

PUBLIC LAW BOARD NO. 3139

In the Matter of:

INTERNATIONAL BROTHERHOOD OF  
FIREMEN AND OILERS, SYSTEM  
COUNCIL NO. 15,

Organization,

and

BURLINGTON NORTHERN  
RAILROAD COMPANY,

Carrier.

National Mediation Board  
Administrator

Case No. 87  
Award No. 86

Hearing Date: May 23, 1986  
Hearing Location: Seattle, Washington  
Date of Award: October 12, 1987

MEMBERS OF THE BOARD

Employees' Member: Mr. Roger A. Burrill  
Carrier Member: Ms. Jacquie Cassity  
Neutral Member: Mr. John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That in violation of the current Agreement, Laborer M. Welch, Alliance, Nebraska, was unfairly dismissed from service of the Burlington Northern Railroad Company, effective February 26, 1985.

2. That accordingly, the Burlington Northern Railroad Company be ordered to make Ms. Welch whole by restoring her to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from her record.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated February 10, 1982; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

On February 3, 1985, the Carrier withheld Claimant, a Hostler Helper at Alliance, Nebraska, from service pending an investigation to determine if Claimant had committed insubordination and violated Carrier Safety Rules 565 and 566 (Rule G).

At 10:45 p.m. on February 3, 1985, the Startup Foreman informed the Assistant General Foreman that the rear two wheels of Engine Unit 5938 were on the ground. According to the Assistant General Foreman, Unit 5938 had run through an improperly aligned switch. Claimant and Hostler Husman were involved in making the move when the derailment occurred.

After Claimant and Hostler Husman completed an F-27 "equipment damage report, the Assistant General Foreman read the "Rule G Card" to Claimant. The Rule G Card states:

"THIS" IS TO ADVISE THAT THIS INCIDENT MAY INVOLVE OPERATING RULE VIOLATIONS (OR, AS APPROPRIATE, ABNORMAL BEHAVIOR). UNDER BN'S EXISTING POLICY GUIDELINES, WE ARE REQUESTING THAT YOU GIVE A URINE SAMPLE TO BN, OR TO A DESIGNATED MEDICAL FACILITY IN ORDER TO EXONERATE YOURSELF FROM AN ALLEGED RULE G VIOLATION. THE URINE WILL BE USED TO DETECT THE POSSIBLE PRESENCE OF ANY DRUGS OR ALCOHOL IN YOUR BODY. WE SHOULD ALSO ADVISE YOU THAT A REFUSAL TO GIVE A URINE SAMPLE WILL BE CONSIDERED A VIOLATION OF RULE G AND 702B\*.

"DO YOU UNDERSTAND? WILL YOU PROVIDE THE SAMPLE?"

"\*BRAC, MWE & Shop Crafts will be governed by Safety Rules 564, 565 and 566."

Claimant refused to provide the Carrier with a urine sample. She testified that the Carrier's request was immoral and unconstitutional. The Assistant General Foreman reported Claimant's refusal to the Assistant Shop Superintendent who directed the Assistant General Foreman to immediately withhold Claimant from service pending a disciplinary hearing.

The Assistant General Foreman emphasized that Claimant was acting in a normal manner and that he did not smell alcohol on her breath. Nonetheless, he asked for the urine sample because there must have been an operating rule violation and Carrier policy compelled him to request the sample. Claimant specifically denied using either drugs or alcohol prior to or during her tour of duty.

Following the investigation, the Carrier dismissed Claimant from service for insubordination and a Rule G violation.

## II. THE POSITIONS OF THE PARTIES

### A. The Carrier's Position

The Carrier instituted a policy requiring a drug screen whenever there is a minor incident involving moving equipment. Running the unit through the switch triggered the Carrier's managerial prerogative to require a urinalysis. Claimant clearly understood that her refusal to provide a urine sample would not only constitute insubordination but also be construed as a Rule G violation. Thus, the Carrier contends that Claimant refused to

submit a urine sample at her own peril. She must now accept the consequences of her failure to comply with a direct order.

Both insubordination and Rule G are serious offenses which justify withholding Claimant from service pending the investigation. Claimant was provided with a fair and impartial Rule 28 hearing. While the Hearing Officer may have engaged in multiple roles during the hearing process, his conduct did not prejudice Claimant.

B. The Organization's Position

At the onset, the Organization argues that the Carrier deprived Claimant of a fair and impartial hearing for two reasons. First, the General Foreman of Locomotives preferred the charges against Claimant, presided over her hearing and issued the dismissal notice. Since he brought the charges against Claimant, the General Foreman was obviously predisposed toward finding Claimant guilty. Second, Rule 28(a) prohibits the Carrier from disciplining an employee without first providing notice and convening a hearing. In this case, the Carrier arbitrarily pulled Claimant out of service before she had been found guilty of committing any offense.

