

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 70

AWARD NO. 70

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. David M. Denesia, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on June 9, 1978. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was dismissed from the Carrier's service on June 14, 1989.

The Claimant was dismissed as a result of an investigation which was held on May 22, 1989 in the Carrier's northern railroad office building in Alliance, Nebraska. 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 as a result of Company officers detecting the odor of alcoholic beverages on his breath at or about 7:30 a.m., Wednesday, May 10, 1989 while he was assigned as a Surfacing Correction Gang Foreman.

Findings and Opinion

Mr. John A. Powers, Roadmaster at Alliance, Nebraska, testified that when the Claimant came into his office at approximately 7:30 a.m. on May 10, 1989 that he "thought I detected an odor of alcoholic beverage". Roadmaster Powers testified that he was on the telephone at the time, and that the Claimant had left the office and proceeded by Carrier vehicle to his job site. Roadmaster Powers testified that he contacted Special Agent Mclain and advised him that he thought he had smelled the odor of an alcoholic beverage on the Claimant's breath, and he asked Agent Mclain to investigate further and to verify his impression. In response to questions from the Organization Representative, Roadmaster Powers testified that the Claimant did not show "signs of any unusual behavior when he was in [Powers'] office", and that when the Claimant was requested to submit to a body fluids test and asked for the presence of an Organization representative that he asked the Claimant "If he wanted to call one, and he said no".

Special Agent Mclain testified that he accompanied Roadmaster Powers to the Claimant's work site and that he had the Claimant enter his vehicle at which time he noted "a strong odor of alcoholic beverage" on the Claimant's breath. Agent Mclain further testified that the Claimant manifested "other symptoms", specifically that "he had bloodshot eyes and he was extremely slow to answer questions that were asked of him". In response to a question from the Organization Representative, Agent Mclain testified that he was not familiar with the Claimant's ordinary "manner of speech". Agent Mclain also testified that the Claimant did not show any "signs of physical impairment".

Special Agent William L. Suit testified that he was in the Special Agent's office in Alliance when the Claimant was brought into that office by Roadmaster Powers and Special Agent Mclain. Agent Suit testified that he had the Claimant blow in his face, that he was very close to the Claimant and that he was positive that there was an odor of alcohol on the Claimant's breath. In response to a question by the Organization Representative as to whether the Claimant showed any signs of being under the influence of alcohol, in terms of his speech or physical actions, Agent Suit testified that the Claimant's speech "was a bit slurred, not real bad" and that he was "in reasonably good control as far as walking and moving around but his eyes were extremely bloodshot and he had some swelling under the eyes, in the eye area and the eyes were extremely red". Agent Suit testified that the Claimant was offered an opportunity to take a urinalysis test and that he refused.

Four (4) fellow employees, who were passengers in the vehicle

the Claimant drove from the Roadmaster's office to the job site on the morning in question, testified regarding their observations of the Grievant's demeanor and physical abilities. Machine Operator Mark Adamson, Machine Operator Gary Lee Witt, Machine Operator Marvin Dwayne Dirks and Machine Operator J.J. Satchell all testified that they rode with the Claimant on a two lane secondary highway for approximately six to seven miles from the Roadmaster's office to the work site; that the Claimant drove through a part of the town of Alliance in order to reach the work site; and that they did not observe any unusual behavior in terms of the manner in which the Claimant operated the vehicle. These fellow employees further testified that they would not have allowed the Claimant to drive a Carrier vehicle if he was under the influence of alcohol. Machine Operator Satchell also testified that Roadmaster Powers did not make any attempt, that he knew of, to stop the Claimant from leaving the site of the depot and driving to the job site.

Mr. Mark L. Sprattler, a Traveling Mechanic, testified that on May 10, 1989 he encountered the Claimant, spoke with him, did not observe any unusual behavior or speech impairment and did not see the Claimant "stumble or in any way have difficulty in moving around the machinery".

The Claimant testified that he was in the Roadmaster's office for approximately five to ten minutes on May 10, 1989, sometime in the vicinity of 7:30 a.m., and that Roadmaster Powers said nothing to him about being under the influence of alcohol and took no action to stop him from driving to his assigned work site. The Claimant testified that he drove to the job site with no difficulty, and that he was not under the influence of alcohol on May 10, 1989 when he reported for work. The Claimant further testified that he requested an Organization representative when he was asked to submit to a urinalysis test and that that request was refused by Roadmaster Powers. The Claimant also testified that he pauses for a period of time before responding to questions and this represents his "normal habit of speech". The Claimant testified that he did not violate Rule G on May 10, 1989. The Claimant testified that he did not "show up intoxicated". The Claimant further testified that he had advised Special Agent Mclain that he had been drinking on the previous evening and that he had finished his "last alcoholic drink" at 10:00 p.m.

The Carrier concluded, based upon the testimony of Roadmaster Powers and the two Special Agents, that the Claimant violated Rule G.

