

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 162

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 162

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (hereinafter the Organization) and the Burlington Northern Railroad Company (hereinafter the 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. 925 (hereinafter the Board).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

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 chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the 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 establishes 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 investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. 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.

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

Mr. Eleuterio H. Zizumbo, hereinafter the Claimant, entered the Carrier's service as a Laborer on April 19, 1972 and he was occupying that position when he was dismissed from the Carrier's service on April 21, 1993 for his alleged violation of Rule G of the General Rules on Friday, March 12, 1993 while working on the Cicero Maintenance Gang.

The Claimant was dismissed as a result of an investigation which was held on March 26 and April 8, 1993 in the Cicero Terminal Conference Room in Cicero, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule G of the General Safety Rules.

Findings and Opinion

On March 12, 1993, a Friday, the Claimant and a fellow employee, Mr. Felix Avalos, were in an office in the Ceco Building at approximately 8:15 a.m. for the purpose of obtaining their pay checks. The Claimant had come on duty at approximately 7:30 a.m.

Mr. Fred Rutt, Terminal Manager, testified that he detected an odor of alcohol when he passed in the vicinity of the Claimant and Mr. Avalos.

Mr. Rutt and several other Carrier representatives, including Roadmasters G.A. Goy and J.D. Haney and Special Agents L.A. Golden and D.R. Swiatek, testified that they were in close proximity to the Claimant and were able to smell alcohol coming from his person and observe his demeanor. Only Special Agent Swiatek testified that he observed the Claimant's eyes as being "bloodshot". Other Carrier eyewitnesses testified that, to the extent they could observe the Claimant's eyes, they did not notice any signs of intoxication or impairment or indicia of alcoholic beverage consumption; and no witness testified that the Claimant was unsteady or that his gait was anything but normal.

Testimony of record, provided by the Carrier's witnesses, indicates that when the Claimant was questioned regarding the odor of alcohol he stated that he had been at a party the previous evening; and, apparently, had consumed some alcohol.

When he was questioned, the Claimant, who is more conversant in Spanish than English, testified that he had not told Carrier representatives that he had been drinking the night before; but he stated that he told them that he had used some alcohol-based medicinal rub and had washed his mouth with Listerine; and that, apparently, was what Carrier representatives smelled.

The Claimant also introduced a document in evidence, which was obtained from a company known as "N.R. Laboratories", and which apparently reflects that the Claimant voluntarily submitted to body fluid testing on March 12, 1993 on his own motion and at his own expense; and that those tests resulted in "negatives" for alcohol and/or controlled substances.

The Claimant was terminated for violating Rule G which reads as follows:

The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited.

Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

There is insubstantial evidence to conclude that the Claimant was guilty of reporting for duty "under the influence". In fact, the body fluids test results submitted by the Claimant, at the least, required the Carrier to further investigate if it wished to challenge the verity of those results. The Carrier did not, and so the record stands uncontradicted insofar as the Claimant's having proven that he was not "under the influence".

Did the Claimant "use alcoholic beverages" while he was "on duty" or "subject to duty"? The failure of any Carrier representative to determine, with any degree of certainty, the Claimant's blood/alcohol level at or shortly after the time the smell of alcohol was discerned, require this Board to conclude that the Carrier has not established by "clear and convincing evidence" that the Claimant was guilty of violating Rule G.

What is "subject to duty"? The Carrier's investigating officer entered nothing in the record to advise the Organization or the Claimant or the Board what the Carrier's view is regarding this term. Is the Carrier suggesting that an individual, who consumes alcohol seven, eight or nine hours before he is subject to duty, and who retains the smell of alcohol on his person or breath, even though he is completely free of any trace of alcohol in his system, is guilty of a Rule G infraction? This record does not provide the Board with sufficient evidence to assess that supposition.

Based upon the foregoing findings, this Board concludes that the Carrier has failed to present sufficient evidence to sustain the imposition of any discipline. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with seniority unimpaired and to make him whole for all lost wages and benefits. The Carrier is further directed to physically expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 20th day of December, 1993.

Richard R. Kasher
Richard R. Kasher
Chairman and Neutral Member
Special Board of Adjustment No. 925