Claimant was not at fault for the derailment. Later, the Hostler signed a waiver of investigation and assumed full responsibility for the accident. At the time, the Carrier had no reason to suspect Claimant was culpable. Claimant exhibited no visible signs of drug or alcohol usage yet the Assistant General Foreman asked her to provide the urine sample. It is incumbent upon the Carrier to prove that Claimant was under the influence

of drugs or alcohol at the time of the incident. Claimant need not demonstrate her innocence.

Finally, the Carrier could not find Claimant guilty of insubordination because the Assistant General Foreman never gave her a direct order. Instead of issuing an instruction, the Foreman merely requested Claimant to submit to a urinalysis.

### III. DISCUSSION

Looking first at the procedural issues, this Board rules that the Carrier provided Claimant with a fair and impartial hearing. Although the General Foreman did perform several roles during the investigation process, Claimant's defense was not prejudiced. Also, Rule 28(b) permits the Carrier to remove from service an employee, who is accused of committing a serious infraction, pending a hearing. Alleged insubordination and Rule G are serious charges justifying the Carrier's decision to withhold Claimant from service before the investigation. Claimant's rights are amply protected since if the Carrier does not subsequently prove the charges, Claimant will be made whole for the time she spent out of service both before and after the investigation.

This is the first in a series of cases which this Board will consider concerning allegations that employees used controlled substances. (See also Award Nos. 87, 88 and 90.) Regardless of the outcome in each of these cases, this Board emphasizes that the use and possession of drugs cannot be tolerated in the workplace. This Board fully understands that drug usage has become unacceptably pervasive among a large

segment of the population. We urge the Carrier and the Organization to pool their resources in a concerted attempt to eradicate drugs from the workplace. This Carrier has established a comprehensive employee assistance program which is an excellent first step in helping employees overcome their drug problems.

Although we wholeheartedly endorse the Carrier's goal of eliminating drugs from the workplace, the Carrier cannot trample on the basic, individual employee rights contained in Rule 28 of the schedule Agreement. When adjudicating drug screening cases, this Board must apply the traditional principles of just cause and substantial evidence which have been developed in the railroad industry for more than sixty years.

The Carrier disciplined Claimant for committing insubordination and for violating Rules 565 and 566. Rules 565 and 566 read:

Rule 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."

Rule 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."

In his May 7, 1985 letter denying Claimant's appeal of her dismissal, the Chief Mechanical Officer stated that he automatically assumed that Claimant was insubordinate and in violation of Rule G solely because she failed to provide the urine sample. His assumptions were consistent with the Carrier's

policy as expressed on the Rule G card. However, the Chief Mechanical Officer's blanket assumptions were inconsistent not only with the Carrier's burden of proof in discipline cases but also with the intended application of the Carrier's policy.<sup>1</sup> The Carrier may not unilaterally create a presumption of guilt. Instead, the Carrier retains its burden of proving, with substantial evidence, that Claimant violated Rule G and failed to obey her supervisor's order.

Considering first the Rule G charge, the Board finds that the Carrier did not meet its burden of proving that Claimant violated Rules 565 and 566. As discussed above, the Carrier may not perfunctorily assume guilt simply because an employee refuses to submit to a urinalysis. Such a presumption effectively forces a charged employee to prove his innocence and the Carrier escapes from shouldering its burden of proving the Rule G charge. From the record presented to us, there is not one scintilla of evidence that Claimant used drugs while either on duty or subject to duty. Indeed, the relevant evidence leads to the opposite conclusion. The Assistant General Foreman related that Claimant's behavior was normal and she did not manifest any of the outward\* symptoms of either alcohol or drug usage. The urinalysis may have very well confirmed the presence or absence of drugs in Claimant's body, but the test was never administered. Thus, Claimant is exonerated of the Rule G charge.

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<sup>1</sup>The latter is more fully discussed in Award No. 87.

The most significant issue in this case is whether or not Claimant committed insubordination. Although the Organization contended that the Assistant General Foreman never directly ordered Claimant to provide a urine specimen, orders need not be couched in any special language. An authoritarian tone pervaded the Foreman's request. While the Rule G card uses the term "requesting," the request was equivalent to a demand since the request for a urine sample was conveyed to Claimant with the threat of disciplinary action should she refuse to comply.

When given a direct order, an employee must usually "obey now, and grieve later." The purpose of the "obey now, grieve later" principle is to prevent workers from constantly challenging their supervisors' orders, causing anarchy in the shops and the disruption of railroad operations. If a supervisor issues an improper order, the aggrieved employee should comply with the instruction and later initiate a grievance to redress any impropriety. However, in this case the "work now, grieve later" principle is inapplicable for two reasons. First, the Carrier's urine sample request must be premised on probable cause, reasonable cause or a reasonable suspicion.<sup>2</sup> Probable cause gives validity to an order requiring a urine specimen. If the employee were obligated to obey an order (demanding a urine

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<sup>2</sup>For our purposes, probable cause, reasonable cause and reasonable suspicion are interchangeable terms and so the Board will hereafter refer to "probable cause." The best definition of probable cause of drug usage is a modicum of evidence raising either an inference or a distinct possibility that an employee may have used a narcotic while on duty or subject to duty.



