

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 37

Carrier File No. CMWB 88-01-04

Organization File No. T-M-622

STATEMENT OF CLAIM

1. The dismissal of machine operator D. S. Rans for alleged violation of Rule G of the Rules of the Maintenance of Way and Rule 565 of the Burlington Northern Safety Rules and General Rules on June 16, 1987 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

2. As a consequence of the violations referred to in Part (1) hereof, the Claimant shall be returned to service with seniority and other benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

F I N D I N G S

On June 16, 1987 the Claimant was subject to a urine test for drugs, with positive findings for marijuana and cocaine made known to the Carrier on June 19, 1987. Based on these findings, the Claimant was subject to an investigative hearing on June 29, 1987 and was thereafter dismissed from service.

The Board concludes that the Claimant was directed to take the test for probable cause, based on observations of him the previous

day as well as on June 16, 1987 while the Claimant was on duty as a Crane Operator. The observations concerned his appearance and demeanor rather than his work performance, but the Carrier is entitled to some leeway in requiring an employee to submit to a drug test. This is clearly not an instance of random testing.

The resulting penalty of dismissal is not inappropriate. The drug test demonstrates recent drug use while the Claimant was subject to duty. The Organization argued that there was no proven "impairment" in the Claimant's work performance. The Board has previously considered this issue. In Award No. 6, the Board stated:

The Board will not cite here the various medical findings, by which the Board is persuaded, that a positive marijuana test can reasonably be determined to result in some impairment, even if such is not visible to observers.

Among the procedural matters by the Organization is the contention that the investigation hearing was untimely and in violation of Rule 40B, which reads as follows:

In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after date withheld from service. He will be notified at time removed from service of the reason therefor.

The Claimant was notified of his suspension from service during the course of his work on June 16, 1987, and the investigation did not occur until June 29, 1987, which the Organization notes is beyond the ten-day limit required by Rule 40B.

There is, however, merit to the Carrier's response to this charge. The Claimant was withheld from service pending result of the drug test, which is accepted procedure. When the test results became known on June 19, the charge was formulated, and the investigative hearing was promptly set within the ten-day period.

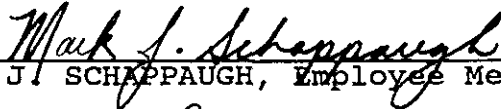
The Board finds other procedural objections raised by the Organization to be without substance.

A W A R D

Claim denied.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: 2/19/1993