

Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way
Employees

vs

Burlington Northern Santa Fe

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Case 9/Award 9

Statement of Claim

1. That the discipline of Track Laborer K. G. Hiebert for alleged violation of Rule "G" on October 21, 1992 was arbitrary, capricious and in violation of the Agreement.
2. That Track Laborer K. G. Hiebert be reinstated to service with seniority and all other rights unimpaired, that his record shall be cleared of the charge leveled against him. It is requested that he be compensated for all wage loss suffered.

Background

The Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with violation of Rule G of the Carrier's Maintenance of Way Rules. An investigation was held thereafter and the Claimant was advised that he had been found guilty as charged and he was dismissed from service of the Carrier. The Claimant's discharge was appealed by the Organization up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it was docketed before this Board for final adjudication.

Discussion and Findings

The Carrier was advised by means of communication to one of its Special Agents by the police department of Whitefish, Montana that one of the Carrier's employees, namely the

Claimant to this case, K. G. Hiebert, had been arrested after an investigation involving a domestic abuse incident. The Claimant had been charged with a felony assault for threatening his wife with a firearm. During the investigation the police had also found some marijuana plants, grow lights, and other drug paraphernalia in the home of the Claimant. The Claimant was subsequently arraigned and he posted bond. Thereafter the Claimant was asked to take a drug test for probable cause and was held out of service pending results of the test. Two tests were performed. The test results were positive for cannabinoids. Thereafter the Claimant was charged with violation of Rule G as outlined in the foregoing, an investigation was held, and he was discharged from service.

Although the Organization disputes the accuracy of the two different urine tests which were performed the Board must conclude that the preponderance of evidence in the record before it shows that the tests were administered properly. The first urine sample was collected from the Claimant by Life Data Medical Services at the depot in Whitefish, Montana and was taken to North Valley Hospital in Whitefish. At the hospital the Claimant was asked to provide a second urine sample and both this sample and the first sample collected at the depot were forwarded to CompuChem laboratories under separate cover. Both samples tested positive for marijuana albeit one sample tested higher than the other. The Organization's argument that this showed improper calibration of the testing equipment is not credible in view of scientific explanation of the difference in test results by the Senior Certifying Scientist at CompuChem laboratories which is part of the record.¹ The difference in test results is reasonably explained by the fluid intake by the Claimant between tests which affected the measure of concentration of marijuana in the Claimant's system per liquid volume. And it is an undisputed fact that the Claimant consumed

¹See Employees' Exhibit A-4.

liquids between tests in order to produce a sufficient amount of urine for the second test. Secondly, because the Claimant may have reached the peak of concentration of the drug in the Claimant's system at the time the first sample was taken, the quantity of THC in his system could have continued to decline through body metabolism which would also reasonably explain the variance in the two tests results. The Board must conclude on basis of evidence of record that both tests showed cannaboids in sufficient quantity in the Claimant's system on the day in question to warrant conclusion that Rule G had been violated. Both tests were also subjected to GC/MS analysis to insure accuracy. Further, a blood test sample was also taken from the Claimant at North Valley Hospital.

The Claimant and the Organization both argue that the positive test results could have been the result of the secondary effects of marijuana smoke in the Claimant's home because of the presence of other smokers of marijuana, including the Claimant's wife and her friends. Such argument has no evidentiary support in the record before this Board and must be viewed, therefore, as mere assertion.

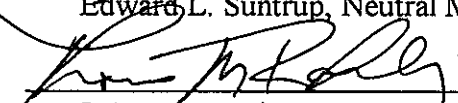
Lastly, and of great concern to this Board, is that there is evidence that the Claimant attempted to sabotage the testing procedure from the beginning by asking someone else to provide a "clean" urine sample in lieu of his own. Under these circumstances rehabilitative considerations by this Board are not reasonably proper and the Board will rule accordingly.

Award

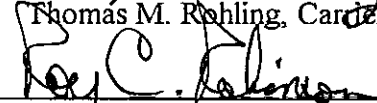
The claim is denied.



Edward L. Suntrup, Neutral Member



Thomas M. Rohling, Carder Member



Roy C. Robinson, Employee Member

Date: December 15, 1999