

PUBLIC LAW BOARD NO 5850

Award No. 154
Case No. 154

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on January 31, 2000, Mr. J. D. Burney was dismissed from service for allegedly violating Rule 1.5 of the Carrier's Maintenance of Way Operating Rules, effective January 31, 1999, in connection with his allegedly testing positive for a controlled substance on November 23, 1999.
2. As a consequence of the Carrier's violation referred to above, Mr. Burney shall be reinstated with seniority, vacation, all other rights unimpaired, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost beginning on November 23, 1999, in accordance with the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant was tested for a controlled substance on November 23, 1999.

The Carrier wrote Claimant on December 2, and again on December 7,

1999, first to advise him of the positive findings of the test and secondly because this was Claimant's first time violation of the BNSF Policy in use of alcohol and drugs, he was advised that the suspension was conditional upon his entering into the Employee Assistance Program and his full compliance with the program with all instructions issued him by the Employee Assistance Counselor. The letter went on to say:

"You must contact the Employee Assistance Manager for evaluation and treatment. Your treatment must commence within 45 days from the start of your suspension. All applicable rules for return to work must be complied with as outlined in Article 6.0 or the BNSF Policy on Use of Alcohol and Drugs.

Your suspension will be considered served when you are released to active service by the Medical Department upon recommendation of the Employee Assistance Manager, provided it is within 365 days from the date this suspension commences. Failure to receive a favorable recommendation by the end of the 365 day period, or failure to abide by the instructions or program set forth by the counselor will automatically result in dismissal if such charges are proven in a separate formal investigation.

This letter will be placed in your personal file. Your signing below serves as acceptance of the level S first time, BNSF Policy on Use of Alcohol and Drugs conditional suspension and agreement to waive your rights to formal investigation in this matter."

Claimant did not sign the letter and an investigation was set, postponed once at the request of Claimant's Representative, and finally scheduled for January 12, 2000. Claimant was dismissed following the investigation which Claimant did not attend even though notice was apparently sent to him indicating

It had been rescheduled.

In review of the record, this Board recognizes procedural improprieties committed in the handling of this matter. On the other hand, it is apparent the procedural problems are attributable, in part, to the Claimant's failure to communicate with the Carrier subsequent to his removal from service on December 2, 1999, pending investigation, and his absence from the investigation, itself, on January 12, 2000. In cases of this nature, it may be appropriate to overturn the Carrier's decision and action. However, in this case, we have an employee who has yet to deny the allegation.

In light of these unique circumstances, the Board believes the Carrier must attempt to correct this situation by "starting over." That is, it will re-issue its letters of December 2 and 7, 1999, respectively, to the Claimant's last address of record. Excluded from these letters will be the option to retest the urine drug screen which was apparently waived by the Claimant when offered the first time. In line with the December 7, 1999 advice, the Claimant will have the opportunity to contact the Carrier's Employee Assistance Manager for evaluation and possible treatment within forty-five (45) days from the date the notice is sent. If the Claimant fails to choose and comply with this option, the Carrier will follow through with the normal and appropriate discipline process. The holding of this possible investigation outside the time limits of the Parties' contract will not be

cited as a procedural defect or a basis for overturning any decision rendered.

Finally, if no response is received from the Claimant for any reason, including unsuccessful legitimate attempts to deliver correspondence to the Claimant, there will be no alternative but to conclude that the Claimant has no desire to continue his employment relationship with the Carrier. Further, all information connected to this matter will be eliminated from the Claimant's employment record and said record will reflect only that he "resigned effective November 23, 1999."

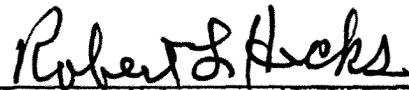
This decision is not designed to amend the terms of the Parties' contract as, this, the Board is not empowered to do. It is further understood that this decision, rendered to resolve this unique situation, shall not be considered a precedent nor shall it be cited by either party concerning similar matters. Notwithstanding the foregoing, the managers in the area where this matter arose should heed this Board's advice to make every effort to administer discipline in the future in accordance with the contract requirements and basic fundamentals of due process. Failure to do so in the future may result in a much different decision than that rendered here.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.



Robert L. Hicks, Chairman & Neutral Member



Rick B. Wehri, Labor Member



Thomas M. Rohling, Carrier Member

Dated: July 10, 2001