. Yes sir.

Q. Was there any problem, did you agree to it?

A. Yes sir.

Q. Did you agree because you felt you would have no problem taking this sobriety test or blood alcohol test?

A. I felt I could pass it.

- Q. Where were you taken for your blood alcohol test?  
Was this the purpose you left the property with Mr. Hancock, to take this test?
- A. It was my understanding. We went to the Decatur Clinic.
- Q. Why didn't you take the test?
- A. Donnie asked the nurse about a blood alcohol test. I can't remember her exact words. She said something about the hospital would have to wait for the results.
- Q. Then, what did Mr. Hancock say?
- A. He asked me to wait for him. Then he got on the phone to talk to someone.
- Q. Then what happened?
- A. I sat there for almost an hour. He came and got me and took me back to my car, and never said a word to me other than he took me out of service for violation of Rule G. I asked him about the blood alcohol test and he said he didn't have to give me one. He just needed two witnesses." (Tr., pp. 18-19).

The evidence of record is clear that Mr. Hancock initiated the effort to obtain the blood alcohol test. Claimant did not request the test. The effort to obtain the blood alcohol test was dropped by Mr. Hancock because of the time delays involved. The dropping of the effort was not protested by the Claimant nor did he make a request at the time to be given the blood test.

The Board is mindful of Special Board of Adjustment 589 Award No. 44, the Brotherhood of Railway Trainmen vs. Pennsylvania, Referee Siedenberg, in a Rule G case, cited by the Organization herein in support of Claimant, wherein it was held that "the Carrier committed prejudicial error when it refused to accede to Claimant's request that he be examined by a physician to determine whether he had been under the influence of alcohol while on duty. The Board holds that the charge of violating Rule 'G' is so grave a matter in this industry that the parties should attempt to get, where feasible, not only competent but also the best evidence as to the truth or falsity of the charge." What the Board stated in Award No. 44 makes good sense. In the instant case, however, as noted above, Claimant did not make a request upon the Carrier for a blood-alcohol test nor was such request denied. The Carrier here did not commit prejudicial error.

Considering the evidence of record as a whole, the evidence establishes clearly that Claimant had blood-shot eyes, smelled of alcohol, and stumbled and staggered. The existence of all of these

facts in the circumstances and evidence of record fully warrants the Carrier's dismissal of Claimant.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim of M. J. Berry is denied.

Joseph Lazar  
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

C. F. Foose  
C. F. FOOSE, EMPLOYEE MEMBER

B. J. Mason  
B. J. MASON, CARRIER MEMBER

DATED: April 3 1984