

PUBLIC LAW BOARD NO. 4148

Joseph Lazar, Referee

AWARD NO. 10
CASE NO. 10
603-10-84

PARTIES) UNITED TRANSPORTATION UNION
TO) vs
DISPUTE) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT
OF CLAIM:

Request of Nebraska District (Denver) Switchman
C. A. Miles for reinstatement to service with
seniority unimpaired and pay for all time lost
until reinstated.

FINDINGS:

The Board, after hearing upon the whole record
and all the evidence, finds that the parties
herein are Carrier and Employee within the meaning of the Railway
Labor Act, as amended, that this Board is duly constituted by
Agreement dated May 6, 1986, that it has jurisdiction of the
parties and the subject matter, and that the parties were given
due notice of the hearing held.

Claimant C. A. Miles was first employed by the Burlington
Northern as a Brakeman/Switchman on June 17, 1978, and on August 1,
1980 was promoted by the Carrier to the position of Conductor. On
April 22, 1984, the Claimant was called off the Extra Board to work
as Switchman on the 7:59 AM 38th Street Yard Assignment. By letter
dated May 4, 1985, Claimant was dismissed from the service of the
Burlington Northern Railroad Company for violation of Rule G of
the Consolidated Code of Operating Rules. Rule G reads:

"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 bev-
erage, intoxicant, narcotic, marijuana or other controlled
substance, or medication, including those prescribed by a
Doctor, that may in any way adversely affect their alert-
ness, coordination, reaction, response or safety."

The transcript of investigation shows the following testimony by Trainmaster McCann:

- "Q. Did you have any further conversation with Mr. Miles?
A. Yes, sir, I did. I pointed out by my watch at that time in front of the Switchmen's room at 38th Street and it was 8:06 A.M. and he was late for that assignment that started at 7:59 A.M.
- Q. In your initial contact with Mr. Miles, was this inside the office or outside the office?
A. It was outside the office.
- Q. Did you determine anything else in your contact with Mr. Miles?
A. Yes, he explained that he was late for work because he had car troubles and several other excuses there and at that time I detected an odor of alcohol and when the conversation was finished, he and I went in the building as I had a crew contact meeting scheduled with that crew.
- Q. What did you do....what did Mr. Miles do after entering 38th Street Switchmen's shanty?
A. Mr. Miles entered the building at 8:09 and went directly to the men's room.
- Q. And what did you, then, do?
A. Well, I called the tower and I told the Trainmaster on duty up there to get a hold of Chuck Wendt on the second floor and tell him not to leave until I talked to him.
- Q. And what was this concerning?
A. That was concerning Mr. Miles....bringing Mr. Miles up to his office to afford him an opportunity for blood/alcohol test.
- Q. From your initial conversation that you had with Mr. Miles outside the 38th Street Office, did you then make the determination that Mr. Miles smelled of alcohol?
A. Yes, sir.
- Q. And at that time, would it be correct to say that you had it in your mind that you were going to take Mr. Miles to the Superintendent's Office?
A. That's correct.
- Q. Did anything else transpire with respect to Mr. Miles at 38th Street?
A.Then when that was finished I asked each member of that assigned crew to breath in my face to see if I detected anymore

alcohol.

Q. Did Mr. Miles breath in your face at that time?

A. Yes, sir, he did.

Q. Did you detect the odor of alcohol?

A. No, about all I got from that breath in the face was a lot of smoke in my face. He was smoking a cigarette at the time and that's all I could smell at the time was the smoke."
(Tr., pp. 4-5).

"Q. ...You also stated that his speech was slurred. Is that what you stated?

A. No, sir, I didn't say that; I said, 'slow and deliberate'.

Q. 'Slow and deliberate'. Can you explain what you mean by 'slow and deliberate'?

A. If one chooses their answers to all the questions, they are 'slow and deliberate' rather than rambling on or an immediate response. They are more hedged than a direct answer.

Q. Do you think possibly he could have been thinking about your your questions before he answered?

A. That's true.

Q. That would be grounds for him being slow in answering your questions, wouldn't it?

A. Yes.

Q. You said that his walk was slow and deliberate....

A. That's right.

Q. Do you know Mr. Miles's walk?

A. I've observed Mr. Miles around the yard and around the terminal.

Q. And he walked different than he normally does?

A. No."

(Tr., p. 8).

The transcript of investigation shows the following testimony of Assistant Superintendent C. E. Wendt:

"Q. Did you have Mr. Miles blow in your face?

A. I did not have Mr. Miles blow in my face; I got within a couple of feet from him when he was at the desk in the front and then during g....later in the conversation prior to having Mr. McCann take him to go to Saint Luke's, I got within a foot from him right out here by my door and I stated to Mr. Miles that I

couldn't smell any alcohol at that point but I smelled something on him and it was a different smell. To me, it smelled like some kind of weeds. It was more than a cigarette odor and I didn't know what it was." (Tr., p. 11).

