PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 34
CASE NO. 43

PARTIES TO DISPUTE ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
BURLINGTON NORTHERN RAILROAD (Former FW&D)

STATEMENT OF CLAIM:

1. That the dismissal of Trackman Willis G. Moran for his alleged violation of the Carrier's Rules 565, 566, and 570 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

2. That the Claimant shall now be reinstated with seniority and all rights restored unimpaired, his record shall be cleared of all charges levied against him and he shall be compensated for all wage loss suffered.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction over the parties and the subject-matter.

Claimant Willis G. Moran, with seniority date of October 19, 1981, was employed as Trackman on Regional Rail Gang No. 4 in the vicinity of Decatur, Texas. Under date of August 19, 1985, Claimant was given the following letter:

"As a result of the investigation afforded you at Wichita Falls, Texas on August 13, 1985, effective this date you are hereby dismissed from the services of the Burlington Northern Railroad Co. for violation of Rules 565, 566, and 570 of the Burlington Northern Safety Rules and General Rules as indicated by the positive results from the urine analysis and drug screen Toxicology Report which was submitted on the urine sample you submitted on July 25, 1985, while you were employed as Trackman on Regional Rail Gang No. 4 near Wichita Falls, Tx and for your failure to report for duty on July 18, 19, 22, 24, 30, 31 and August 2, 1985, as was disclosed in testimonies presented at the investigation."

Rule 565 reads:

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

Rule 566 reads:

> "Employes must not report for duty under the influenc of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance, or medicatio including those prescribed by a Doctor, that may in a way adversely affect their alertness, coordination, reaction, response or safety."

Rule 570 reads:

> "Employees must report for duty at the designated tim 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 transcript of investigation shows the following testimo by Claimant:

"Q. Were you on duty in your assignment on July 18, 1985?
A. No sir.

Q. Why were you absent on that day?
A. I had been stopped the previous night before for a faulty taillight and the police officer had reason to search my car, and he found a controlled substance in the car.

Q. What was the result then of the detection of controlled substanc in your car by the officer?
A. I was taken to jail.

Q. And, on the date of July 18, 1985, were you absent from work?
A. Yes sir.

Q. You did not have proper authority to be absent, is that correct?
A. No sir.

Q. Had you contacted anyone to whom you report on the railroad rela to that absence in advance of your tour of duty on July 18?
A. No sir. I was not able to.

Q. Over what period then did you remain in jail as a result of this occurrence/
A. From the 18th of July to the 22nd of July.

Q. Were you then in jail for four days?
A. Yes sir.

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Q. Did you report for work on July 24, 1985?
A. No sir, I was not able to report to work that day.

Q. Why not?
A. Because, I did not have enough gas in my car to get to work and I did not have enough money to purchase gas or make a phone call to explain to a supervisor why I was not able to come to work.

Q. So your statement is then, that in advance of your absence on July 24 you did not have any authority to be absent from work, is that correct?
A. No sir, I didn't.

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Q. Were you present at work on July 30, 1985?
A. No sir, I was not.

Q. Were you present at work on July 31, 1985?
A. No sir, I was not.

Q. On those dates, prior to such time as you were absent from work, had you obtained permission from anyone to be absent?
A. No sir.

Q. Why were you absent from work on those dates?
A. My car had a mechanical failure, and I was in the process of repairing it.

Q. Is there any particular reason for which you did not contact the proper authority or someone responsible for your assignment to obtain information?
A. No sir, there was not.

Q. Were you also absent from work on August 2, 1985?
A. Yes sir.

Q. Why were you absent on that date?
A. Also, mechanical failure on the car, work vehicle.

Q. And prior to your absence on that date, did you contact any pers nel from the gang relative to permission to be absent?
A. No sir." (Tr., pp. 19-21).

There is no dispute about Claimant's absence from duty without proper authority on July 18, 19, 22, 24, 30, 31, and August 2, 1985. It is well established in the railroad industry that incarceration does not justify an absence. Conscious violation of the law does nc constitute an unavoidable absence for good cause. Violations of th law are presumed avoidable. It follows that the Carrier's decision in the instant case that Claimant violated Rule 570 is warranted.

