

Joseph Lazar, Referee

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO) and
DISPUTE) BURLINGTON NORTHERN RAILROAD (Former FW&D)

1. That the Carrier's decision to dismiss Track Laborer R. L. Thorn was in violation of the Agreement. Said action was based on unproven charges, in abuse of discretion and without a fair and impartial hearing and consideration throughout the appeal procedures.
2. The Carrier will now be required to return Claimant to his former position with seniority and all other rights restored unimpaired and with compensation for all wage loss suffered, including Holiday and vacation credits.

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 employe and carrier within the meaning of the Railway Labor Act, as amended, that it has jurisdiction over the parties and the subject matter, and that the parties were given due notice of the hearing held.

"effective this date you are hereby dismissed from the services of the Burlington Northern Railroad Company for violation of Rules 564, 565 and 566 of the Burlington Northern Safety Rules and General Rules as a result of your insubordinate behavior, profane language, quarrelsome and otherwise vicious conduct at about 12:45 p and your refusal to submit a urine sample as instructed by carrier

officials at about 3:30 p.m., August 16, 1985, while assigned as a Trackman on Regional Rail Gang No. 4 at that date and time near Chillicothe, Texas, as was evidenced in the testimonies at the formal investigation afforded you on August 29, 1985 at Childress, Texas."

Rule 564 reads:

"564. Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."

Rule 565 reads:

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

Rule 566 reads:

"566. Employees must not report for duty under the influence of any alcoholic beverages, 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 transcript of investigation reports the following testimony by Assistant Foreman Rivers:

"Q. And what was that?

A. OK. Well, as I was passing by, he (Claimant) said, "Hey, Man, it's around 2 o'clock." He said, "We've got to have lunch. You got to feed us between the 4th and 6th hour." And so I said, "Well, I don't understand that." I said, "In this case it's an emergency." He said, "Well, just fuck you" and pushed me out of the way. I said, "You need to go back to work", and that's when he said, "Naw, I am going home." He just went on down the track and I headed on down there to talk to the foreman and let him know what was going on. I told the foreman what had happened.

Q. During the alleged incident on August 16, did Mr. Thorn at any time following your directions when you told him to get back to setting spikes?

A. No.

Q. Could you state for the record how many times you requested him to go back to work and set spikes?

A. Around three times.

Q. Three times?

A. Yes.

Q. What did you tell the foreman?

A. I told the foreman that he had cussed me and pushed me. I said I wanted to write him up." (Tr., pp. 7-9).

The transcript of investigation shows the following testimony by Claimant:

"Q. On August 16, 1985, what duties were you performing on the track gang?

A. Different duties, straightening plates, setting spikes, knocking off anchors, knocking on anchors.

Q. Did you have an exchange of words with Mr. Gaston on 8/16/85?

A. Yes sir.

Q. And, what were they?

A. I requested to be allowed to go to lunch and he told me, "No, go back to work". So, at that time I said fuck em, I'm going to lunch.

Q. What did Mr. Gaston in turn say to you?

A. He told me to go back to work.

Q. Did you then go back to work?

A. After I was called off the track and talked to Mr. Thomson and Mr. Persons and was made to apologize to Mr. River, yes, I did back to work." (Tr., pp. 48-49).

The evidence of record is clear that Claimant refused to comply with the Assistant Foreman's instructions to return to work. This refusal constituted insubordination and was a violation of Rule 564 Claimant's use of profanity may be regarded as "shop talk", but when coupled with refusal to follow instructions to return to work and was directed at the Assistant Foreman, such language makes the defiance of authority and insubordination even more explicit.

There is no doubt that the Claimant felt a strong sense of grievance at being denied meal period at about 2:00 p.m. after starting work at 8:00 a.m., especially so when the Agreement provided for meal period between four and six hours of work and the Bulletin

specified meal period between 12:00 and 12:30 p.m. Moreover, there is no question that Claimant was hungry. In the circumstances, Claimant should have complied with instructions and filed his grievance. Absent a threat to health or safety, it is the employee's obligation to comply with instructions.

The transcript of investigation shows the following testimony by Assistant Roadmaster D. M. Thomson:

- "Q. I believe you stated on your testimony, that Mr. Thorn was offered an urinalysis, for what reason did you offer him an urinalysis?
- A. Because of his abnormal behavior.
- Q. Was this due to instructions given to you by higher authority?
- A. Yes.
- Q. You said, because of his abnormal behavior, yet I believe in prior testimony, you testified that in your presence that Mr. Thorn's behavior was normal?
- A. In my presence, yes.
- Q. What would the urinalysis do to explain a person's abnormal behavior?
- A. It would show if there were either alcohol or controlled substances in his body, at the time.

- Q. Was Mr. Thorn taken out of service?
- A. Yes.
- Q. For what reason?
- A. For failing to provide an urinalysis sample.
- Q. For no other reason than that?
- A. Also, for his insubordinate behavior." (Tr., pp. 39-40).
- In connection with the urine sample request, Claimant testified:
- "Q. Did he state to you that you would be regarded as not complying with instructions from proper authority?
- A. Yes sir.
- Q. Did you submit to a urine sample?
- A. No sir.
- Q. Why not?
- A. I believed there was no cause for them to ask me to submit to one (Tr., p. 52).

Where probable cause is present, the employee is subject to the duty to submit a urine sample. Claimant, it is clear, did not think that "there was cause for them to ask me to submit to one." The transcript of investigation shows the following:

"Q. Did you, in fact, use profanity towards Mr. Rivers?

A. Not directly towards Mr. Rivers, no. I used profanity towards the whole situation. I was mad. No water, no lunch. It was 2 o'clock in the afternoon and I was hot and tired, hungry. Just generally angry." (Tr., p. 51).

The fact remains, however, as stated in the first part of this Finding, that Claimant behaved in an insubordinate manner towards his supervisor. Insubordinate behavior is not ordinarily considered to be normal behavior; to the contrary, it is regarded as abnormal behavior. The Carrier had probable cause, in the circumstances of this case, to require Claimant to submit a urine sample and his refusal to do so placed him in jeopardy of termination for violation of Rules 565 and 566. The Carrier's decision to terminate Claimant for violation of Rules 564, 565, and 566 is warranted by the evidence of record.

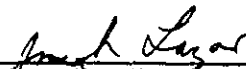
The Board notes that the instant claim was discussed in conference with the General Chairman prior to the Carrier's final decision in letter of March 20, 1986, which states: "This case was discussed in conference on March 14, 1986. At that time you advised that Mr. Thorn has not cooperated with the EAP Coordinator. The Carrier's decision was affirmed."

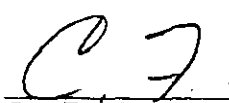
In the circumstances of this particular case, the Claimant should be reinstated, without back pay, subject to the strict condition that he fully cooperate with the EAP Coordinator and subject to the condition that the EAP must first certify to the proper authority of the Carrier that Claimant is fit and has satisfactorily completed the program for rehabilitation and restoration to service.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The Carrier shall reinstate Claimant without back pay and subject to the conditions stated in last paragraph of Findings.

Order: Implementation of this Award shall commence within thirty (30) days of date of Award.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER


C. F. FOOSE, EMPLOYEE MEMBER


L. MARES, CARRIER MEMBER

DATED: 12/5/86