

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(Formerly The Colorado and Southern Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Grinder Operator G. Martinez for alleged '... violation of Rules 565 and 566 ... on May 29, 1985, and ... absence without proper authority ... on June 4, 5 and 6, 1985.' was without just and sufficient cause and on the basis of unproven charges (System Files BN-8-85 and BN-11-85).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was a Grinder Operator at the Pueblo Rail Welding Plant. On May 29, 1985, he informed his Supervisor that he had been convicted of possession of cocaine and would be jailed for the offense. (Claimant ultimately served a 60-day sentence for conspiracy/distribution of a controlled substance.)

Claimant was requested to submit to a urine drug analysis. A report issued on June 4, 1985, indicated a positive analysis for Cannabinoids. Claimant began his jail term on June 3 and subsequently was absent from work on June 4, 5, and 6. On June 6, he was cited for allegedly violating Rules 565 and 566 of the Burlington Northern Railroad Company's Safety Rules and for being absent without proper authority on June 4, 5, and 6. Following a hearing conducted in absentia on June 14, 1985, Claimant was discharged from Carrier's service.

Burlington Northern Safety Rules 565 and 566 read as follows:

"565. 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.

566. 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."

Safety Rule 570 states:

"570. Employees must report for duty at the designated time and place. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

The Organization first maintains in its Submission that Claimant was denied a full and fair hearing when its request for a postponement at the investigation on June 14, 1985, was denied. Claimant had hoped to be released temporarily to attend the investigation, but his request was not approved by the judge before going on vacation. Carrier counters that the Organization could not offer any date certain as to when Claimant would be available and that, by his own actions, waived his right to confront his accusers.

This Division has long supported the position adopted in Second Division Award 8315 that "incarceration is not considered an unavoidable absence from work for good cause." (See First Division Awards 12021, 14692, 18244; Second Division Awards 4689, 6606, 7067; Third Division Awards 12992, 18816, 19568.) As noted in Award 3 of Public Law Board 2206 involving the same parties, "the situation in which Claimant found himself was not 'unavoidable' and he cannot be exculpated by such a bootstrapping argument."

The Organization further argues that Carrier cannot conclude that Claimant was under the influence of Cannabinoids because the accuracy of the immunoassays for detection of marijuana are questionable and Carrier presented no evidence to show that the testing was performed by a qualified toxicologist. This Division has reviewed the entire record of this case, including

all relevant documents exchanged on the property, and finds that the Organization's questioning of the validity of the testing procedures utilized did not, for the most part, arise until the Organization presented its Submission to this Division. The failure to bring up these issues denied both parties an opportunity to explore this avenue of discussion at an earlier date. It is a well-accepted precept within the railroad industry that matters not addressed during the on-property development of a claim are not admissible before the National Railroad Adjustment Board. We so hold here.

Our review of the record leads us to conclude that, given his arrest for possession of a drug, Carrier had sufficient reason to require Claimant to submit to a urinalysis, and that there was a reasonable basis for Carrier to find that Claimant was in violation of Safety Rules 565 and 566. Under the circumstances, Carrier had a reasonable basis for its action. (See Award 34, PLB 2529.)

The transcript of Claimant's investigation reveals that he did not have permission to be absent on June 4, 5, and 6, 1985. Thus, he was absent without proper authority. Given the extent of Claimant's Rules violations, the discipline imposed can be considered neither arbitrary nor capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest.


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.