

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF THE CLAIM

1. The dismissal of Laborer R.S. Nolan for alleged violation of Rule G was unwarranted, without just and sufficient cause and in violation of the Agreement (System File S-P-353/AMWB 87-03-17E).
2. The Claimant shall be reinstated with seniority and other benefits unimpaired and he shall be compensated for all wage loss suffered and he shall be allowed all other benefits to which he would be entitled if he had not been dismissed including but not limited to health and welfare, qualification for vacation, personal leave days, lump sum bonus and back pay qualifications.

FINDINGS OF THE BOARD

On August 28, 1986, the Claimant, Mr. Randy S. Nolan was operating a Pettibone Speed Swing which overturned while under his responsibility. Mr. Nolan was taken to an area hospital for medical attention. While at the hospital, Mr. Nolan signed an authorization statement for the collection of urine and blood samples to be used for tests for drug abuse. On September 11, 1986, the Carrier received notice of the test results, which showed positive for cannabinoids. An investigative hearing was initially scheduled by the Carrier for September 19th, but rescheduled to October 27th at Mr. Nolan's request. At the hearing, Mr. Nolan admitted that he had used marijuana "... a week or two weeks ..." prior to August 28th (the day of the accident). Mr. Nolan testified that he did not use marijuana during work on August 28th.

Mr. Nolan was subsequently dismissed from employment with the Carrier for violation of Rule G. Following his dismissal, Mr. Nolan enrolled in the Carrier's Employee Assistance Program. Upon successful completion of the program, his E.A.P. counselor recommended that Mr. Nolan be returned to service with a probation period.

The Carrier contends that the claim in this matter is moot because when Mr. Nolan agreed to the E.A.P. probationary reinstatement he also agreed to waive any claim resulting from the alleged violation of Rule G. On this threshold issue ... does the waiver signed by Mr. Nolan bar the Organization from appealing the claim ... we must decide 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. Nolan 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. Nolan's waiver of rights is improper. 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.

We also find that the investigative hearing was initially scheduled to be held within the time limits specified by Rule 40A. Although the accident took place on August 28th, the Carrier did not receive the test results report until September 11th. The Carrier properly acted within the fifteen (15) days, starting on September 11th.

We must now address the central issue of this case ... has the Carrier sustained its burden of proving that Mr. Nolan violated Rule G on August 28, 1986? The issue can be stated even more succinctly ... should a violation of Rule G (i.e., that Mr. Nolan was under the influence of marijuana) be based solely on the results of an urinalysis test?

In reaching a decision in this matter, we accept the Organization's contention that the composition of Rule G, in effect prior to March 1, 1986 and subsequent to February 1, 1987, should be used. The Carrier rescinded the composition of Rule G under which Mr. Nolan was disciplined. The applicable Rule G states:

RULE G

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.

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.

Evidence of drug abuse in this matter is clear. Mr. Nolan acknowledged using marijuana away from the workplace, and following the accident, his drug screen was positive for cannabinoids, 152 nanograms per milliliter. The language of Rule G states in part, "Employees must not report for duty under the influence of ... marijuana ..." Mr. Nolan was not drug free, therefore, he was under the influence of a prohibited drug.

The degree of impairment from drug use is determined by a host of interacting factors, such as recency of use, frequency of use, absorption rates, etc. The Organization argues that the urinalysis tests are not capable of correlating physiological and psychological effects of marijuana with levels of urinary metabolites reported in the tests. Nevertheless, as long as marijuana or its metabolites are present in the body, they are affecting the delicate relationships between the brain and

muscles, and anyone under this influence is a risk to himself/herself and others. It is irrelevant, as in this case, that a person does not outwardly show behavior modifications (the "high"). Scientific evidence has conclusively established that the impairments produced by drugs linger long after the acute phase has passed.

Rule G does not provide for degrees of influence or impairment. Any degree of influence is influence, and therefore is prohibited by Rule G. Until it is established that certain levels of drugs in the body do not pose safety risks, co-workers, the public and the Carrier are entitled to expect that persons at work are drug free.

Mr. Nolan was aware of the Carrier's drug abuse policy, yet he acted in a manner to violate that policy. The Carrier has sustained its burden of proving that Mr. Nolan violated Rule G.

AWARD

Claim denied.



Ronald L. Miller
Chairman and Neutral Member



Maxine Timberman
Carrier Member



Bruce G. Glover
Organization Member

16 Sept 1988

Date

DISSENT: See Attached.

ORGANIZATION'S DISSENT TO CASE 31 OF
PUBLIC LAW BOARD 4381

The Organization respectfully but firmly dissents from the findings of this Board with respect to:


1. Time limits specified in Rule 40 of the Collective Bargaining Agreement.

2. Definition of Rule G.

1. It is undisputed that the date of the occurrence giving rise to the suspicion of violation of Rule G was August 28, 1986, with initial hearing scheduled for September 19, 1986. The fifteen (15) day time limit for the holding of a hearing is clearly set forth in Rule 40 of the Collective Bargaining Agreement. The interpretation of this language has been considered on numerous occasions by arbitral forums. The parties must follow the time lines outlined in an agreement. The findings of this Board concerning these time limits seriously departs from numerous precedential awards between the parties.

2. The findings of this Board concerning standards of proof of violation of Rule G again seriously depart from a series of precedential awards between these same parties. (SBA 925, Cases 22, 30 and 32, and BMW-NRPC SBA 986, Case 32). These awards were set out in the Organization's submission to this Board which have held that the Carrier has the burden of proof of showing that the residue or substance found in urinalysis testing was influencing the employee's behavior at the time of the probable cause which led to the urinalysis test. The record of investigation establishes that the Claimant exhibited no behavior which would indicate he was under the influence of marijuana on the date of the incident. We submit that this award is in error because of this Board's findings relative to scientific and medical theory wherein it suggests "As long as marijuana or its metabolites are present in the body, they are affecting the delicate relationships between the brain and muscles...". This award is seriously erred wherein the Board suggests that "Scientific evidence has conclusively established that the impairments produced by drugs linger long after the acute phase has passed." Clearly there is no evidence of record or for that matter scientific or medical evidence to support this Board's finding that same has been "conclusively established". Instead, under the line of precedential awards mentioned earlier, the Carrier is required to demonstrate not only the presence of "residue" but that such "residue" had some influence on the employee's behavior. The Carrier's testing policy and procedures are specifically designed to produce evidence to meet this standard of proof established by precedential prior arbitral forums.

For the above cited reasons, the Organization respectfully submits this award departs radically from arbitral precedents between the parties and the reasoning applied in the award is faulty. Therefore, I dissent.



Bruce G. Glover
Organization Member