

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

V.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

"The Company did not prove Mr. Sylvia guilty of Rule G. This Investigation was not fair and impartial.

This Claim is for pay for all lost time, returned to work immediately (sic), full promotional opportunity and removal of this Investigation from Mr. Sylvia's personal records."

FINDINGS

The threshold issue... does the waiver signed by Mr. Randal Sylvia bar the Organization from appealing the claim... must be decided in favor of the Organization. The Organization has the right and the duty to police the Agreements to which it is a party. The Organization must assure that individual settlements do not adversely affect collective rights. It is not sufficient that Mr. Sylvia discussed signing the waiver with the Organization. The Organization, as the collective representative, must retain the right to pursue the matter if it believes Mr. Sylvia's waiver of rights is wrong. The duties associated with fair representation require the Organization to consider and to reconcile individual and collective interests. There is no evidence in this case that the Organization acted in an arbitrary or capricious or discriminatory manner by deciding to go forward with the appeal.

The Carrier has established probable cause for the request that Mr. Sylvia submit to the urinalysis. Therefore, the Carrier did not engage in random testing. The Carrier's officers had sufficient reasons to believe that the report of use of marijuana by the Claimant during a lunch period was reliable. Additionally, the close observation of Mr. Sylvia by two Carrier officers, over a period of time, provided sufficient indications that Mr. Sylvia might be under the influence of a prohibited substance.

The test results of Mr. Sylvia's urinalysis indicated that at the time he underwent the test, he had in excess of 440 nanograms of marijuana in his system. The results of the emit test were confirmed by a

thin-layer chromatography test. Given the level of nanograms of marijuana in Mr. Sylvia's system and the confirmation of the test results, there is substantial evidence from which to conclude that Mr. Sylvia violated Rule G (in effect in 1985). Mr. Sylvia had substantial marijuana in his system while he was on duty or subject to duty.

The investigation was not defective, as claimed by the Organization, because the Carrier did not produce the co-worker informant as a witness. The basis for disciplinary action taken against Mr. Sylvia was the test results, not the co-workers information. No important due process benefit would have accrued to Mr. Sylvia by having an opportunity to cross-examine the informant. Furthermore, the program to bring forth information about the use of controlled substances and alcohol by employees on duty or subject to duty could be severely handicapped by requiring the informant to appear.

The record of this case contains no procedural defects that would justify setting aside the discipline. In his testimony, Mr. Maze was not serving as an expert witness, nor did he claim to be an expert witness. Rather, he related information made available to him about the test results. Accordingly, appropriate weight has been assigned to his statements. The test results were made part of the record and were considered in reaching a decision in this matter. Finally, the record is clear that Mr. Sylvia voluntarily submitted to the urinalysis; he had the option to refuse.

#### AWARD

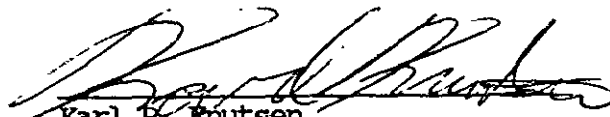
Claim denied



Ronald L. Miller  
Chairman and Neutral Member



Maxine M. Timberman  
Carrier Member



Karl P. Knutsen  
Organization Member  
DISSENTING ( SEE ATTACHED

20 May 1988

Date

EMPLOYEE MEMBER'S DISSENT

While concurring with the majority decision that the Organization had the right to pursue this claim as part of its right and duty to police the Agreement, the Organization respectfully but firmly dissents from the majority's conclusion that the Carrier was not required to produce the alleged informant as a witness at the hearing and from the conclusion that Mr. Sylvia had the option to refuse urinalysis. If the Carrier is not required to produce the informant as a witness, the Carrier then acquires the ability to allege the receipt of a report by an anonymous informant, whether or not such report did occur, as a basis for any urinalysis test. The Carrier thereby de facto acquires the ability to engage in random testing.

Regarding Mr. Sylvia's alleged right to refuse the urinalysis test, the evidence of record shows that under Company policy had Mr. Sylvia refused to submit to urinalysis testing, he would have been charged with insubordination, a charge which customarily carries a penalty of dismissal. In effect, Mr. Sylvia was required to submit to urinalysis test under pain of dismissal for refusal to do so. The Organization avers that submission to urinalysis testing on pain of dismissal for refusing to do so is clearly not voluntary..

Karl Knutsen  
Employee Member