

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 4055

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BURLINGTON NORTHERN RAILROAD COMPANY \*  
(Former Frisco) \*  
-and- \*  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES \*  
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CASE NO. 6  
AWARD NO. 6

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

#### Background Facts

Mr. Jimmy Wayne Rogers, hereinafter the "Claimant", entered the Carrier's service on June 2, 1973 as a Trackman. He was subsequently promoted to the position of Assistant Foreman, and he was occupying that position when he was dismissed from the Carrier's service effective June 14, 1985. An investigation was held on July 16, 1985 at Cape Girardeau, Missouri regarding the Claimant's dismissal for his alleged violation of Rule G. The investigation, originally scheduled for July 2, 1985 and then July 10, 1985, was postponed due to the conflicting schedules of the Organization and the Carrier representatives. The Claimant appeared at the investigation and he was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he was in violation of Rule G on June 14, 1985 as he was allegedly under the influence of alcohol while on Carrier property. On December 11, 1985 the Carrier reinstated the Claimant on a leniency basis, effective December 12, 1985. The Claimant was reinstated with seniority and all other rights unimpaired, but without pay for time lost. The claim before the Board seeks to expunge the discipline from the Claimant's record and seeks pay for the time the Claimant was held out of service.

### Findings and Opinion

On June 14, 1985 while assigned as an Assistant Foreman at Crystal City, Missouri, the Claimant spoke with Roadmaster R.D. McCafferty as well as to Acting Roadmaster P.J. Scheffer to advise them that he had suffered a personal injury (strain of his lower back) and he requested permission to mark off. The Claimant was granted such permission at approximately 8:30 a.m. on the morning of June 14, 1985.

Roadmaster McCafferty testified that he advised the Claimant to fill out an accident report and that "I (McCafferty) want him to come to Cape Girardeau to the doctor since he lived in Cape Girardeau". When the Claimant did not appear at Cape Girardeau, at approximately 10:30 a.m., Roadmaster McCafferty instructed a Mr. Peters to check the bunk car to determine the Claimant's whereabouts and to direct the Claimant to come to Cape Girardeau so he could be seen by a doctor. Approximately fifteen minutes later, Mr. Peters called Roadmaster McCafferty to advise that he could not gain access to the bunk car. Roadmaster McCafferty testified that he became concerned because "I knew Bo (the Claimant) was diabetic and I was afraid he had done went into a coma or something. I got concerned about it". As a result of his concern, Roadmaster McCafferty had Special Agent Paul Cross attempt to locate the Claimant; and at or about the same time Roadmaster McCafferty was instructed by the Division Office to have the Claimant provide a urine specimen once he, Roadmaster McCafferty, determined that the Claimant was not suffering from his diabetic condition. Roadmaster McCafferty then proceeded to Jefferson County Hospital in Crystal City where he met the Claimant and Special Agent Paul Cross. The Claimant provided Carrier officers with a urine specimen.

The urine specimen was provided to Mr. L.A. Brower, Trainmaster at Chaffee, Missouri. Trainmaster Brower had been instructed to meet Roadmaster McCafferty; to proceed to Crystal City; and to secure a sanitized container for a urine sample. Trainmaster Brower met the Claimant at Jefferson County Hospital and advised the Claimant that if he refused to provide a urine sample, that he would be withheld from service. The Claimant stated to Trainmaster Brower that the urine sample would probably show positive for alcohol since he had been drinking the night before. At that time, and prior to the furnishing and/or the testing of the urine, Trainmaster Brower advised the Claimant "that by his own admission he had violated Rule G and that he was being dismissed in accordance with the provisions of the agreement".

The record evidence before this Board establishes that there

was some lack of communication at 8:30 a.m. when the Claimant spoke with Roadmaster McCafferty regarding his, the Claimant's, obligation to immediately proceed to Cape Girardeau to see a Carrier doctor. There is some evidence in the record that the Claimant had no reason to believe that he was obligated to come to Cape Girardeau on the morning of June 14, 1985. The Board can also conclude that a number of employees, who observed the Claimant on the morning in question, were of the opinion that he acted in a normal manner and demonstrated none of the usual indicia which would establish that an individual was under the influence of alcohol. On the other hand, two Carrier witnesses testified that they did smell alcohol on the Claimant's breath; and the urinalysis showed a 0.15 alcohol reading.

In this Board's view, the Carrier had the right to develop facts regarding its concern about the Claimant's physical condition; including the requirement that the Claimant take a urinalysis test because it, the Carrier, had reason to surmise that the Claimant had consumed alcohol. However, there is evidence in this record which establishes that the Carrier, in the person of Trainmaster Brower, dismissed the Claimant from service prior to its possessing any facts of probative value regarding the Claimant's condition. Merely because the Claimant admitted that there might be some alcohol in his system as a result of his drinking the night before did not establish probable cause that he had been drinking while on duty or was under the influence of alcohol while he was on duty. The Carrier dismissed the Claimant with no proof of any rule violation. The proof was gathered after the dismissal was effected; and although this Board is persuaded that the Carrier did have reliable proof of the Claimant's violation of Rule G, we must also conclude that the Carrier violated the Claimant's rights to procedural due process when it dismissed him prior to having any evidence of wrongdoing.

This Board is not usually disposed to decide cases on procedural grounds. However, there is good and sufficient reason for requiring the Carrier to possess some reliable evidence of a rule's violation prior to its imposition of discipline. This is so because once the Carrier has decided to issue discipline its stance becomes hardened, even though subsequently discovered facts may raise doubts regarding the propriety of imposing the discipline. In the instant case, the Carrier may well have decided, after consultation with the Special Agent, review of the urinalysis, and/or a meeting with the Claimant, that dismissal was appropriate; and if the Carrier had withheld the Claimant from service pending the results of its on the property factfinding, then this Board would, in all likelihood, have denied the claim. However, the Carrier "shot first and asked questions later". In these circumstances, we are constrained to sustain the claim.

Award

The claim is sustained. The Carrier is directed to expunge the discipline from the Claimant's personal record and to make the Claimant whole for all time lost as a result of the discipline.

This Award was signed the 8th day of May 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher  
Richard R. Kasher, Neutral Member  
Public Law Board 4055