sample) issued without probable cause, the Carrier would be effectively relieved of satisfying its threshold burden of demonstrating a necessity for the urinalysis. Compelling the Carrier to first show probable cause of suspected drug usage establishes the relationship between the workplace and the alleged off duty misconduct. The second reason for not applying the "work now, grieve later" principle to this case is the lack of a feasible remedy should a later grievance be sustained. If the employee obeys the order by submitting a urine specimen and it is later found that the Carrier did not have probable cause for requiring a urinalysis, it would be impossible to redress the effects of the Carrier's improper order. A grievance could hardly undo the personal humiliation and the unreasonable invasion of privacy associated with the administration of an invalid mandatory drug screening test. Thus, this Board rules that before the Carrier may impose discipline on an employee who defies the Carrier's demand for a urine sample, the Carrier must show probable cause for issuing the order. Nonetheless, we warn employees that a refusal to provide a urine specimen (when asked) exposes them to possible discipline. Employees declining to supply a urine sample are guilty of insubordination provided the Carrier's order was premised on probable cause.

Based on the particular facts and evidence in the record before us, we find that the Carrier mechanically applied its policy to consequently vitiate its burden of demonstrating probable cause for requiring Claimant to undergo a urinalysis. The record does not contain any evidence showing that Claimant

was partially or completely responsible for the derailment of Unit No. 5938. On the contrary, the scant evidence of record strongly suggests that the Hostler alone was responsible for running the unit through the switch. If the Hostler was entirely responsible for the accident, Claimant was blameless. Neither Claimant nor the Assistant General Foreman declared that Claimant was derelict in performing her duties on February 3, 1985. The Carrier must show that not only that a derailment occurred but also a modicum of evidence indicating that Claimant may have been wholly or partially responsible for the accident. Put differently, the Carrier must demonstrate a rational relation between the derailment and Claimant.<sup>3</sup> If the Carrier could mechanically apply its policy to compel any employee in the vicinity of a derailment to submit to a urinalysis, the policy becomes tantamount to random testing. As we will discuss in a subsequent case (Award No. 87), the Carrier itself announced that it intended to prudently and reasonably apply its policy. The Carrier represented to its workers that not all crew members will be tested when it is clear that culpability is concentrated on one or more members of the crew but not others.

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<sup>3</sup>The Board notes that the Carrier did not charge Claimant with negligent performance of her duties or with being responsible for the minor derailment. While it was unnecessary for the Carrier to bring these charges in order to show probable cause, evidence proving such charges would be more than sufficient to demonstrate probable cause for requiring a urine sample.

The Carrier failed to establish the requisite probable cause in this case. Thus, Claimant was not guilty of insubordination.

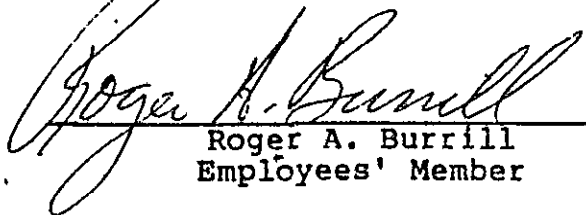
Absent probable cause, the Carrier must show that an employee voluntarily consented (without the threat of disciplinary action) to providing a urine sample. Claimant herein did not consent.

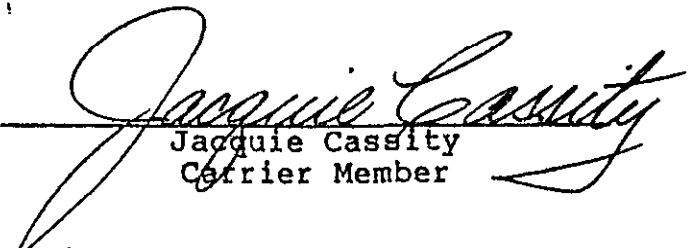
Claimant shall be reinstated with her seniority unimpaired and compensated for her wage loss in accord with Rule 28(g). Claimant's request for retroactive health and welfare benefits should be handled in accord with Section 5 of the 1982 National Agreement. The claim for interest on the back pay is denied.

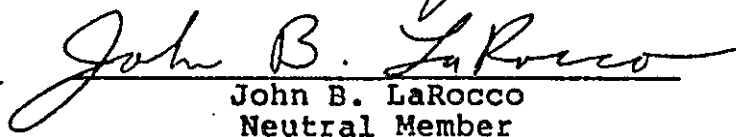
AWARD AND ORDER

Claim sustained. The Carrier shall exonerate Claimant in accord with Rule 28(g). Claimant's request for retroactive health and welfare benefits should be handled in accord with Section 5 of the 1982 National Agreement. The claim for interest on the back pay is denied. The Carrier shall comply with this Award within thirty days of the date stated below.

Dated: October 12, 1987

  
Roger A. Burrill  
Employees' Member

  
Jacquie Cassidy  
Carrier Member

  
John B. LaRocco  
Neutral Member