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NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 19

Carrier File No. 1MWB 89-02-02C

Organization File No. S-P-406

STATEMENT OF CLAIM

1. The dismissal of Machine Operator E. J. Sundberg for alleged violation of Rule G was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File S-P-406/1MWB 89-02-02C).

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

On August 31, 1988, the Claimant was subject to an investigation under charge of his "responsibility in connection with [his] alleged violation of Rule G while employed as machine operator on steel gang No. 1, Thursday, August 11, 1988". The hearing produced evidence that the Claimant had submitted to a urinalysis test for drugs and was found positive for

cocaine (300 nanograms) through both an EMIT screening test and a confirmatory GC/MS test. The Claimant had been found guilty of a previous Rule G violation within the previous 10 years. Following the hearing, the Claimant was dismissed from service.

Before reviewing the most significant aspect of this dispute, the Board reaches certain conclusions as to issues raised by the Organization:

1. While test results were not provided to the Organization prior to the investigation hearing, such were fully available at the hearing. The Board finds this sufficient.

2. The Claimant was properly denied a retesting at a later date, since the presence of cocaine is medically determined to be short-lived. The Claimant did not request a retest of the same urine specimen.

3. Likewise, a later negative test result provided by the Claimant was not of probative value. It was taken four days after the initial test and was specifically noted as not following the "proper chain of possession".

4. In finding of positive cocaine testing, the Board follows many previous Awards as equating such with being "under the influence" and thus in violation of Rule G.

5. While the Organization raised numerous questions

as to possible inaccuracy or mishandling of the drug testing procedure followed herein, the Board finds no substantive basis to question the screening and confirmatory results.

Basic to this dispute, however, is whether the Carrier properly subjected the Claimant to a drug test at all. The Claimant was one of 33 members of Steel Gang No. 1. Two proven incidents of drug use by gang employees were on record. According to the Carrier, seven employees, acting anonymously, had complained of supposed widespread drug use. In addition, the Carrier had received anonymous telephone call tips to the same effect. The Carrier's response was to direct all 33 members of the gang to undergo drug testing. There was no showing that the Claimant had been specifically identified as a drug user, nor did any Carrier representative observe any behavior on his part to suggest such use.

The Carrier's Guidelines for the Enforcement of Rule G, as revised June 1, 1986, includes the following:

B. Alcohol/Drug Testing Policy

The following procedures will govern Burlington Northern's testing program:

1. If an employee has been involved in an accident or incident or directly involved in a rule violation and a supervisor has reasonable suspicion to believe that the employee's acts or omissions contributed to the occurrence, one (1) supervisor can make the determination.

2. An employee may be required to submit to urine testing for reasonable suspicion of being under the influence of a controlled substance or abnormal behavior only if the determination is made by at least two supervisory employees. At least one of the

supervisors must have received at least (3) hours of training in the signs of drug intoxication consistent with a certified FRA program. . . .

C. Steps to follow when information is received from a 3rd party source concerning a BN employee.

1. If an employee is on duty, two (2) supervisors (one must have drug detection training) should observe employee and determine if there is a Rule G violation or reasonable suspicion for urinalysis testing. If the observation concludes there is no problem, the employee should be allowed to continue working. However, if observation indicates a possible violation of Rule G, the supervisors should follow the procedures set forth in Paragraph A or B above, as appropriate.

Despite the Carrier's well understood concern based on actual incidents and third-party reports as to the Steel Gang, it is eminently certain that the mass testing of all gang members exceeded the Carrier's own procedures, as quoted above. Especially where procedures are of the Carrier's own devising, employees properly expect protection against being subjected to testing not covered by such procedures.

As a result, the Board must necessarily find that the Claimant was improperly subjected to a urinalysis test and that such became a "random testing" which has no sanction under either the scheduled Agreement or the Carrier's own policy. The dismissal from service cannot be allowed to stand. If it were so allowed, the possible abuse would be enormous: what if 50 employees were tested because of a report that one employee was reported anonymously to be using drugs?

The determination of remedy, however, is not as clear-cut. The Organization refers to Public Law Board No. 3139, Award No. 87 (La Rocco) which concerned a Hostler Helper on duty at the time of a locomotive derailment. The Award found that "the Carrier failed to show a rational relation between the accident and the [Claimant] who was compelled to submit to a urinalysis. Probable cause was not 'adequately implemented'." In sustaining the claim with back pay, the Award stated:

If the Carrier could test every employee in the vicinity of an accident, the Carrier's policy would be easily abused and tantamount to a random testing program. Without a showing of probable cause, this Board must disregard the results of Claimant's drug test.

In this instance, the Board does not reach the same conclusion as to remedy. The Carrier's action in testing the entire crew, while procedurally inadequate as discussed above, did arise from the general situation as to reportedly widespread drug use by gang members. The fact remains that the Claimant tested positive for cocaine, and this followed a previous Rule G violation on his record within the past ten years. The Board concludes that there remains some responsibility to be assessed to the Claimant. Based on these particular circumstances, the Board will direct the Claimant's reinstatement with seniority rights unimpaired, but without back pay or retroactive benefits.

A W A R D

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



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.