

## Public Law Board No. 6204

### **Parties to Dispute**

Brotherhood of Maintenance of Way  
Employees

vs

Burlington Northern Santa Fe

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Case **19/Award 19**

### **Statement of Claim**

1. That the dismissal of **Trackman** D. G. Braun for alleged violation of Rule 1.5 of the Maintenance of Way Operating Rules for reporting to duty and while on Company property under the influence of alcohol on September 10, 1995 was without just and sufficient cause, on the basis of unproven charges, and in violation of the Agreement.

2. As a consequence of the aforesaid violation the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him, and he shall be compensated for all wage loss suffered.

### **Background**

The Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with his failure to comply with Maintenance of Way Rule 1.5 when he reported for duty at the Dickinson Depot on Sunday, September 10, 1995 at approximately **5:30** AM. After an investigation was held the Claimant was advised that he had been found guilty as charged and he was dismissed **from** the service of the Carrier. The discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant labor Agreement up to and including the highest Carrier **officer** designated to hear such. Absent

settlement of the claim on property it was docketed before this Board for **final** adjudication.

### **Discussion**

Prior to addressing the merits of this case the Board will rule on procedural objections made by the Organization. The Organization alleges that the Carrier violated Rule 40(e) of the labor Agreement. This Rule reads as follows.

#### **Rule 40(e)**

The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports and information made a matter of record.

According to the Organization it was provided a copy of the transcript but it was “. incomplete.. .”. It was incomplete, according to the Organization, because it did not contain copy of the “...**exhibits** placed on record during the investigation...“. At the operational level it is simply denied by Carrier’s **officers** that the exhibits were not provided to the Organization and the Claimant. At the Labor Relations’ level the Carrier states that it believes that the Organization had the exhibits in question **and/or** in either case the Organization must have had some of them because the Organization cites them in its lower level appeal. Notwithstanding, the Carrier at the highest level of handling provides a copy of these exhibits as attachments in its correspondence with the Organization. Because of credibility problems on this issue it is difficult for the Board to come to **firm** conclusions about whether exhibits were forwarded and/or whether the

Organization had copies of them already or not when it charges that the transcript of investigation was forwarded without the exhibits attached. Clearly, the Organization had some of the exhibits on hand at this time. On more substantive grounds, assuming that the Organization did not have some of the exhibits which were not forwarded, which would have been a technical violation of Rule 40(e), a search of the record fails to persuade the Board that such lapse may have made any difference in this particular case. The Organization argues that the lack of exhibits "...hampered...(its) ability to progress the claim...". But the Organization does not develop arguments on exactly why this was the case. The Board will go on record that all rules of the parties' labor Agreement are to be respected by both sides to that Agreement. In view of the full record before it on **this** particular objection as it applies to this case, however, the Board will rule that reasonable minds would conclude that the objection by the Organization with respect to alleged violation of Rule 40(e) should be dismissed.

A second objection raised by the Organization deals with witnesses. According to the Organization the record was not fully developed at the investigation because certain witnesses whom the Organization wished to appear did not do so. The Organization argues that the witnesses did not appear because the letter sent to them by the Carrier advising them to appear tended to discourage rather than encourage these employees to appear at the investigation. The Board has reviewed copy of the letters sent. They state the following in pertinent part:

"(The Organization) has requested that you appear as a witness on behalf of

(Claimant) **Braun** at (the) investigation...in connection with (the Claimant's) alleged violation of Maintenance of Way Rule 1.5.

“If you desire to comply with (this) request and such action on your part necessitates your absence from duty, please advise the undersigned (General Roadmaster) in order that I may arrange to provide relief, it being understood that this company will not be liable for any expense, including loss of wages, which may result from your attendance at said investigation, unless the applicable schedule rule provides otherwise”.’

