

Joseph Lazar, Referee

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

1. That the Carrier's decision to dismiss Mr. P. N. Hernandez on August 21, 1984 was in violation of the Agreement and without just and sufficient cause.
2. Claimant shall now be reinstated to his former position with the Carrier with seniority and all other rights restored unimpaired and with compensation for all wage loss suffered.

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 P. N. Hernandez, with an employment date of November 4, 1974, was regularly assigned as section laborer headquartered at Petersburg, Texas on date of this claim. On August 21, 1984, the Carrier advised him: "Effective this date you are hereby dismissed from service of the Burlington Northern Railroad for violation of Rule 'G' of the Burlington Northern Rules of the Maintenance of Way Department and Rule 565 of the Burlington Northern Safety Rules Book, as disclosed by testimonies offered at investigation accorded you on August 3, 1984, at Lubbock, Texas."

Burlington Northern Rules of the Maintenance of Way Department,
Rule G, 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 beverages, intoxicants, narcotics, marijuana or other controlled or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response, or safety."

The Burlington Northern Safety Book General Rule 565 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."

The Transcript of Investigation shows the following answers by Claimant's Foreman:

- "Q. Did you notice any irregularity during his (Claimant's) trip over to the truck and back?
- A. Well, when he went over to the truck he talked to them about 30 seconds and as the truck drove away it appeared that he had about four home rolled cigarettes trying to get them in his pockets before he returned to the motor car."
(Tr., p. 4)
- "Q. You say that you saw them give him four home rolled cigarettes? Your statement. How could you be sure that they were cigarettes and not something else approximately the same size?
- A. Well, I guess it looked like it. They were in the same shape as a home rolled cigarette and they were about the same length.

- Q. At this time did you suspect that these were not home rolled cigarettes but actually marijuana?
- A. Yes sir." (Tr., p. 5).

The Transcript of Investigation shows the following answers by Claimant:

- "Q. Okay, at approximately 1:15 on August 27th did Trainmaster Hendricks approach you?
- A. Yes.
- Q. Did you and him have conversation?
- A. Well, he went over to talk to John, the Foreman and then he just walked over and said come here I want to talk to you. I didn't know who he was so it was starting rain and I said why don't you talk to John and he said he wanted to talk in the car by the elevator and he said get in so I got in the car - my Company check he said there was a rumor that there was some grass on the job, would you mind if I would empty my pockets. So I emptied my pockets and billfold and everything and said would you take a urine test - I said no because I been out last night and I had beer and drink and all sorts of things smoking a little bit and I'm afraid it will come out and he said well let's go over and talk to your Supervisor so I talked to Supervisor and I told him same thing..." (Tr., p. 14).
- "Q. You stated that on the evening before or the night before or during the night that you did in fact have some beer to drink and smoke some marijuana, is this correct?
- A. I guess it was like when you are out drinking. You know. You don't stop to think about that until afterwards.
- Q. What time in the evening or approximately what time that evening did you take your last drink or smoke your marijuana?
- A. Well we smoked marijuana, actually it was pretty late that night about 2:30 in the morning.
- Q. Pretty late? About 2:30 in the morning of the 27th, which is the day in question?
- A. Right." (Tr., p. 15).

The Transcript of Investigation shows the following answers by Assistant Trainmaster Everett H. Hendricks:

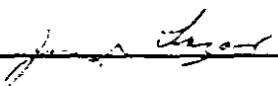
- "Q. What time did you arrive at the location South Plains where the Petersburg Section Gang was working?
- A. I arrived South Plains at 11:15, excuse me, at 1:15 p.m.
- Q. Could you in your own words tell us what transpired from the time you got there until you finally took Mr. Hernandez out of service?
- A.He took off his safety glasses and within about after about five minutes time I got him where he would look at me and such, and his eyes his pupils were dilated and his eyes appeared glazed. At that time when I asked him if he would be willing to go into Plainview and take a blood test and/or urinalysis and he refused saying that he was a - would like to have a couple of days notice if he was going to be asked to do that.....". (Tr., p. 7).

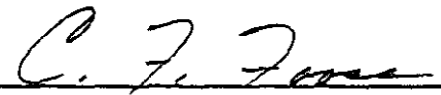
The Claimant has admitted to drinking beer and smoking marijuana as late as 2:30 A.M. prior to reporting for duty on his regular assignment at 8:00 A.M. on July 27, 1984. At the time of drinking and smoking marijuana, Claimant was subject to duty. The testimony of Claimant's foreman, that Claimant received four hand-rolled marijuana cigarettes while on duty is probative and credible. In the opinion of the Board, the evidence of record supports the Carrier's determination that Claimant is in violation of the cited rules.

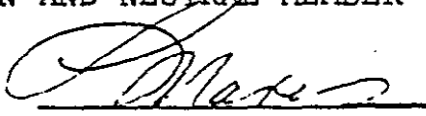
On May 6, 1985, the Carrier reaffirmed its declination to give consideration to the Organization's request that Claimant be reinstated to service. The Carrier further stated that: "Mr. Hernandez must contact the Social Counselor, cooperate and complete his program and receive his concurrence before being reinstated." (Carrier's Exhibit No. 9).

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim of Section Laborer P. N. Hernandez is denied. However, if Section Laborer P. N. Hernandez shall, within ninety (90) days of this Award, contact the Carrier's Social Counselor, cooperate and complete his program and receive his concurrence, he shall be reinstated.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER


C. F. FOOSE, EMPLOYE MEMBER


L. MARES, CARRIER MEMBER

DATED: December 17, 1985