

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 257**

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

**(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)**

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on March 30, 2004, when it dismissed the Claimant, Mr. A. Y. Lee, from service, for allegedly failing to comply with the terms of his conditional suspension, signed January 13, 2004, in violation of Maintenance of Way Operating Rules 1.5.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service, remove any mention of this incident from the Claimant's personal record, and make him whole for all wages lost account of this alleged violation.

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 arrested by an Arizona Highway Patrolman for driving while under the influence and driving on a revoked license. The charge was driving under the influence while on company property. The on-property charge came to be that when Claimant stopped for the Arizona Patrolman, he pulled over at a Carrier's crossing.

This was Claimant's first charge of being under the influence while on company property. As is the usual handling, an investigation is scheduled, but if Claimant seeks a

conference before the scheduled hearing and agrees fully with a conditional suspension, the original investigation will be cancelled. Claimant's conference was on January 13, 2004, wherein Claimant agreed to certain conditions listed below:

"This suspension is conditional based upon: 1) your first-time violation of Rule 1.5 or BNSF Policy On Use of Alcohol and Drugs, 2) your placing yourself into the Employee Assistance Program, 3) your full compliance with the program and with all instructions issued you by the Employee Assistance Manager."

Claimant did not comply with Item 2 as set forth above.

Claimant contends that he contacted an EAP Counselor on the date he signed the conditional lease. According to Claimant, the Counselor was contacted as soon as he signed the conditional suspension. Following is Claimant's testimony when responding to question 32:

"A. Yes, I called Jim Harrell right after I signed this. I called him in Gallup Roadmaster's office. I called him twice. He told me to go ahead and sign it so we can move this investigation up to March 3 and he said I'm on, on the phone with a client, call me back when you sign, sign all the papers. And after I signed them all I called him and he said alright buddy, you sign it, we'll just wait until March 3."

Claimant said he made several attempts after the initial contact with the EAP Counselor but was unable to make contact. He alleged he left voice messages each time, but the Counselor never returned a call or responded in any way.

The Counselor advised the responsible Carrier Officer that Claimant never attempted to contact him, contradicting Claimant's testimony.

The Counselor was contacted by phone and denied that Claimant had ever called him. The Counselor has been working as such since 1986. He testified he keeps a telephone log listing date and time when anyone calls him. Claimant was not listed. He also states when he is not in the office, his voice mail is consistently monitored and he

responds.

This obviously presents conflicting evidence, but the Carrier weighed in on the Counselor's side. To reiterate, he has been in the counseling business since 1986, and he is well aware of the importance of such contact and the necessity to record who calls and the date of the call.

Claimant attempted to overcome the charges by presenting a calendar where he recorded alleged efforts to contact the counselor to support his testimony. But a review of his testimony sets forth where he alleged that he made contact on January 13, 2004. He stated the Counselor was too busy to talk at the moment as he was with another client, but he would call back.

The Counselor allegedly returned the call on the same day. Claimant further alleged he was advised to sign the papers and they would wait until March 3.

That makes no sense. March 3, 2004, is the date of the investigation here concerned. On January 13, 2004, there was no need for this investigation. The investigation came to be only after Claimant failed to follow the terms of the conditional suspension he signed on January 13, 2004.

The Carrier has furnished sufficient evidence of Claimant's culpability for the charges assessed. The dismissal is upheld by this Board.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

Robert L. Hicks
Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli
Rick B. Wehrli, Labor Member

William L. Yeck
William L. Yeck, Carrier Member

Dated: Sept 2, 2004