

PUBLIC LAW BOARD NO. 4244

**Award No. 204
Case No. 209**

Parties to Dispute: (**BROTHERHOOD OF MAINTENANCE**
(**OF WAY EMPLOYEES**
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(**-and-**
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(**BURLINGTON NORTHERN SANTA FE RAILWAY**
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Statement of Claim: Claim on behalf of Eastern Region Maintenance of Way Employee Randy Harris for reinstatement with all seniorities, vacation and benefit rights restored, and compensated for all wage loss beginning February 12, 1996 and continuing.

INTRODUCTION

This Board was duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Act, 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Railway Labor Act ("Act"), as amended.

FINDINGS

The claimant, Randy Harris, was hired by the Carrier on July 25, 1994, and at the time of his discharge eighteen months later he was assigned to a gang which operated from Pampa, Texas. On December 22, 1995, the claimant was scheduled to work 7:00 a.m. to 3:30 p.m., but he failed to report until approximately 8:30 a.m.

The claimant first appeared at the office of the roadmaster, Larry Gawthrop, located at the Pampa depot. The roadmaster and a track supervisor, William Merrick, were present when the claimant entered the office. Gawthrop described the claimant as holding his right hand, and he appeared very nervous. The claimant told the supervisors he had been in a fight that morning and the police were searching for him. Gawthrop asked the claimant to remove his sunglasses twice without a response, but on a third request from Merrick the claimant removed the Carrier issued safety glasses. According to the roadmaster, the claimant's eyes appeared bloodshot and the pupils were dilated. The claimant acted very restless, and based upon his recent drug awareness training, the roadmaster suspected the claimant was under the influence of drugs. Gawthrop told the claimant he wanted to "run a drug test on him." The claimant reportedly stood up and stated that his brother was waiting for him outside, that he needed to go to the hospital, and the police were looking for him. Claimant proceeded to leave the office at approximately 8:45 a.m.

The roadmaster followed the claimant from his office, but he testified the claimant had already left the property when he reached the outside of the building. The

roadmaster did not check with the hospital to see if the claimant had been admitted for treatment, or contact local law enforcement in an effort to verify claimant was in custody. Track supervisor Merrick's version of events on the morning of December 22, 1995, was similar to the roadmaster's statements. He observed the claimant who appeared very nervous. Merrick had prior discussions with the claimant concerning claimant's personal problems, including a difficult divorce, and work related problems such as late arrivals and the Carrier's need to be informed if he was unable to report to work. Merrick confirmed that when asked by the roadmaster to take a drug test, the claimant stated his brother was waiting for him. There was no question but that the claimant was in pain and unable to work on December 22, according to Merrick.

The claimant admitted that he failed to report to work as scheduled, although he attempted to telephone prior to his appearance at the roadmaster's office. On December 22, 1995, he walked to his ex-wife's residence at 6:00 a.m. to engage in sexual relations -- activity they participated in despite their marital separation. When he found his ex-wife was not at home, the claimant went to a local restaurant where she worked. At the restaurant, a fight erupted between the claimant and his ex-wife, and the claimant broke his hand when he hit his wife on the back of her head. He also admitted striking the ex-wife's coworker who came to her assistance. Claimant testified: "... after I had committed my offense, I went to his [roadmaster] office to inform him that I would not be at work that day and I didn't know when I might would [sic] be able to come back to work because I was presently being

arrested because I had to turn myself in for committing an assault." (Tr. 43-44). The assault occurred at approximately 7:30 a.m. according to the claimant. He further stated that the redness in his eyes was due to his crying during the night, coupled with very little sleep.

When asked to submit to a drug test, Claimant gave his verbal consent to submit to the test. The claimant testified he told the trainmaster and supervisor that he had to go to his car and inform his brother and the arresting officers that the Carrier wanted him to take a drug test. However, upon exiting the building the police refused to permit the drug test and immediately placed the claimant under arrest. On recall, the roadmaster testified that when he told the claimant of his intentions to administer a drug test, the claimant did not say yes or no; rather, the claimant only answered that his brother was waiting outside to take him to the hospital and the police were looking for him. Track supervisor Merrick stated he heard no response from the claimant.

Local newspapers reported the claimant had been arrested, charged with aggravated assault and a bail bond was set at \$15,000 on each count. One of the two articles listed the names, age and medical treatment of the victims of claimant's assault. The Carrier was not mentioned in either article. A relief section foreman from Pampa, James Byfield, testified over the Organization's objection that after working with the claimant on December 21, he stopped at a local convenience store. When he was identified as a employee of the Carrier, a convenience store clerk commented to him that the Carrier hired "druggies." The clerk also stated she witnessed claimant purchase "a rock of crack cocaine." Byfield

reported this conversation early on the morning of December 22, 1995, to Merrick and Gawthrop. On cross-examination, Byfield admitted that he had no way to confirm the clerk's statement without bringing her to the investigation, and he did not ask her to appear and testify.

The claimant presented the Carrier with medical evidence of his physical inability to work approximately ten days after the incident. On January 22, 1996, two days prior to the formal investigation and a month after the incident, the Carrier's division superintendent authorized a leave of absence for the claimant from December 21, 1995, through February 13, 1996, due to his off-duty injury.