As can be observed, the letters do say that if these witnesses appear that they do so on their own time and that if they miss work they will not, in effect, be paid. While such may potentially tend to discourage employees to appear on behalf of fellow employees in a forum such as the investigation in question, there is nothing in the labor Agreement to show that the Carrier's letters were in violation thereof. In the **final** analysis, the employees did not appear because they did not want to. This may have been related to the fact that they may have lost some compensated time if they would have appeared. These employees were aware, however, or they could have been made aware by the Organization, that their absence or presence at the investigation could have had some effect on this case. But in view of the record before it the Board can only conclude that whatever their reasons --- which are not totally clear --- these employees did not appear at the investigation of the instant Claimant because they did not want to appear. The Board is unable to conclude that there was a violation of the Claimant's due process rights because of this objection raised by the Organization.

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‘Employees’ Exhibits A-5 pp. 13-15. All letters to three different employees substantively read the same

On merits, the Rule at bar in this case is the following.

**Rule 1.5 Drugs & Alcohol**

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company **property**.<sup>2</sup>

At the time of the alleged incident the Claimant, D. G. **Braun**, was working as a Section Laborer, **Trackman** on a water truck in and around Dickson, North Dakota. He was working with a road gang grinding track. His job was to work the water truck and to put out any **fires** which may have resulted from the grinding work. The Claimant started working for the Carrier in April of 1992.

The weight of evidence in this case comes **from** testimony at the investigation by a Trainmaster and a Roadmaster both of whom state that they smelled alcohol on the Claimant on September 10, 1995.

According to testimony by the Roadmaster the work on the day in question started at approximately 5:35 A.M. At about 7:00 AM, according to this witness, the Section

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\*Burlington Northern Railroad Maintenance of Way Operating Rules, Effective --April 10, 1994 (Superseding the General Code of Operating Roles dated October 29, 1989 and the Maintenance of Way Rules dated November 1, 1991). The Neutral **Member** of this Board would like to acknowledge receipt of the copy of Rule 1.5 from the Board Members after request was made at the hearing on this case.

Foreman advised him that the Claimant smelled of alcoholic beverages and that he was exhibiting abnormal behavior. At that time the Roadmaster was riding in the caboose of the rail grinder, heading west in this Roadmaster's territory which extended from Antelope, North Dakota to **Iona**, Montana. The Section Foreman also told the Roadmaster that the driver of the water truck told him that the Claimant smelled of alcoholic beverages and that the driver of the boom truck told him that he did not want the Claimant on his truck that day. At 7: 15 AM the Roadmaster, along with the Gang Roadmaster who was responsible for the grinding machine, asked the Claimant to step off the water truck. The Trainmaster from the grinding tram had also been called and the Claimant was asked to sit in the Roadmaster's vehicle until the Trainmaster arrived. The Claimant asked for his **lunch** box off the water truck and began to eat immediately. Testimony by the Roadmaster is that the water truck driver informed him that the Claimant had been eating and drinking from his lunch box already that morning and that he was smoking incessantly. When the Trainmaster arrived on the scene at about **7:20** AM the Claimant was asked to get into the former's Jeep. He was asked to sit in the passenger side. The Roadmaster also got into the Jeep and sat in the rear seat. Testimony by the Roadmaster is that the Claimant smelled of alcoholic beverages. When asked if he had been drinking the preceding Saturday **and/or** the preceding Saturday night the Roadmaster states that the Claimant answered in the negative. Concurrently, the Claimant stated to him that he could not account for the odor. According to this witness the Claimant was fidgeting while in the Trainmaster's **truck,** "...**tied** his boots twice-was

constantly looking away, breathing away and looking out the window and scratching his arms...“. At that point, according to the Roadmaster, the Claimant was advised that he was being taken out of service and the Trainmaster advised him that under the “...**two officer** rule...” there was no requirement to administer a test. At that point, according to the Roadmaster, the Claimant stated that he would get a test and pay for it himself and he was advised that “...that was fine...“. When the Claimant was then driven to the depot he was asked to take off his company issued dark glasses. According to the Roadmaster the Claimant’s eyes were red and he noted again that the Claimant smelled of alcoholic beverages. At the depot the Claimant went to the rest room several times and when he emerged he stated that he wanted to call his union representative. Upon cross examination this witness states that he had not smelled alcoholic beverages on the Claimant earlier in the day when they were in a truck going to the work site. At that time this witness stated that he was about 6 feet from the Claimant.

