

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 51

Case No. 51

STATEMENT OF CLAIM

The System Committee of the Brotherhood claims, in behalf of J. L. Reed, Social Security Number 462-82-7021, Payroll Number 797099-0, with service date commencing April 7, 1980, that his dismissal from service on April 22, 1992, for alleged violation of Rule G is arbitrary, capricious, and on the basis of unproven and disproved charges and in violation of Rule 26 of the Agreement. It is respectfully requested that the claimant be returned to service with all seniority and other rights unimpaired and compensated for all wage loss suffered.

F I N D I N G S

At the time of the incident here under review, the Claimant was under the restrictions of a Rule G waiver, requiring him to "follow the Employee Assistance Coordinator's prescribed program" during a one-year "probationary period". On March 10, 1992, the Claimant was operating a machine and, in doing so, allegedly damaged signal equipment. The Roadmaster was advised of the damage on March 10 shortly after 4 p.m.

Based on this information, the Roadmaster directed the Claimant on the morning of March 11 to undertake a urine test under the "reasonable suspicion" provision of the Carrier's Guidelines for the Enforcement of Rule G or Safety Rule 565. The test, confirmed in the usual manner, showed the Claimant positive for cocaine use. As a result, he was subject to a investigative hearing, following which he was dismissed from service.

It should be noted that the Claimant was not in a classification subjecting him to random testing, nor is there any specific indication that his Rule G waiver program included a requirement for random testing. The record shows that the Claimant was tested solely under the "reasonable suspicion" provision, related to the alleged damage caused to the signal equipment.

The Organization raises questions about the reliability of the urine test results. From the record, the Board finds there is no substantial basis under which the positive test result for cocaine should not be accepted.

The Organization, however, raises several other questions, at least one of which the Board finds determinative. The Carrier's Guidelines are specific as to "reasonable suspicion" testing, stating:

The department head, superintendent or his representative will sanction the urine test, which will be accomplished as soon as possible prior to going off duty but in no case more than eight hours after knowledge of the occurrence has been received.

This is in consonance with virtually identical language in Federal Railroad Administration regulations. There can be no

question that the Claimant was subject to the urine test well in excess of eight hours after the Roadmaster had "knowledge of the occurrence". This is not a minor technicality, since employees are free of required testing except under specific circumstances, of which "reasonable suspicion" is one.

Despite this, the Carrier argues that the Claimant, in probationary status based on a previous Rule G violation, was found to be drug positive when reporting for work and that this should be sufficient to justify his dismissal.

The Board concludes that the Carrier must be bound by its own mandatory regulations. The Claimant was not tested within eight hours of the incident and was thus improperly subjected to a drug test. This is without consideration as to whether the signal equipment damage was shown to justify "reasonable suspicion" as to the Claimant's physical condition. Thus, the investigative hearing was based on improperly obtained evidence, and the resulting dismissal cannot be supported.

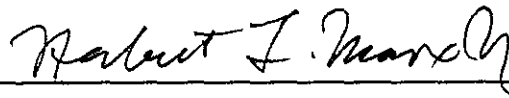
The Board also cannot accept the Carrier's contention that, based on the Claimant's waiver status, it could have dismissed the Claimant without the necessity of an investigative hearing, if it had chosen to do so. As pointed out by the Organization, the Carrier's own procedures requires an investigative hearing in this circumstance.

As to remedy, however, the Board must recognize the reality of the Claimant's Rule G waiver status and the positive drug finding. The Claimant cannot be found to be without some

responsibility. In sustaining the claim, the Board will not provide for the requested compensation for wage loss. Further, the Board finds it reasonable to reimpose on the Claimant a further one-year period after return to work under Rule G waiver conditions.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: December 17, 1993