

SBA No. 1112
BNSF/BMWE
Case No. 5
Award #6

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 5
AWARD #6**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 29, 1998 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims of grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may choose to appeal their claim to this Board. The Employee has a sixty (60) day period from the effective date of this discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

The Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data, including argument, evidence, and awards. In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

Finally, the Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

BACKGROUND FACTS

The Claimant, S.A. Olson, has established and held seniority for approximately 29 years. His service records shows various instances of discipline.

On February 8, 1998, following an investigation conducted on January 11, 1998, the Carrier dismissed the Claimant from service for violation of BNSF/BMWE Operating Rule 1.5 and BNSF Policy on Use of Alcohol and Drugs¹. Those provisions read, in relevant part:

BNSF/BMWE Operating Rules

Rule 1.5 Drugs and Alcohol

The use or possession of alcoholic beverages while...on Company property is prohibited. Employees must not have any measurable alcohol in their breath...while on Company property...

* * *

BNSF Policy on the Use of Alcohol and Drugs

Rule 2.1.3 Prohibitions Under BNSF Policy

FRA and FHWA regulations set forth minimum prohibitions on the use alcohol and drugs. However, BNSF's General Rule for All Employees set forth even more strict prohibitions on such use, and provide, in part as follows:

¹In the original investigation the Claimant was also charged with violating Operating Rule 1.25. However, because that is not an asserted basis for the dismissal, we will not pass on that allegation.

Drugs and Alcohol

The use of possession of alcoholic beverages while...on BNSF property is prohibited. Employees must not have any measurable alcohol in their breath...while on BNSF property.

* * *

Rule 12.0 Dismissal

Any one or more of the following conditions will subject employees to dismissal:

* * *

(c) Refusal to provide a...breath sample for testing when instructed under the terms of this policy or federal or state regulations unless the inability to provide a same is for a verified medical reason...

* * *

FINDINGS AND OPINION

On December 3, 1998 the Claimant dropped off a high-rail vehicle belonging to the Carrier at a local garage for repair. At the request of the garage, the Claimant agreed that the truck could be parked at a designated area on Carrier property with the keys left under the seat, something which is apparently an ordinary arrangement between the parties. On the following day, the garage parked the car in accordance with the arrangement made with the Claimant. At around this same time the Claimant parked two of his personal vehicles near the same location, again on Carrier property. time.

On December 5, 1998 Special Agent Borries received a page at or around 8:00 p.m. from a Carrier patrolman that a confidential informant had reported that the Claimant was in a local bar and Claimant might be drinking. Borries contacted Roadmaster Wayne Morris and both agreed to meet at the site to investigate the report. Borries arrived at or around 9:00 p.m. and once Morris arrived they waited at the site in question for approximately one hour. At that point Borries entered the bar in an effort to determine the validity of the report, only to find that the Claimant was not there. He and Morris then proceeded to three other local establishments only to find once again that the

Claimant was not in any of them.

By the time that they completed their survey of the third bar, on or about 1:20 a.m. the next day, Borries and Morris, who were in separate vehicles, saw the Claimant arrive in a vehicle and park on Carrier property. Borries pulled up to the Claimant, who was not on duty at the time, and spoke with the Claimant. As he did so he was able to smell alcohol on the Claimant's breath and see that his eyes were watery. Because of these observations, Borries asked the Claimant to remain where he was saying that he wished to speak with him. The Claimant however did not comply and instead drove away in his vehicle to another area on Carrier property. Once Borries and Morris caught up to the Claimant Borries asked the Claimant if he had been drinking and the Claimant admitted that he had a few beers. Borries then asked the Claimant, whom he described as agitated and uncooperative, to turn around so that he could be placed into handcuffs and taken for a drug and alcohol test. By this time Morris also arrived and confirmed Borries' earlier observations regarding the Claimant's physical condition. Borries then placed the Claimant into his vehicle and the two of them proceeded to a nearby laboratory. As they drove, Borries again smelled alcohol on the Claimant's breath.

Once they arrived at the laboratory Borries removed the handcuffs from the Claimant so that he would not be embarrassed and asked the Claimant if he was going to be cooperative. However, the Claimant refused to submit to the drug and alcohol test. Borries and Morris then took the Claimant back to the point at which the dispute arose despite this request that he be dropped off elsewhere.

The investigation and dismissal described above then ensued leading to this dispute.

The Organization and Claimant contend that the Carrier did not have cause to dismiss the Claimant because it has failed to meet its burden of proving the Claimant's guilt of the charge of having measurable alcohol on his breath or in his system at the time in question. First, the Organization contends that because the Claimant was off-duty at the time he is somehow insulated from discipline. However, the rule in question does not limit its reach only to on-duty conduct, but rather clearly and explicitly applies to the presence of such conditions "while on Company property," a fact which is not in dispute. Secondly, the Organization contends that the lighting conditions during that evening were such that neither Borries nor Morris could have perceived what they claimed to have seen. We do not find that this argument invalidates all of their perceptions however and at best invalidates only their visual perception. Thus, there is no objective evidence to refute the testimony

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of these two individuals however that they smelled alcohol on the Claimant's breath. Moreover, the Claimant admitted both to Borries and Morris and at the investigation in this matter that he did in fact consume some beer earlier that evening. On this point we note that the Claimant contended that at his body weight, 230 pounds, any alcohol consumed earlier that night would no longer be in his system. However, that assertion is just that, an assertion made in closing argument, and is not supported by any record evidence. Finally, the Claimant contends that his agitated state was caused by the rough treatment that he received by Borries just before and at the time that he was handcuffed. On the basis of this entire record however, we conclude that his agitation was more likely caused by the fact that he had alcohol in his system and was about to be tested for such.

That conclusion then leads this Board to the final point and one, no matter how the arguments above are resolved, that ultimately dictates the disposition of this claim. The record conclusively shows that the Claimant refused to submit to the drug and alcohol test required by Special Agent Borries. Under the rule, not attacked by the Organization with regard to its validity, the only defense available to an employee is if he or she is unable to submit to such a test for medical reasons that are verified. Neither condition was satisfied in the instant matter.

Thus, in light of the foregoing, this Board concludes that the Claimant was guilty as charged with violations of Rules 1.5, 2.1.3. and 12.0 as cited by the Carrier.

AWARD: The claim is denied.



**Robert Perkovich, Chairman and
Neutral Member, SBA No. 1112**

DATED: May 18, 1999