

PUBLIC LAW BOARD NO. 5939

**Case No. 41
Award No. 41**

PARTIES TO DISPUTE: BROTHERHOOD OF LOCOMOTIVE ENGINEERS

-and-

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim on behalf of Casper, Wyoming Engineer J. D. Mann for reinstatement to service; removal of discipline from his personal record; and pay for all lost time.

FINDINGS:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1932;

That this Board has jurisdiction over the dispute involved herein.

The material facts that led to this claim are not in dispute. The Claimant was hired as an Engineer in 1979. In December 2003, he was working as a Brakeman at Casper, Wyoming. He was assigned to the Casper/Greybull pool.

On December 2, 2003, the Claimant was called for Train M-CASLAU4-20, which had an on duty time of 9:30 p.m. Between 8:00 p.m. and 8:26 p.m. thirteen calls were made both to his residence and his cell phone. There was no response to these calls.

On December 3, 2003, the Claimant was held out of service pending an investigation. On January 4, 2004, a formal investigation was held to determine the Claimant's alleged responsibility for missing the call for Train M-CASLAU4-30 on December 2, 2003, when he was assigned to the Casper/Greybull pool. At this investigation, the Claimant acknowledged that he missed the call for this assignment.

He thought he was on medical leave. On January 26, 2004, the Claimant was dismissed from service for his reputed violation of Rule 1.16 of the BNSF General Code of Operating Rules.

There is no question that the Claimant missed a call on December 2, 2003. His explanation that he thought he was on medical leave is baseless. On December 2, 2003, the Claimant logged on to the Carrier's Voice Response Unit (VRU) four times. He therefore knew that he was marked up and available for a call. He could have used the VRU to mark off on medical leave but did not do so.

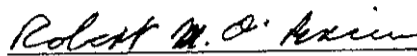
That the Claimant was experiencing psychological problems in December 2003, cannot be gainsaid. On December 5, 2003, he was admitted to the Wyoming Behavioral Institute for inpatient treatment. According to the Wyoming Behavioral Institute, since the latter part of November 2003, outpatient treatment was attempted but the Claimant did not improve. His judgment and decision making abilities were impaired at this time. Evidently, the Claimant was unable to concentrate on his employment obligations because of his psychological condition.

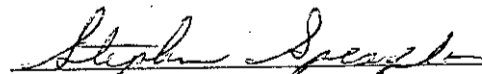
The Claimant has a history of missed calls. In 2003, he missed four calls. In the last three years, he missed eight calls. The Carrier applied progressive discipline for these missed calls.

Notwithstanding the Claimant's plethora of missed calls for which progressive discipline was applied, in the light of his psychological state in late 2003, which evidently affected his judgment and decision making abilities, this Board is of the opinion that he should be given the opportunity to demonstrate that he is a reliable employee. However, the Claimant's reinstatement is conditioned on his passing a physical and psychological examination. In view of the Claimant's prior disciplinary record, he is not entitled to any back pay for the time he has been out of service, in our opinion.

AWARD: Claim sustained to the extent indicated in the Findings.

The Carrier is ordered to make the within Award effective on or before thirty (30) days from the date hereof.


Robert M. O'Brien, Neutral Member


Stephen D. Speagle, Employee Member


Robert S. Karov, Carrier Member

Dated: 28 Mar '05