

PUBLIC LAW BOARD NO. 4244

Award No. 212

Case No. 216

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim: 1.

That the Carrier's decision to suspend Western Region Trackman Carlos P. Franco from service for ninety (90) days was unjust, as well as the additional three (3) year probation period is excessive.

2.

That the Carrier now rescind their decision and pay for all wage loss as a result of an investigation held 9:00 a.m., November 7, 1996 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if the Claimant violated the rules enumerated in the decision, suspension from service is extreme and harsh discipline under the circumstances.

3.

That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("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 Act, as amended.

FINDINGS

The claimant, Trackman Carlos P. Franco, was suspended pending a formal investigation after he was subjected to a reasonable cause breath alcohol test following a personal injury accident on September 25, 1996. The test revealed measurable quantities of alcohol in the claimant's system. In a notice of formal investigation dated October 14, 1996, the claimant was charged with allegedly failing to perform his duties safely while stacking track material at the Calwa Yard, and having a measurable level of alcohol in his system while on duty in violation of Rules 1.1.1, 1.1.2, 1.3.1, 1.5, 1.6 and 50.2.3 of the Safety Rules and General Responsibilities for All Employees, effective January 31, 1996.

After a postponement of the investigation, the claimant signed an agreement to receive a Level 5 conditional suspension for a first time Rule 1.5 violation. The claimant

agreed to waive a formal investigation on the charge of having a measurable level of alcohol in his system while on duty and on company property. The formal investigation into the remaining charges leveled against the claimant was conducted on November 7, 1996. On December 10, 1996, the Carrier issued claimant notice of a ninety-day suspension commencing September 26, 1996, up to December 29, 1996. He also was placed on probation for a period of three years for violation of the remaining rules contained in the letter of charges.

The record of the formal investigation reveals the following facts. The claimant and another trackman were instructed to sort through a neatly stacked pile between three and four feet in height consisting of a mixture of 132 and 136 pound metal angle bars. The two employees' assignment was to search through the stack for 136 pound bars. The two trackmen began to remove the angle bars from the top of the stack, and place the bars they did not want on a loose pile next to the stack. With the claimant turned to one side, his partner in the sorting process grabbed an angle bar which slipped off the stacked pile of mixed angle bars onto the claimant's left foot causing a bruise.

The claimant initially testified the stack of angle bars was "scattered," but it was later established at the hearing that only the very top layer of angle bars on the stack was less than perfectly arranged. While at first the claimant testified that he did not see his coworker handle the angle bar which fell on his foot, he later stated that ". . . before I turned to my

right, I looked across, he had something. He went to grab something, but then I turned around and that's when it slipped out of the pile." (Tr. 24). Although the claimant's testimony at hearing would suggest that his partner was responsible, in part, for the injury, he declined to answer the question on the injury report form he completed whether the accident was caused by the conduct of any person other than himself.

Apart from the suggestion that the angle bars placed in the original pile were stacked incorrectly, the claimant admitted the duties in question could have been performed safely without injury had the two employees taken their time, instead of being in a hurry. The claimant asserted he was under time constraints by the need to get the angle bars to Madera for use by a welder. A supervisor, Manuel Fernandez, rushed the trackmen to complete their task, according to the claimant. On further examination, however, the claimant acknowledged he had assumed they were to hurry through their assigned task. He also admitted the injury could have been prevented had he taken his time and employed greater care. The claimant further agreed that the alcohol content in his body on the morning of the accident (the two breath alcohol tests administered three hours after the accident recorded alcohol levels of .093 and .084, respectively), created an unsafe condition which contributed to his injury.

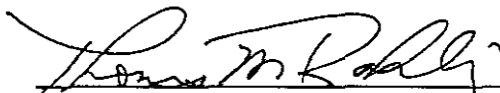
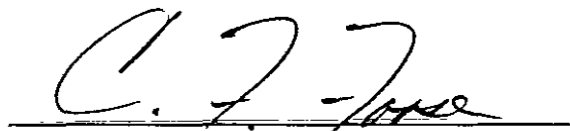
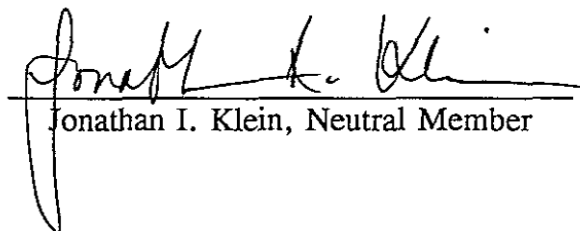
The Board concludes that the claimant failed to take the safe course of action. His being under the influence of alcohol was the primary cause of his lack of attention to the task of sorting the angle bars, and the key factor contributing to the accident and his injury. The only unsafe condition at the scene of the accident was caused by the lack of attention to

safety by the claimant. The Board remains unconvinced that the working conditions of Calwa Yard at the scene of the accident on September 25, 1996, were such as to cause or otherwise contribute to the personal injury suffered by the claimant.

The Board further finds that the discipline assessed is excessive under these facts and circumstances. As previously noted, the principal factors leading to the injury were the level of alcohol in the claimant's system, and the failure of the claimant (and his coworker) to work in a less hurried, more careful manner. The Board notes the claimant took a conditional suspension under the bypass program for the initial Rule 1.5 violation. At the time of the investigation, he had completed three weeks in a rehabilitation center. The Board concludes, after consideration of the claimant's past disciplinary record in his twenty-four years of service, together with his acceptance of the conditional suspension arising out those facts constituting the primary cause of the accident, that the suspension should be reduced to sixty (60) days. Rather than the three-year probation which the Board determines to be excessive under these facts, it is ordered that the claimant will be subject to a one (1) year probation.

AWARD

The claim is sustained, in part. The claimant's suspension is reduced to a sixty (60) day suspension with one (1) year probation. The Carrier will compensate the claimant for the net wage loss resulting from the remaining thirty (30) days of suspension within thirty (30) days of this Award.


Thomas M. Rohling, Carrier Member
Clarence F. Foose, Employee Member
Jonathan I. Klein, Neutral Member

This Award issued the 19th day of August, 1997.