The transcript of investigation further shows the following testimony by Claimant:

"Q. Did you submit the urine sample for toxicology testing on July 25, 1985?
A. Yes.

Q. And, did that indicate a positive test result?
A. Yes.

Q. And, did that positive test result indicate cannabanoid content
A. Yes." (Tr., p. 25).

Claimant further testified:

"Q. In relation to July 25, 1985, what is the most recent time whic you had made use of marijuana?
A. Approximately two years before.

Q. Are you in any manner acquainted with the characteristics of cannabanoid or marijuana?
A. Yes sir.

Q. Can you explain how toxicological analyses on your urine sample which you submitted would yield a positive result for cannabano content?
A. Well, apparently...I go to parties that my friends throw on wee ends at certain times and most...some of these people at these parties do smoke cannabis and I inhale the smoke that they exha and it shows up in my blood stream or urine.

Q. Mr. Moran did you make any use of marijuana while subject to du on the date of July 25th, 1985?
A. No sir.

Q. Did you make any use of marijuana in the hours or days immediat preceding July 25, 1985?
A. No sir, I do not use marijuana in any form." (Tr., p. 22).

Roadmaster Ross testified as follows:

"Q. When you were in contact first with Mr. Moran at the Decatur depot, on July 25, did he show any behavioral or physical signs which were visible to you, relative to drug or alcohol use?
A. At that time, I didn't see anything.

Q. Did you see any glassy eyes on his part?
A. At that time in the morning, I did not.

Q. Did you detect either odor of alcohol or marijuana about Mr. Mo
A. No, I didn't.

Q. Did Mr. Moran's speech appear to be impaired or slurred in any
A. No, his speech was...I had talked with him at length about the reason for being there...it seemed to be normal.

Q. Was his movement unsteady in any way or did his coordination appear to be impaired?
A. No, it didn't.

Q. Did he ever become belligerent toward you or Mr. Peterson, or d play temper toward you?
A. No sir, he didn't.

Q. Did he appear unusually nervous in any way?
A. None other than just having an officer there, other than that n (Tr., pp. 14-15).

The testimony of Roadmaster Ross adds support to the Claimant's testimony that he had not used marijuana for some two years prior tc July 25, 1985. The Board, however, takes notice of the Federal Rail road Administration's Comment to Final Rule on Alcohol and Drug Abus 1985, stating: "Traditional detection techniques do not provide the capability to detect on-the-job impairment" of cannibinoids. Road- master Ross's observations, accordingly, must be considered in the c text of the toxicological report.

With regard to the toxicological report, the Board has carefull considered the article by Arthur J. McBay, Ph.D., DABCC, DBFT, Chief Toxicologist in the Office of the Chief Medical Examiner of the Stat of North Carolina and Professor of Pathology and Pharmacy at the Uni ersity or North Carolina School of Medicine, Chapel Hill, NC., publi in Laboratory Management, January, 1985. (Employes' Ex. A-3). Certa the standards and methodologies discussed by Dr. McBay give integrit meaning, and credibility to the results of urine testing. In the in case, however, the record does not contain probative evidence to ind that the Toxicological Report on Claimant's test, signed by Gary H. bish, Ph.D., DABFT, Texas College of Osteopathic Medicine, Institute Forensic Medicine, Department of Pathology, Toxicology Laboratory Se vice, Camp Bowie at Montgomery, Fort Worth, Texas, in any way was de ficient or failed to meet the criteria of methods or standards descr by Dr. McBay.