On February 12, 1996, the claimant was issued a Level 6 Dismissal for failing to protect his regular assignment on December 22, 1995, being on Company property under the influence of alcohol and/or illegal drugs, refusing to take a drug test, and for allegedly causing severe criticism to the Carrier in violation of Rules 1.1, 1.5, 1.6, 1.9, 1.13 and 1.15 of the Safety and General Rules for All Employees, and Sections 2.13, 9.1 and 12.0 of the Carrier's Policy on Use of Alcohol and Drugs, effective January 1, 1995.

The first issue for consideration before the Board is whether the claimant behaved in such a way that the Carrier was criticized for his actions. The charge of a violation of Rule 1.9 was based solely on the most prejudicial of hearsay evidence, the unverifiable verbal allegations of an unidentified convenience store clerk who did not testify at the hearing. This charge cannot stand. There was no evidence any effort was made to

secure the attendance of the clerk at the investigation or a showing that despite such efforts she remained unavailable as a witness. There was no written statement from the clerk. Finally, the newspaper articles identify the claimant, but the Carrier is never mentioned as his employer. Simply stated, there was no credible evidence establishing a nexus between the claimant's actions and the Carrier which brought the latter under criticism or disrepute.

The Board further finds the evidence to be irrefutable that claimant failed to protect his regular assignment on December 22, 1995, in violation of Rule 1.15. His scheduled report time was 7:00 a.m., and rather than reporting to work the claimant had occupied himself with locating his ex-wife, and engaging in a physical assault upon his wife and her co-worker. The grievant testified in a straightforward manner to the events on the morning of December 22, and proof of this charge was overwhelming. There remains an unexplained contradiction between the period covered by the grant of a leave of absence, and the grievant's absence due, in part, to the altercation and his incarceration on the assault charges.

The Board further finds that the Carrier had reasonable suspicion on December 22 to request that the claimant submit to drug testing. An employee who reports for duty over an hour after the scheduled start of his shift, wearing dark safety glasses which he initially declined to take off, presenting an injured hand and in great pain, dilated and red eyes, coupled with an announcement that he was wanted by the police --- represent specific, contemporaneous, articulated observations concerning the claimant's appearance and

behavior. These observations support the Carrier's determination that reasonable suspicion existed to require the claimant to undergo a drug test. The claimant was observed by two supervisors, one of whom (the roadmaster) had the requisite training on the signs and symptoms of drug use.

The most critical question posed by these facts is whether the claimant refused to provide a urine specimen when instructed to do so. A reasonable and rationale conclusion concerning claimant's matter-of-fact admissions of rather egregious, off-duty conduct during the formal investigation offers some guidance into his actions on the day of the incident, and his propensity to speak forthrightly concerning the events in the trainmaster's office on the morning of December 22, 1995.


The Board finds claimant's explanation that he exited the office to inform his brother of the Carrier's request that he submit to drug testing when he was arrested by the police consistent with the facts. The supervisors were told claimant's brother was waiting outside to take him to the hospital, and that he was wanted by the police. There is no substantive evidence to contradict this version of events, and claimant's arrest and confinement in the local jail on December 22 is not disputed. The testimony of the Carrier's supervisors on this issue is not inconsistent with the claimant's adamant denial that he refused to provide a specimen for drug testing. Moreover, while the Board concludes that the evidence supports a determination that reasonable suspicion existed to drug test the claimant, he was in apparent need of immediate medical attention for his hand injury. Such

circumstances do not require the Carrier to conduct a urine drug test or risk noncompliance with federal regulations. 49 C.F.R. §219.300(c).

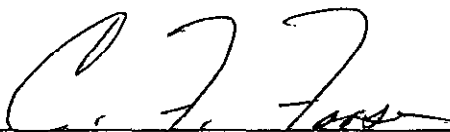
The Board finds that the claimant failed to protect his regular assignment on December 22 caused by off-duty conduct of which he freely admitted his guilt. The grievant, a short-term employee, had personal problems which affected his job, and for which the Carrier had offered assistance and counseling (Testimony of Merrick). The Board, after consideration of the entire record and circumstances present in this case, concludes the claimant shall be reinstated to employment with the Carrier with his seniority rights unimpaired, but without compensation for his net wage loss. As a condition of his reinstatement, the claimant must: (a) provide a negative urine sample within 45 days of this Award; (b) promptly contact a substance abuse professional retained under the Carrier's employee assistance program; (c) fulfill all rehabilitation steps specified as a result of the EAP evaluation; and (d) be certified by the EAP professional as sufficiently rehabilitated to return to duty.

AWARD

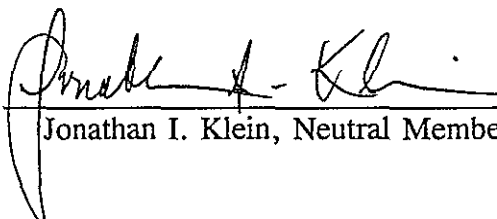
The claim is sustained in accordance with the findings set forth above.



Greg Griffin, Carrier Member



Clarence F. Foose, Employee Member



Jonathan I. Klein, Neutral Member

This Award issued the 1st day of April, 1997.