The Organization contends that the testimony of five (5) fellow employees who observed the Claimant, as well as the Claimant's testimony, establish that the Claimant was in no way impaired or

under the influence of alcohol; and that no one observed the Claimant engaged in any "unusual behavior". The Organization further contends that Roadmaster Powers' allowing the Claimant to leave the depot and drive four (4) fellow employees to a work site seven (7) miles away is additional evidence that the Claimant was neither impaired nor under the influence of alcohol on the morning in question. The Organization also submits that the Claimant's rights were violated when his request for an Organization representative was denied at the time the Claimant was asked to submit to a urinalysis test. The Organization also points out that the Carrier allowed the Claimant to drive home, a distance of approximately one hundred twenty-five miles, in face of Carrier's contention that the Claimant was in violation of Rule G. The Organization submits that it is impossible to believe that a responsible Carrier officer would allow an impaired employee to do the things that the Claimant was allowed to do. The Organization contends that the only logical conclusion is that Roadmaster Powers did not, in fact, believe that the Claimant was under the influence of alcohol on May 10, 1989. Based upon the above arguments, the Organization requests that the claim be sustained and that the Claimant be returned to service with seniority unimpaired and be paid for all lost time.

Five (5) witnesses, not including the Claimant, all testified that they noticed nothing unusual about the Claimant on the day in question. Interestingly, neither the Organization Representative nor the Conducting Officer asked any of these witnesses whether they smelled alcohol on the Claimant's breath, whether the Claimant's eyes appeared to be bloodshot and/or swollen or whether the Claimant's speech was in any way "slurred".

On the other hand, three (3) Carrier witnesses testified that they were positive that they smelled alcohol on the Claimant's breath; two (2) of these witnesses detected the odor of alcohol in spite of the fact that the Claimant did not breathe directly in their faces; two (2) witnesses testified that the Claimant's eyes were bloodshot and swollen; and these two (2) Special Agents each discerned that the Claimant had some problem with his speech.

The Carrier chose to credit the observations of the Roadmaster and the two (2) Special Agents. In fact, since the five (5) witnesses, who appeared on behalf of the Claimant, as well as the Claimant did not dispute that there was an odor of alcohol on the Claimant's breath or that his eyes were bloodshot and swollen, those indicia of alcoholic consumption are not subject to a question of credibility. The Claimant's explanation is that he stopped drinking some nine and one half (9 1/2) hours prior to appearing for work. He did, apparently, tell Special Agent Mclain that he had had "approximately ten mixed drinks" the night before he reported to duty at an establishment known as Toad's Lounge.

It is a well-established principle where detection of alcoholic use is concerned that lay people are qualified to make reliable observations regarding the standard indicia of intoxication or "under the influence".

The Organization wrongly assumes that "under the influence" is synonymous with "impairment". Those two terms are not necessarily interchangeable. An employee may be able to walk a straight line and/or place his finger upon his nose and/or show no other signs of physical impairment, and still that employee may have a blood alcohol content that exceeds the legal limit in a number of states. Impairment is not co-extensive with being under the influence; and "under the influence" is not synonymous with having a blood/alcohol content above the legal limit. In fact, individuals may be able to drive seven miles or seventy miles on two lane highways or expressways and still have sufficient alcohol in their systems to render their reaction times less dependable. That is the reason the Carrier's Rule G prohibits employees, such as the Grievant who are responsible for the operation or the direction of the operation of heavy equipment, from coming to work with alcohol in their system.

While there is some merit in the Organization's contention that Roadmaster Powers' allowing the Claimant to leave the depot and drive to the work site is indicative that the Roadmaster was not convinced that the Claimant was under the influence or intoxicated, the evidence indicates that Roadmaster Powers first had a suspicion as he "thought" he smelled alcohol on the Claimant's breath. Roadmaster Powers may have acted more judiciously had he put down the telephone and directed the Claimant to remain in the depot so that his demeanor and actions could be assessed in terms of the suspicion that he was under the influence of alcohol. However, the evidence makes it clear that Roadmaster Powers was sufficiently concerned that he called upon the Special Agent Mclain to accompany him and to verify his suspicions regarding the Claimant.

In this Board's opinion, there is sufficient and convincing evidence in the record to establish that the Claimant appeared for duty with enough alcohol in his system to cause a strong odor to remain on his breath, to cause his eyes to remain bloodshot and to cause his speech to be somewhat impaired.

The Claimant may have been able to disprove Roadmaster Powers' assessment that he was in violation of Rule G had he submitted to the body fluids test that was offered. He chose not to; and thus the only objective evidence is contained in the observation of the eyewitnesses. This Board is also of the opinion that the Claimant was not denied the opportunity to have an Organization representative present, although it is not clear that he was entitled to such representative since the Carrier did not engage in any disciplinary investigation or order the Claimant to submit to a body fluids test on May 10, 1989.

In any event, the Board is persuaded that the Carrier has relied upon substantial and convincing evidence in the record which establishes that the Claimant appeared for duty on May 10, 1989 and that he manifested the indicia of intoxication. Therefore, the Carrier was justified in citing him for a violation of Rule G.

Based upon the foregoing findings, the Board concludes that the Carrier had just cause to discipline the Claimant and to dismiss him from service.

Award: The claim is denied. This Award was signed this 31st day of August 1989 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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