

PUBLIC LAW BOARD NO. 4244

Award No. 216

Case No. 219

# BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**Parties to Dispute:**

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

**Statement of Claim:**

1. That the Carrier's decision to issue a Level S Suspension for Western Region, S. E. Gonzales, J. C. Olvera, M. F. McCleery, G. P. Hodges, K. L. O'Neal, and C. M. Douglas from service for thirty (30) days was unjust.
2. That the Carrier now rescind their decision and expunge the Level S. suspension of thirty days and the three year probation period and pay for all wage loss as a result of an Investigation held 9:00 a.m., February 25, 1997 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 the 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, after hearing and 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

On January 31, 1997, Roadmaster Larry Long who was headquartered at Stockton, California, received a telephone call between 7:15 a.m. and 7:30 a.m. from Edward Woodward, a machine operator on section gang 27708. Woodward informed Long that the van used to transport a number of the gang members from a nearby hotel to the job site had broken down. Long paged the foreman, Mac Garza, who reported to the hotel to investigate.

When the foreman arrived at the hotel, he attempted to start the van several times. In the process, the foreman mentioned to the gang that he smelled alcohol, and informed the occupants of the van, including the claimants, "I give you five minutes to tell me who drink that night." (Tr. 48). Machine Operator Woodward and the assistant foreman, Russ Oliver, were standing alongside the van at the time the foreman made his remarks. Foreman

Garza went into the hotel to place a call for a tow truck and to contact the roadmaster. When Garza returned to the van, all of the claimants had exited the van and drove away in their personal vehicles. He then traveled to the job site, but the claimants were not to be found.

Despite the mass exodus of all six claimants, not all members of the gang left the vicinity of the van and hotel. Trackman Vincent Harris identified the claimants as present at the hotel at 7:00 a.m. on January 31, 1997, and seated in the van. Harris testified the van engine died when Oliver placed the van in gear. He noted that Garza announced to everyone in the van that he smelled alcohol, and he wanted the occupants to tell him who had been drinking. According to Harris, the foreman told the occupants of the van that he was going to give them five minutes to think it over, and then they were to tell him "who was drinking or not." (Tr. 19). This instruction engendered a great deal of conversation in the van "about drinking or not drinking." (Tr. 19).

Harris indicated that the foreman then went to his truck parked several feet ahead of the van. The assistant foreman came back to the van and stated he was going to call Roadmaster Long. This statement was followed by the claimants exiting the van, entering their vehicles and leaving the scene. Harris overheard the assistant foreman tell the claimants that it was not a good idea to leave the van, and the assistant foreman spoke directly to claimant Ken O'Neal as the latter drove out of the hotel exit.

When questioned further by the hearing officer as to why he did not leave with the claimants, Harris stated that he had not been released, nor did he hear anyone else released

to leave work. Woodward supported the version of events as outlined by Harris, including the foreman's statement that he would give the claimants five minutes to tell if they had been drinking. He did not hear the foreman or assistant foreman authorize anyone to leave the area of the van and hotel.

Russ Oliver, the assistant foreman, also confirmed the fact that the foreman wanted the gang members to report who had been drinking within a five minute time span. At one point after the foreman's instruction, Oliver reached into the van to pick up his radio and mentioned to the occupants of the van that they "should stick around." (Tr. 36). Oliver observed each of the claimants, Gonzales, McCleery, O'Neal, Olvera, Hodges and Douglas, exit the van, go to their personal vehicles and drive off the hotel property. Both the foreman and assistant foreman denied releasing any employee from their work assignment with authority to go home.