- "Q. You earlier stated that you could not smell the odor of alcohol on Mr. Miles's breath. I guess, you compared the smell that you detected as that of weeds.
- A. Yes, sir, some dead weeds or something to that effect. I really couldn't pin point it. That's the best I can describe it.
- Q. Was Mr. Miles smoking at the time that you smelled his breath?
- A. Mr. Miles had smoked a.... one or two cigarettes at the desk in the office just prior to me smelling his breath or getting close enough where I could observe or smell his....I made note, I outright told Mr. Miles that when he was standing here at the door. I also, stated that I felt there was something wrong here.
- Q. Why did you feel there was something wrong with him?
- A. During my initial conversation with him, he appeared to be what I'd call tense or more tense or beyond the point of nervous when I was talking to him. He would not look at me directly in my eye when I talked to him. He was either looking to the right, to the left or at the floor and I said to Carleton, 'You won't even look at me when I'm talking at you.' He looked up briefly for 15 seconds and then during the rest of the conversation, again, he was not....he would not look at me. I got a brief glimpse of his eyes and I did not see that there was a redness in his eyes. And like I say, his actions were that he was trying to avoid eye eye contact and, also, his answers to my questions were very indecisive.
- Q. When questioned about drinking prior to coming on duty, was Mr. Miles adamant in his refusal that he had been drinking or was evasive in his answers.
- A. He said, 'You know I was just out for that. I don't do that', he said. I believe it was something to that effect and he never said he wasn't and he never said he did. He just said, 'I don't have that kind of money for that', or something.
- Q. Was there any other unusual physical characteristics about Mr. Miles on the morning of April 22nd that you can describe, that you haven't described previously?
- A. No, the only thing is, when he was standing I know that when he was talking....when I was talking to him he would, like by the door here, he was leaning on the door; just leaning up against the door. It could be a....it could be just a characteristic

of his....that's what I noticed. The strange thing was his body language or his....in his eye contact, he wouldn't look at you." (Tr., pp. 13-14).

The case of the Carrier rests wholly on the testimony of its two witnesses, Messrs. McCann and Wendt. Mr. McCann makes a single observation of smelling alcohol on Grievant's breath, but denies such smelling later. Mr. Wendt reports that he did not smell alcohol on Grievant's breath, but smelled some unidentified "dead weeds" on Grievant. Not noticed by Mr. McCann, Mr. Wendt observes a redness in Claimant's eyes. Mr. Wendt also states that Claimant had lack of eye contact, tenseness, and a posture of leaning. Mr. McCann observed that Claimant's speech and walking were apparently normal.

In the opinion of the Board, the termination of an employee is a serious matter. The probative evidence in this case, at best, barely can support a conclusion of probable cause for probable cause testing. This case, however, arose prior to the putting in place of the Carrier's probable cause testing, and the Carrier's policy on this is not here involved. The stated charge for terminating Claimant is violation of Rule G, and the probative evidence does not warrant the Carrier's decision.

Claimant is entitled to be reinstated and to be paid for time lost. The Carrier argues that time lost should be computed on the basis of Claimant's past work record. The Organization argues that time lost, as provided in the Agreement, should be construed as based on the Claimant's assignment at the time of suspension or discharge and therefore the earnings accrued therefrom.

In construing the terms "time lost", the Carrier calls attention to PLB 2049 (Ritter), and the Organization calls attention to the recent PLB 4107, Award No. 5 (Vaughn), quoting Ritter's Award No. 143:

"The Board finds that this Carrier is entitled to take into consideration an employee's past work record in calculating 'time lost'. We conclude that this is the only fair measure, to avoid unjust enrichment, and at the same time properly compensate the employee in arriving at an equitable resolution. The Claimant established his work record (he worked 53% of the time) and there is no evidence that he would have improved his work record had he been permitted to work during the time he was out of service."

Chairman Vaughn, in Award No. 5, observes:

"The purpose of a back pay award is to make an employee whole for an employer's improper termination. Both punishment to the employer and unjust enrichment to the employee are to be avoided."

Award No. 5 concludes with: "Accordingly, the Carrier is directed to reinstate claimant, remove the censure from claimant's personal record and to make him whole for wages lost during the period of time he was out of service."

It is evident that in both the Ritter and Vaughn awards, the "make whole" principle is the construction given to the Agreement terms "time lost". Although Vaughn decided to refuse "as a general matter, to insert the language requested by the Carrier into each award, without regard to the facts of the particular claim", it is clear that he gave effect to the "make whole" principle in Award No. 5 of PLB 4107. It is, of course, axiomatic that each discipline case is unique and must be decided on the basis of the peculiar facts of that particular case, and, accordingly, Vaughn's refusal as a general matter to insert the language requested by the Carrier into each award without regard to the facts of the particular claim is not inconsistent with the general doctrine of "make whole". In the light of the facts of record in this particular case, however, the application of "make whole" in giving effect to "time lost" can best be accomplished, in the Board's judgment, by computing time lost on the basis of Claimant Miles's past work record.

A W A R D

1. The Carrier is in violation of the Agreement.
2. The Carrier shall reinstate Claimant and pay him for time lost computed on the basis of his past work record.

Order: Carrier is directed to comply with this Award within thirty (30) days from the date hereof.

Joseph Lazar
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

W. T. Pearl
W. T. PEARL, EMPLOYEE MEMBER

J. B. Wright
J. B. WRIGHT, CARRIER MEMBER

DATED: December 18, 1986