Testimony by the Trainmaster, whose responsibility was for the **Train, Yard** and Enginemen on the line of track which the crew was grinding on the day in question, was that **after** he arrived on the scene, after being called from his home by the Roadmaster, he smelled the odor of alcoholic beverages on the Claimant after the latter was instructed to and got into his Jeep. Upon being queried the Claimant denied having drank any alcohol the day or the night before arriving at work early on that morning. This witness also describes the shoe typing behavior of the Claimant while the latter was in the Jeep, and he testified that the Claimant’s eyes were “...**all** red with lines across them and watery...”

when he was asked to take his dark glasses off when they arrived back in the **office**. The glasses were dark BN safety glasses with side shields.

Testimony by the Claimant at the investigation confirms the sequence of events outlined in the foregoing by the two Carrier witnesses. The Claimant states that he asked for a test after being informed that he was being taken out of service on suspicion of being under the **influence** of alcohol, and that he was refused. The Claimant states that he denied at that time that he was under the influence of alcohol and/or that he had drank any alcohol on the evening or day before he came to work on the morning in question. When the Claimant arrived home after being driven there by the Trainmaster the Claimant testified that he attempted to get a breathalyser test but was unable to do so at either the police or the local hospital. There is a statement in the record by a medical technologist who works at the local hospital to the effect that the Claimant had called there to **try** and get a test at about **8:30** AM on the date in question but that such could not be administered without a doctor's order and/or a request by the employer.

There was testimony at the investigation by a personal friend of the Claimant who testified that she had been with him for the several days prior to the alleged incident. She testified that she did not see him drink prior to going to work on the Sunday morning in question. She testified that when the Claimant was dropped off at his house by the company **official** that she could not "...**smell** alcohol on..." him at that time.



PLB 6204  
Awd 19

## **Finding**

There is corroborating testimony by two supervisors that they smelled the odor of alcoholic beverages on the person of the Claimant on the morning in question. There is also testimony that the Claimant's behavior patterns were less than normal after he was confronted albeit that could have been due to nervousness and the Board can draw no conclusions from the testimony of witnesses on this issue. The Roadmaster did testify that when the Claimant took off his company issued dark glasses that his eyes were red. Obviously, this is not normal and is a physical characteristic associated with the use of alcohol. However, the main evidence of record in this case lies in the corroborated testimony by the Roadmaster and the Trainmaster both of whom appeared as company witnesses at the investigation. There is no evidence in the record that the two supervisors fabricated the evidence that they testified about or that they would have any motive to do so. The Claimant vaguely testifies to the fact that the company may not have wanted to have paid him overtime for working on a Sunday. It strains credibility, however, from this Board's long experience in this industry, to use such reason to conclude that this is why two supervisors would concoct a story to have this employee discharged. The Claimant denied that he drank anything either the night before and/or the day before the morning of the day in question. This is in unequivocal conflict with the testimony by the supervisors who testified of a strong odor of alcohol on the person of the Claimant. That odor did not come from nowhere. The Claimant's personal **friend** testified at the investigation that the

Claimant had not drank during the evening or the day before he showed up for work. The latter also testified that there was no odor of alcohol on the Claimant after he was returned home on that Sunday morning when two supervisors stated unequivocally that there was. How could she not have smelled this odor when the Claimant returned home? Clearly someone was not being truthful about what was going on. The Board can but conclude, absent any other information, that the resolution of this credibility problem rests on the side of the supervisors rather than on the side of the Claimant's **friend** who had a vested interest in testifying the way she did. Lastly, there was at least one other employee who also smelled the odor of alcohol on the Claimant on the Sunday morning in question. That person did not testify at the investigation. But that person, who was the driver of the water truck, was the person who started the whole line of events leading up to the Claimant being taken out of service since it was the testimony of the Roadmaster that it was the driver of the truck --- one of the Claimant's co-workers --- who alerted supervision in the **first** place that the odor of alcohol was present on the Claimant.