The claimants' testimony was uniform as to the events after the foreman arrived on the scene: Garza announced that he smelled alcohol, he gave them five minutes to state who had been drinking, and if there was no report as to the wrongdoer he was sending everyone home. The claimants were dissatisfied with what they perceived to be an improper accusation of wrongdoing and threat by the foreman. Claimant Curtis Douglas admitted that he took it upon himself to simply exit the van and go home on his own based on the foreman's statement. Claimant O'Neal could not recall the assistant foreman telling him to stay as O'Neal drove his vehicle out of the hotel, although he acknowledged that Oliver did stop his vehicle. While most of the claimants disclaimed any knowledge of who might have been drinking, there was significant dissatisfaction expressed by several claimants toward Garza as to the method he

selected to obtain the name of any gang member who had been drinking. (Testimony of George Hodges at Tr. 103). On recall, Foreman Garza denied giving any instruction to the claimants that they should leave the property if he failed to receive an answer within five minutes.

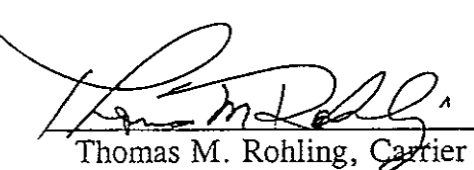
The Board finds the following factors of significance in resolution of this dispute. First, the alleged method utilized by Foreman Garza to compel an admission of wrongdoing or leave work had admittedly never been employed before with any of the claimants. Rather than assist the claimants in defending their departure as a commonly recognized and permissible action, this factor indicates that such a directive by the supervisor to confess or leave work was highly unusual.

Second, the Board finds this alleged truth seeking mechanism as described by the claimants even more atypical by its self-executing nature. This procedure, which the claimants described with remarkable uniformity, requires the Board to accept the notion that the foreman granted the six claimants permission to leave their assignment (after a minimum of five minutes of soul searching) without fear of any consequence for non-disclosure of the source of the smell of alcohol and walking off the job. Their central theory of the case lacks logic, and is refuted by other evidence of record. The claimants cannot overcome the clear and unambiguous testimony of the two gang members, Vincent Harris and Edward Woodward, who stated they could not leave the hotel because they were without proper authority to do so. The claimants were unable to show that Harris and Edward were biased, and that the evidence justified their mass exodus from work.

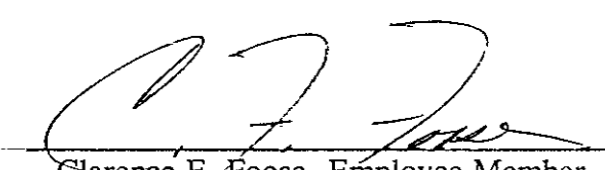
There is sufficient, credible evidence in the record to find that the claimants failed to receive any order or instruction to leave work. The method used by Garza to "sweat out" a confession was clearly counterproductive -- if reasonable suspicion of alcohol use existed, testing should have been the method used to ferret out any possible rule violations in lieu of grade school level interrogation methods. Nevertheless, there is no reasonable basis to conclude under these facts that the claimants were afforded the right to simply walk off the job if disclosure of a suspect was not achieved within five minutes. The Board finds the claimants actions wholly unwarranted, and in disregard of instructions by the assistant foreman to remain in or near the van. The Carrier must be able to depend on its work force, including the claimants, to report to work and remain on duty under such circumstances. The Carrier proved claimants breached the rules in this case, and the claim must be denied.

### AWARD

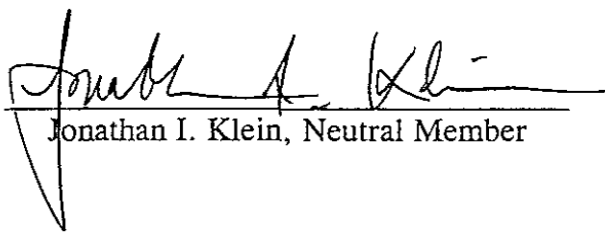
The claim is denied.



Thomas M. Rohling, Carrier Member



Clarence F. Foose, Employee Member



Jonathan I. Klein, Neutral Member

This Award issued the 17<sup>th</sup> day of November, 1997.