

**PUBLIC LAW BOARD NO. 5850**

**Award No.  
Case No. 294**

**(Brotherhood of Maintenance of Way Employees**

**PARTIES TO DISPUTE:**

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

**STATEMENT OF CLAIM:**

1. The Carrier violated the Agreement on September 21, 2005 when Claimant, M. S. Grant, was dismissed for alleged violation of Maintenance of Way Operating Rule 1.13-Reporting and Complying with Instructions and Item 4 of Appendix C, Policy for Employee Performance Accountability when claimant failed to follow instructions from EAP manager regarding a treatment plan; and
2. As a consequence of the violation referred to in part 1, the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights unimpaired, remove any mention of this incident from Claimant's personal record, and make Claimant whole for all time lost commencing September 21, 2005.

**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, on July 18, 2003, was charged with a violation of Rule 1.5. He waived his right to an investigation at that time and was returned to service under specific conditions, one of which was the Carrier's right to subject Claimant to random testing.

The test was scheduled at 0600 hours, but Claimant was not tested until 0710 hours. At that time, his breathalyzer was .019%. Any reading below .02% is not

considered as being under the influence or even having any alcohol in the system.

The record is somewhat confusing as to why the one hour ten minute delay occurred. One version was the individual doing the testing was late, the other reason was that Claimant at first refused the test contending he did drink quite a bit the night before and he was apprehensive about passing the test. The only two positives in this case is the 0710 hour reading was .019%, and that flowing from the July 2003 conviction of a Rule 1.5 violation, Claimant's conduct was still being monitored by Carrier's medical service (actually a contracted service).

Testimony developed that after an evaluation of Claimant's conduct and the latest test results, it was that Department's opinion that Claimant required a more stringent treatment for alcoholism. They ordered Claimant to admit himself to a treatment facility some 800 miles from his home. Claimant drove to the facility but refused to admit himself.

A short time after his refusal, he was again encouraged to enter the facility and accepted an airline ticket, but after arriving and talking with some of the staff, he again refused to admit himself.

Claimant advanced several reasons as to why he would not commit to enter the recommended facility, mainly being prevented from receiving visitors or talking to them over the phone as he was in the process of getting a divorce, which he contends his son was taking hard.

The charge for which Claimant was deemed culpable by the Carrier was the refusal to abide by the instructions of the medical people and nothing else.

Claimant did not comply with those instructions. To that extent he is guilty. Even

though Claimant committed to an outpatient facility and did complete the program, for this Board to return Claimant to service would be treated as granting leniency. Leniency is a prerogative solely of Management. They could have at any time during the handling of this case reconsidered and permitted Claimant to accept his treatment at another facility closer to his home.

Under the circumstances, there clearly is sufficient evidence of Claimant's culpability for the charges assessed. The Carrier allowed Claimant three options since 2003 to correct his behavior, but they were unsuccessful in their effort. This Board will not offer a fourth chance.


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, Chairman & Neutral Member

  
David D. Tanner, Labor Member

  
Samantha Rogers, Carrier Member

Dated: 3/21/07