The Organization argues that the Claimant should have been accommodated when he asked for a breathalyser test and the fact that he was not given one by the Carrier is **sufficient** proof that the Carrier has not met its burden as moving party in this case. The Organization also states, as the Claimant himself testified at the investigation, that he was not able to get a test for the reasons outlined in the record. The Board will observe **first** of all that the preponderance of evidence in this case suggests that the Claimant would have failed such a test albeit his own efforts to obtain one, at least according to his testimony,

were-both considerable and unsuccessful. Secondly, the representative for the Organization intimates that the Carrier was in violation of its own policy when it did not provide the Claimant with a breathalyser test when he had requested one. To this effect the Organization's representative read into the investigation record policy taken from the Supervisor's Handbook of FRA **Regulations**/BN Police and Procedures. This policy states the following.

"Possession of alcohol/controlled substances. Odor of alcohol (no testing required). If a supervisor detects the odor of alcohol on an employee, or if an employee is found in possession of alcohol or controlled substances, the employee shall be removed **from** service and investigation scheduled.

"There is no need for a blood specimen to be collected if the supervisor detects the odor of alcohol on an employee. However, if an employee requests a blood specimen **to be** collected, such request must be made in writing to the supervisor, who will approve the specimen **collection**".<sup>3</sup>

A review of this policy does not persuade the Board that supervision violated it when the Claimant was not given a breathalyser test at his request. The policy specifically states that no test is required when the odor of alcohol is present. The Organization's representative also cites Rule G Guidelines at the investigation which state the following.

"When a supervisor has reasonable suspicion that an employee is under the influence of some substance due to their behavior, the supervisor must obtain the opinion of another supervisor.

"Two supervisors must agree that testing is required. When they agree testing is required, the appropriate supervisor will direct the employee to provide a urine specimen for a controlled substances' testing. If a urine specimen has been collected and the employee requests a blood test, such request must be made in

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<sup>3</sup>Quoted from Trans. @ p. 11.

writing to the supervisor who will approve the blood specimen collection. The blood specimen will be collected after the employee has provided a urine sample".<sup>4</sup>

On this point the Board observes that there are **innumerable** Awards in this industry which state that "...intoxication need not be proven through medical or other formal tests. Reasonable men can make this type of **determination**...".<sup>5</sup> The brunt of this case centers on whether the evidence provided by the two supervisors was **sufficient** to warrant conclusion that the Claimant was under the **influence** of alcohol on the day in question when he reported for work. On this crucial issue the Board here concludes in the affirmative.

The railroad industry is a safety conscious industry. Members of this craft work in a particularly dangerous part of this business where skill, dedication and having one wits at all times are prerequisites for one's own safety and that of one's fellow workers. In view of the full evidence of record in this case the Board must reasonably conclude that there is **sufficient** substantial evidence to warrant conclusion that this Claimant broke that trust. The claim cannot be sustained.

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<sup>4</sup>Quoted from Trans. @ p. 14.


<sup>5</sup>See National Railroad Adjustment Board Second Division Award 8420, cited in **Public** Law Board No. 4161, Award 7 @ p. 3)(1987). See also Second Division Award 8807 & **Third** Division Awards 8993, 10928 & 15574 on the same issue.

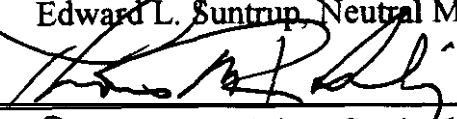
PLB 6204  
Awd 19

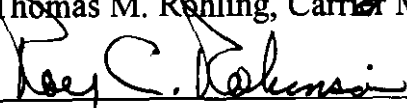
13

**Award**

The claim is denied.

  
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Edward L. Suntrup, Neutral Member

  
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Thomas M. Rohling, Carrier Member

  
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Roy C. Robinson, Employee Member

Date: 7/30/01