

PUBLIC LAW BOARD NO. 2529
Joseph Lazar, Referee

AWARD NO. 24
CASE NO. 33

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

STATEMENT
OF CLAIM:

1. That the dismissal of Mr. G. A. Muniz was without just and sufficient cause and in violation of the Agreement, said action being excessive and in abuse of discretion.
2. That Claimant now be reinstated to the service of the Carrier with seniority and all rights restored unimpaired and with compensation for all wage loss suffered.

FINDINGS:

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, and that it has jurisdiction.

Claimant Track Laborer G. A. Muniz has been an employee of this Carrier since October 26, 1981. Prior to being dismissed, he was assigned as a Laborer on Steel Gang No. 3, working in the Fort Worth area. On November 11, 1983, the Carrier dismissed Claimant from its service, writing him: "This is to notify you that you are hereby dismissed from the services of the Burlington Northern Railroad for violation of Rule G of the Consolidated Code of Operating Rules, at about 7:30 a.m. at Mile Post 97.80 on October 28, 1983, as evidenced by a formal investigation afforded you on November 3, 1983, at Wichita Falls, Texas."

Rule G of the Burlington Northern Rules of the Maintenance of Way and Operating Department reads:

"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.

"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 transcript shows Claimant's answer to the question, did his supervisor "ask you if there was anything wrong with you" on the morning of October 28, 1983, at about Mile Post 97.80: "... Just a little bit sick from the night before." (Tr., p. 20). Claimant answered, "No" to the question: "You heard testimony from (Supervisor) to the fact that he smelled alcohol on you. Do you deny this?" (Tr., P. 21). Further, in answer to the question, "Approximately how much did you have to drink the night before October 28, 1983", Claimant answered: "A 12-pack". (Tr., p. 22). Claimant testified that his last drink, before he "crashed", was at approximately 12:30 a.m.

Claimant's supervisor, Roadmaster, Steel Gang #3, testified that at the 7:30 a.m. meeting with the crew, "I noticed that Mr. Muniz was very belligerent, obnoxious, his eyes were very red and glassy, and he was a little unsteady on his feet." "...The condition he was in, to my belief, he was under the influence of alcohol and being unsteady on his feet and all, he could very easily have hurt himself or hurt someone else, some other employee on the gang." (Tr., p. 7).

The Special Agent testified that Claimant "appeared as though he had had little or no sleep the night before, his eyes were red and glassy, and I could smell what appeared to be a strong odor of alcohol on his breath." (Tr., p. 12)

The District Roadmaster, Wichita Falls, testified that Claimant "smelled strongly of alcohol, his eyes were red and glassy, and he talked with a little bit of a slur, and was a little unsteady on his feet." (Tr., p. 14)

The Trainmaster testified that he asked Claimant, "Have you been drinking?" and Claimant said, "Not now, but I did drink heavy all night till the bars closed at Wichita Falls. I received some bad news." (Tr., p. 17). The Trainmaster further testified: "It was very obvious that Mr. Muniz was under the influence of alcohol on his breath, his eyes were very red and glassy, and he was unsteady on his feet, and he seemed disoriented." (Tr., p. 17).

The evidence of record clearly supports the Carrier's determination that Claimant violated Rule G.

The witnesses at the investigation were all officers of the Carrier, and there were no employees testifying. The record shows that when Claimant was asked: "...do you have any witnesses present at this investigation to give testimony in your behalf?", Claimant answered: "No." (Tr., p. 2). Claimant had the opportunity to have witnesses if he desired.


Claimant was offered the opportunity of a breath test, which he accepted, but refused the administration of a blood test when it was determined that equipment was not available for the breath test. In view of the substantial evidence already against Claimant, the burden of proof was on Claimant to establish his position, and his willingness to accept a breath test while refusing a blood test failed to meet his burden.

The evidence of record shows that Claimant was a short term employee. Mitigating circumstances are not in evidence. In the circumstances of this case, the Carrier's discipline of dismissal was not excessive.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim of Trackman G. A. Muniz is denied.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER


C. F. FOOSE, EMPLOYEE MEMBER


H. H. PAYNE, CARRIER MEMBER

DATED: April 17, 1985