The Board has also given close attention to the Organization's attachment to its submission: "Sworn Testimony of Dr. Harold L. Klawans" "In the Matter of Testing for Marijuana (Cannabis) Use Among Railroad Workers" (dated August 9, 1986, with interrogation by Paul L. Pratt, Esq., Approved Attorney for Brotherhood of Maintenance of Way Workers). The Board is impressed by the exceptional qualifications and credentials and experience of Dr. Klawans. His testimony is highly persuasive. The Board notes, however, that his testimony was not subject to cross-examination and was not presented in a context of testimony by other authorities. Dr. Klawans expresses his opinion that: "There is no evidence whatsoever that you can correlate urine testing of marijuana and its various metabolites and derivative with behavioral effects at that time. No relationship whatsoever between what is in the urine and what is going on in the brain and whether or not what is going on in the brain or not what is going on in the brain is affecting behavior or has for days to weeks beforehand." Also, "If you want to say is it a reasonable test for whether or not there has ever been any exposure, the answer is yes. But for purposes of behavioral effects, now or in the past, it's useless." Dr. Klawans was asked: "So even with the best quality of the marijuar the most mental effect that could be possible or behavioral effect would be twenty-four hours?" He answered: "The most significant behavioral effect, certainly. Rarely even last twenty-four hours."

This twenty-four hour behavioral effect recognized by Dr. Klawar has been reported in empirical research on airplane pilots. American Journal of Psychiatry, Vol. 142:11, November 1985, reports: "The current data...indicate impaired performance 24 hours after smoking THC. Thus, it appears that our ability to identify drug effects may depend on the complexity of the task tested." "These results suggest a need for concern about the performance of those entrusted with complex behavioral and cognitive-tasks within 24 hours after smoking mar ijuana. The subjects in this experiment were unaware of any effects on their performance, mood, aler tness, etc. Some results may be app able to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures. Further research on these complex tasks should continue in an attempt to define the point after smoking THC at which the performance of complex tasks returns to base line."

The former Chief of Psychiatry, Cowell Hospital, University of California, Berkely, David H. Powelson, M.D., has written: "I am concerned not only for the marijuana user, but also for those whose lives he affects. Because marijuana accumulates in the brain, people who use marijuana are clinically 'stoned' all the time. Thus we have reason to be concerned about public safety if airplane pilots, air-traffic controllers, firemen, policemen, train motormen, surgeons, an nurses are users of this drug." (Executive Health, Executive Publica tions, Pickfair Bldg., Rancho Santa Fe, Cal., Vol. XIV, No. 1, Oct., 1977).

Current scientific opinion is clear that a user of marijuana is subject to mental or behavioral impairment for at least twenty-four hours, and it is clear that appropriate urine tests can determine whether a person has been exposed to the marijuana. There is medical concern about longer impairment in view of the accumulation of marijuana in the brain and fatty tissues of the body. Additional scientific research is called for as to effects of marijuana use resulting in mental or behavioral impairment over longer time periods, and precise measures of positive testing remain to be correlate with degrees of impairment in complex working situations with numerous task variables. In sum, there is a need for more research.

Although there is a need for more research, the current state of understanding, as available to the Board, supports the conclusion that it is not unreasonable for the Carrier to determine that a positive result on Claimant's urine sample in the instant case shows violation of Rules 565 and 566. The Carrier's judgment was not arbitrary, capricious, or made in bad faith, and there was no showing of violation of due process.

In conclusion, the Claimant's violations of Rules 570, 565, and 566 were just cause for his termination.

The Board notes that the instant claim was discussed in conference prior to the Carrier's letter of final decision. The Carrier on March 18, 1986 wrote to the General Chairman: "...This claim was discussed in conference on March 14, 1986. At that time you were advised that Mr. Moran was not cooperating with the EAP Coordinator. Therefore, Carrier's decision not to reinstate Mr. Moran was affirmed

In the circumstances of this particular case, the Claimant shoul be reinstated, without back pay, subject to the strict condition that he fully cooperate with the EAP Coordinator and subject to the condit that the EAP Coordinator must first certify to the proper authority o the Carrier that Claimant is fit and has satisfactorily completed the program for rehabilitation and restoration to service.

A W A R D

1. The Carrier is not in violation of the Agreement.

2. The Carrier shall reinstate Claimant without back pay and subject to the conditions stated in last paragraph of Findir

Order: Implementation of this Award shall commence within thirty ( days of date of Award.

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

C. F. FOOSE, EMPLOYE MEMBER

L. MARES, CARRIER MEMBER

DATED: 12/5/86