NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 6

Carrier File No. CMWB 87-12-16
Organization File No. T-M-620

STATEMENT OF CLAIM

1. The dismissal of Sectionman F. L. Baklund for alleged violation ". . . violation of Rule G and Rules 565 and 566 of Safety Rules and General Rules Form 15001 . . . ." was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

2. As a consequence of Part (1) above, Claimant F. L. Baklund shall:

> "be reinstated to the service of the Company immediately, that he be compensated for all lost wages, including lost opportunity to perform overtime service, that he be credited for all lost fringe benefits including but not limited to vacation accreditation, health and welfare insurance payments, contributions to both the Railroad Retirement and Railroad Unemployment funds and that he be made whole for any lost promotional opportunities incurred."

F I N D I N G S

The Claimant was employed as a Burro Crane Operator on

July 21, 1987. During the course of his assignment, the boom of his crane hit overhead power lines, knocking down a power pole and leaving power lines hanging some distance off the ground. The accident was promptly reported. In line with established Carrier policy, the Claimant was subject to a urinalysis test as for alcohol and drugs. The Claimant assented to such test.

The initial test report showed a "high positive for THC (marijuana) metabolite". A confirmatory gas chromotograph/mass spectrometry test was "positive" for THC (Cannabinoids).

Based on the results of the test, the Claimant was directed to attend an investigative hearing on July 30, 1987. The hearing was held as scheduled. By letter dated August 25, 1987, the Claimant was notified as follows:

> Effective this date, you are hereby dismissed from the service of Burlington Northern Railroad Company for your violation of Rule G and Rules 565 and 566 of Safety Rules and General Rules Form 15001 at approximately 11:30 A.M. on Tuesday, July 21, 1987 near Canton, South Dakota, as disclosed by testimonies offered at investigation accorded you on July 30, 1987.

Rule "G" (identical with Safety Rules 565 and 566) reads as follows:

> 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.

On October 19, 1987 the Organization initiated a timely appeal concerning the Claimant's dismissal. This is the claim which was progressed to the Board.

On October 29, 1987 the Carrier issued and the Claimant signed a letter returning the Claimant to duty under specific conditions. The letter noted that such return to service had been "approved by your EAP Coordinator". One of the conditions was as follows:

> 4. You waive your right to any claim as a result of your violation of Rule G and Safety Rules 565 and 566.

Above the Claimant's signature was the following statement:

> I have discussed this matter with my representative and I understand the foregoing.

Based on this, it is the Carrier's view that the claim is now moot and should be dismissed. The Organization takes

the position that the claim, initiated by the Organization, was not under the control of the Claimant and that the claim can be considered withdrawn only by the specific action of the Organization, which did not occur.

The Board finds the Organization's position technically correct, following the reasoning in Public Law Board No. 4381, Award Nos. 13, 14 and 15 (Miller), which stated as follows:

> 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. Russell 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. Russell's waiver of rights is wrong. 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.

However, the Organization must accept the full burden of having its position upheld. The Claimant's return to duty was not a "leniency" determination by the Carrier, in the usual sense. It was, rather, a conditional arrangement, dependent upon a number of considerations, including the waiver of claim. If this waiver is not valid, as argued by the Organization, then the entire agreement must fall. The Carrier cannot be held to

its willingness to return the Claimant to duty other than under the conditions to which the Claimant agreed.

Thus, the dispute before the Board is whether or not the Claimant was properly subject to disciplinary action.

The Organization argues to the contrary on three bases:

1. Failure to demonstrate that the Claimant was "under the influence of . . . marijuana" (Rule G) by observation of his conduct.

2. Doubt as to the validity of the laboratory tests.

3. Failure to establish a relationship between the alleged use of marijuana and the accident itself.

As to the last point, the Board agrees with the Organization that there was no probative showing that the accident occurred because of the Claimant's impairment by use of marijuana. The Claimant had only two weeks' experience as a Crane Operator. A proximity warning device, designed to alert the Operator to danger, was apparently inoperative. While the accident may have been due to the Claimant's impaired state, it is just as reasonable to conclude that he simply operated the crane in an unsafe fashion, causing the accident.

As to the other two points, however, the Board does not accept the arguments of the Organization, despite the extensive

discussion by the Organization as to the reliability of drug testing and the lack of observable affected behavior by the Claimant while operating the crane.

Innumerable Awards (some of which are cited here by the parties) have dealt with both the effect of marijuana and other drugs on sensory perceptions and on the reliability of laboratory test results. As argued by the Organization, the preliminary drug screen reported here is of a type which can produce "false positive" results. Experience with the confirmatory gas chromotography mass spectrometry test has been to the contrary. This shows an extremely high degree of reliability. (While the later report was not available at the hearing, the hearing officer offered to postpone the hearing to obtain it, an offer which the Organization's representative declined.)

Accusations as to possible failure to follow the proper chain of custody procedure are simply that. There is insufficient showing to make a presumption that the urine tested was not that of the Claimant or that it was improperly tested.

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. Further, the Carrier need

only find that the Claimant was "under the influence" of marijuana. As stated in Public Law Board No. 3139 (LaRocco);

> While the experts are divided, we find that the weight of the medical evidence strongly suggests that undetectable yet substantial impediments to an employee's coordination, judgement, and reaction time are possible so long as the THC remains in the body system.

With these findings, the Board thus denies the Organization's claim. However, the Board does not reach the conclusion that the Claimant should revert to dismissal status. The Carrier, by its own initiative, undertook to return the Claimant to service, albeit under specific conditions. No positive purpose is served by disturbing this.

The Board will determine, therefore, that the Carrier's letter of October 29, 1987, concurred in by the Claimant, shall be in effect, provided the Organization promptly provides its written concurrence. If the Organization chooses not to do so, then the original dismissal action must necessarily be made effective.

The result, therefore, will be to sustain the claim to provide for retroactive reinstatement as provided in the October 29, 1987 letter; the claim is denied if the Organization does not provide its concurrence.

A W A R D

Claim disposed of as provided in the Findings.

Herbert L. Marx Jr

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

Wendell Bell

WENDELL L. BELL, Carrier Member

Mark J. Schappaugh

MARK J. SCHAPPAUGH, Employee Member

NEW YORK, N.Y.

DATED: