

PUBLIC LAW BOARD NO. 4104

Case No. 53

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PARTIES TO DISPUTE:

Brotherhood of Maintenance of
Way Employees
vs.
Burlington Northern Railroad

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

1. The dismissal of Extra Gang Laborer R.D. Wilson for alleged violation of General Rules 563, 564, 565 and 566 of the Burlington Northern Safety Rules and General Rules was unwarranted, improper, without just and sufficient cause, on the basis of unproven charges and an abuse of the Carrier's discretion (System File 10 Gr 10 DI R.D. Wilson). *DMWA 85 12 20 A*

2. The Claimant shall be reinstated to service with seniority and all other benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: At the time this dispute arose, Claimant, R.D. Wilson, was employed as a Laborer assigned to Extra Gang 922. On July 23, 1985, Claimant and Gang Foreman W.A. Thorne engaged in an argument which developed into a physical altercation. Both employees were withheld from service and asked to provide urine samples. On July 23, 1985, the two employees were advised to attend a hearing on July 31, 1985 in connection with the alleged altercation. On July 25, 1985, Claimant's test results indicated negative for alcohol but positive for THC, the active ingredient in marijuana. As a result of the positive drug test, Claimant was notified to attend a second investigation on August 2, 1985. As a result of the investigations, Claimant was notified on August 19, 1985 that he was dismissed from service.

The Organization appealed the dismissal of Claimant. Carrier denied the appeal. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for

adjudication.

The Organization contends that Carrier improperly dismissed Claimant. It maintains that the July 23, 1985 incident between Claimant and Thorne is an everyday occurrence on the property involving a disagreement between two employees. It asserts that the testimony provided at the hearing concludes that Claimant did not initiate any physical contact. It argues that Claimant was unintentionally pushed by Thorne causing him (Claimant) to fall backwards over the rail. It further argues that Thorne was assessed a thirty day suspension for the incident while Claimant was dismissed.

The Organization further addresses the charges against Claimant regarding the positive test results for marijuana. It states that Carrier did not require the urinalysis testing until 7:55 a.m. on July 24, 1985, sixteen hours after the incident on July 23, 1985. It argues that if Carrier determined that such testing was necessary, it should have been conducted immediately or shortly after the incident occurred. Additionally, it asserts that the results of the urinalysis test do not prove that Claimant was under the influence of marijuana while on duty on July 24, 1985. It contends that evidence offered by both the Claimant's and the Carrier's witnesses reveals that Claimant showed no signs of impairment on the date of the incident nor on the date he was tested. Although Claimant admitted use of marijuana on the evening of July 23, during off duty hours, it argues that Claimant could not have been impaired when he submitted to the urinalysis test,

due to the lack of medical evidence. In the Organization's view, Carrier improperly based its determination that Claimant was under the influence of marijuana solely on the results of the urinalysis test. Accordingly, it asks that the claim be sustained and Claimant be made whole for all wages lost.

Carrier, on the other hand, contends that the testimony at the hearing concludes that Claimant was in an angry state and initiated a physical confrontation with his foreman. It asserts that Claimant provoked the altercation and was clearly the aggressor. It concludes that such behavior between two employees on the property can not be tolerated. It maintains that such behavior is a dismissable offense which is not seen by the Carrier as a simple disagreement, as the Organization alleges.

Additionally, Carrier contends that since the urinalysis test showed positive on the marijuana screening, Claimant was subject to discipline for violating Rules 565 and 566. It contends that Claimant admitted that he had used illegal drugs the evening of July 23, 1985 and test results proved that there were metabolites of THC in his urine on the following day. It asserts that although Claimant may not have exhibited any outward signs of drug intoxication, medical evidence has shown that there may be no external signs that can be detected by a lay person, and as such cannot be used as a defense by the Organization supporting Claimant's innocence. It concludes that the results of the test were sufficient to show that the Claimant was under the influence of marijuana and thus in violation of Rules 565 and 566. In the

Organization's view, dismissal is an appropriate penalty and asks that the claim be denied.

A thorough review of the transcript convinces the Board that the discharge of Claimant is unjustified. While the evidence does support Carrier's determination of guilt in the altercation incident, dismissal is excessive in this case. Under these particular circumstances, a suspension from July 23, 1985 to the date of this Award is justified. However, due to a settlement of injuries between Claimant and Carrier, no monetary claim is provided in this Award. This suspension serves as notice to Claimant of the seriousness of the incident, who would be well-advised to avoid any time of similar behavior in the future.

As to the charge regarding the use of marijuana, this Board has been advised that Rule G is currently being applied differently by Carrier than at the time this dispute arose. This Award is construed to encourage the return to application in effect at the time of the dispute. As such, the discipline assessed for that charge will not be addressed.

Accordingly, and for the foregoing reasons, the claim is sustained to the extent indicated in the Opinion.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

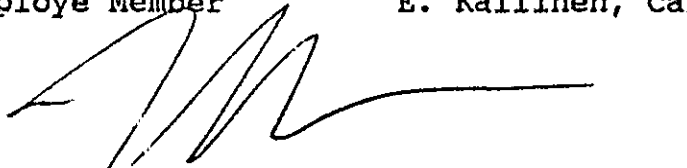
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

1/2/41