

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 11

Carrier File No. MWA 881121

Organization File No. C-88-D070-5

STATEMENT OF CLAIM

1. The dismissal of Track Laborer R. D. Williams for alleged violation of Rule G was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-88-D070-5/MWA 88-11-21).

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

F I N D I N G S

Following an investigative hearing, the Claimant was dismissed from service under the following charge:

Violation of Rule G of the Rules of The Maintenance of Way by being under the influence of THC, an illegal controlled substance, on July 13, 1988, when you incurred an on-duty injury.

Rule G provides in pertinent part that "Employees must

not report for duty under the influence of . . . , marijuana or other controlled substance . . . that may in any way adversely affect their alertness, coordination, reaction, response or safety".

In this instance, the Claimant was on duty on July 13, 1988 engaged in shoveling rock from a switch. He experienced pain in his back muscles and neck and was unable to continue work. When the Claimant reported his injury to the Roadmaster, it was the Roadmaster's conclusion that the Claimant's voice "was slurred to a certain extent". The Claimant was taken to a medical facility for treatment of his injury. Based upon the injury itself as well as the observation of allegedly slurred speech, the Claimant was requested and consented to undergo a urinalysis test.

The test resulted in a positive showing for THC (cannabinoids), indicating the presence of marijuana. The investigative hearing followed and as a result the Claimant was dismissed from service.

The Organization raised a procedural objection in its submission, repeating its allegation at the investigative hearing that the Organization representative did not receive five days' advance written notice of the hearing, as required by Rule 40. The Carrier contends that such notice was sent in

timely fashion. The Hearing Officer offered to postpone the commencement of the hearing upon learning of the Organization's allegation, but such was not accepted by the Organization. In view of the Hearing Officer's offer, the Board finds this procedural objection without significance.

The Organization also raises questions concerning the urinalysis testing procedure but without specific reference to any error or omission. In this instance, a preliminary EMIT screen test was confirmed by a GC/MS confirmatory test, the currently accepted procedure in such testing. The confirming test result showed a level of 100 nanograms, substantially above the "cut-off" point employed to report a positive finding. At the investigative hearing, the Claimant admitted to recurrent use of marijuana over an extended period, although he denied such use in the six months prior to the July 13, 1988 test. The positive findings at the 100 nanogram level would, according to accepted medical information, place the most recent use at a much more recent date.

The Organization argues that a positive marijuana finding does not necessarily lead to the measures of impairment as cited in Rule G and points out that, other than the indefinite observation of "slurred" speech, there were no indications that the Claimant was not performing his duties in a fully satisfactory manner.

The Board will not review here the many previous Awards which have dealt with the question of a positive marijuana finding being equated, in and of itself, to an "impairment". The Board is persuaded to hold to the conclusion in Public Law Board 3408, Award No. 44 (Marx), which found as follows:

The Claimant admitted to previous use of marijuana while not on duty, without specifying a time period for such use. The Organization argues, however, that there was no demonstrated effect on the Claimant's work performance and thus no finding of being "under the influence". Considering the level of marijuana found in the employee's urine, the Board finds that the Claimant was "under the influence" of marijuana, despite the absence of any specific failure to perform his work properly. This is borne out by the findings of numerous other awards, as well as by the extensive literature cited by the Carrier in its submission. While there is some continuing dispute as to the length of time a marijuana user remains under its influence, there can be no doubt as to possible or probable work impairment for some considerable time after actual use.

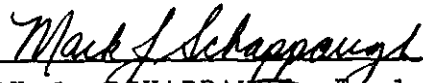
Thus, the Board finds sufficient support for the Carrier's conclusion as to Rule G violation and its action to dismiss the Claimant. The Board notes the Claimant's failure to seek timely guidance from an Employee Assistance Counselor within five days of relief from service, which might have led to the Claimant's retention in service.

A W A R D

Claim denied.



HERBERT L. MARX, JR., Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: 1/14/91