

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

v.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

1. The dismissal of Truck Driver F. J. Kallio for alleged violation of Rule 'G' was unwarranted, without just and sufficient cause and on the basis of unproven charges (System File REG-SP-130/AMWB 85-12-27A).
2. The Claimant shall be reinstated to service with seniority and all benefits unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

The Claimant, Mr. Floyd J. Kallio, was employed by the Carrier as a truck driver. He was regularly assigned to a Monday through Friday work week. During the evening of Thursday, June 20, 1985, Mr. Kallio was arrested for possession of a controlled substance (marijuana). He posted bail and reported for work on Friday, June 21, 1985. Beginning Monday, June 24, 1985, Mr. Kallio observed two (2) weeks vacation, and did not report for work until Monday, July 8, 1985. While Mr. Kallio was on vacation, Assistant Roadmaster Kazen learned on June 25, 1985 that Mr. Kallio had been arrested on June 20th. At the conclusion of his vacation, Mr. Kallio arrived at the outfit car on Sunday, July 7, 1985. The next morning, Monday, July 8, 1985, as Mr. Kallio was reporting for work, Mr. Kazen asked Mr. Kallio to undergo urinalysis testing. Mr. Kallio was tested on July 8, 1985. Subsequently, Mr. Kallio requested and was granted a medical leave of absence, beginning July 9, 1985 and ending August 6, 1985. During this leave of absence, the Carrier received the test results on July 16, 1985, and a notice of investigation was issued on July 19, 1985. Following the investigative hearing on August 13, 1985, Mr. Kallio was discharged from employment with the Carrier on August 29, 1985.

A number of issues have been raised by the Organization in its appeal and are decided in turn. First, the issue of the timeliness of the investigation was not raised prior to/nor during the investigation. Therefore, this issue is not properly before this Board.

In his testimony, Assistant Roadmaster Kazen 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. A decision in this case rests far less on the test results than on Mr. Kallio's admitted use of alcohol and controlled substances while subject to duty. Additionally, it is evident at Question No. 42 that Mr. Kallio had access to the test results report and was aware of the results. The record indicates that Mr. Kallio did not take exception to the test results.

It is not unreasonable that the Carrier waited until Mr. Kallio returned from vacation before asking him to undergo testing. Based upon the police report concerning Mr. Kallio's arrest, the Carrier had probable cause to request the test on July 8th.

Rule G is not limited to proof that an accused was under the influence in the course of performing his/her duties. Rule G additionally prohibits the use of alcohol and controlled substances while the employee is subject to duty. An employee who has the residue of such alcohol or substances in his/her system while on duty or on Carrier property is also in violation of Rule G. Subject to duty should be interpreted in the context of a particular situation. Given the results of the tests and Mr. Kallio's testimony regarding his use of alcohol and controlled substances, the Carrier has provided substantial evidence from which to conclude that Mr. Kallio violated Rule G when subject to duty on July 8, 1985.

During the course of the investigation, Mr. Kazen testified (Question 32) that "Mr. Kallio has been an excellent employee," and Mr. Kallio had nearly nine (9) years of service. It is regrettable that Mr. Kallio has not successfully completed the EAP Program. The Carrier has properly denied Mr. Kallio reinstatement due to the lack of sustained abstinence by Mr. Kallio.

#### AWARD

Claim denied. Mr. Kallio is to be returned to service, without back pay and with seniority restored, only after he successfully completes the EAP Program, and is certified by the Program Coordinator for return to service. If Mr. Kallio is returned to service under these conditions, he is to serve a one year probationary period under conditions established by the EAP Program Coordinator.

R. L. Miller

Ronald L. Miller  
Chairman and Neutral Member

Maxine M. Timberman

Maxine M. Timberman  
Carrier Member

Karl P. Knutsen

Karl P. Knutsen  
Organization Member

*Dissenting*  
*See below*

4-5-88

Date

ORGANIZATION MEMBER DISSENT

The Organization respectfully but firmly dissents from the findings of this Board with respect to (1) "probable cause", (2) definition of Rule G, and (3) "subject to duty" language of Rule G.

1. The Organization respectfully avers that a urinalysis test performed on July 8, 1985 is not reasonably related in time to an alleged "probable cause" occurring on June 20, 1985, some eighteen days earlier. The finding of this Board closely approaches affirmation of the random urinalysis testing now proscribed both by Carrier policy and Federal law.

2. The findings of this Board concerning standards of proof of violation of Rule G seriously depart from a series of precedential awards between these same parties which have held that the Carrier has the burden of proof of showing that the "residue of such alcohol or substances" found in a urinalysis test was influencing the employee's behavior at the time of the "probable cause" which led to the urinalysis test. Under this line of precedential awards and in what Carrier Senior Management Officials describe as proper application of Carrier urinalysis testing policy, 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.

3. The term "subject to duty" has previously been accepted by all forums of the Railroad Adjustment Board to refer to that period of time in which an employee without a defined starting time, such as an extra board employee, is waiting to be called to report for duty. It has never previously been construed to apply to employees such as Claimant Kallio with a fixed starting time. Given that Claimant Kallio was required to submit to urinalysis testing before his regularly assigned starting time and given that no rule of the September 1, 1982 BMW-BN Agreement provides that Mr. Kallio could report for duty prior to that assigned starting time, the evidence of record does not support this Board's finding concerning "subject to duty".

For the above cited reasons, the Organization respectfully submits this Award departs radically from arbitral precedent between these same parties, and is palpably erroneous and therefore has no precedential value.