

PUBLIC LAW BOARD NO. 3139

In the Matter of:

INTERNATIONAL BROTHERHOOD OF
FIREMEN AND OILERS, SYSTEM
COUNCIL NO. 15,

Organization,

and

BURLINGTON NORTHERN
RAILROAD COMPANY,

Carrier.

National Mediation Board
Administrator

Case No. 88
Award No. 87

Hearing Date: May 23, 1986
Hearing Location: Seattle, Washington
Date of Award: October 12, 1987

MEMBERS OF THE BOARD

Employees' Member: Mr. Roger A. Burrill
Carrier Member: Ms. Jacquie Cassity
Neutral Member: Mr. John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That in violation of the current Agreement, Laborer S. Bair, Alliance, Nebraska, was unfairly dismissed from service of the Burlington Northern Railroad Company, effective March 27, 1985.

2. That accordingly, the Burlington Northern Railroad Company be ordered to make Mr. Bair whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his record.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated February 10, 1982; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

At approximately 5:00 a.m. on February 18, 1985, Hostler Hill and her Helper, Claimant, were moving a locomotive consist at Alliance Diesel Shop when Locomotive Unit 5124 went through a switch derailing the lead truck of the Unit. The Hostler and Claimant each completed an F-27 damaged equipment report. In accord with Carrier policy as expressed on the Rule G card, the Assistant General Foreman requested Claimant and the Hostler to furnish urine samples. Both complied with the order. The Assistant General Foreman emphasized that he demanded the urine specimens because the locomotive was run through a switch and Carrier policy required a drug screening test. Claimant's demeanor was normal and he did not exhibit any outward symptoms of either drug or alcohol usage.

Claimant provided the urine specimen at Box Butte General Hospital in Alliance. A Carrier Patrolman secured the sample in a sealed box and later in the day delivered the urine sample to Western Pathology in Scottsbluff, Nebraska. The pathology laboratory conducted a thin layer chromatography test which detected THC, the psychoactive ingredient of marijuana, in Claimant's urine. The presence of THC was confirmed by an EMIT test. The test results were negative for alcohol and other

controlled substances although the test did detect the presence of some legal over-the-counter drugs in Claimant's body.

For some unknown reason, the Carrier did not receive the pathology consultant's February 19, 1985 test report until on or about February 25, 1985. The Carrier immediately withheld Claimant from service pending an investigation to determine if he violated Carrier Rules 565 and 566 (Rule G) on February 18, 1985.

At a March 14, 1985 investigation, Claimant denied using marijuana while either on duty or subject to duty on February 18, 1985. Claimant hypothesized that he might have passively inhaled some marijuana smoke because he had recently been in a room where people were smoking the drug. The Patrolman declared that although the urinalysis was positive for THC, the test did not disclose the level of THC in Claimant's urine. Thus, the test did not reveal if Claimant was under the influence of the drug on February 18, 1985.

Claimant's representative vigorously objected to the absence of Dr. Armstrong, the Supervisor of Testing Procedures at Western Pathology, from the investigation. According to Claimant's representative, if Dr. Armstrong had appeared at the investigation, he could have elaborated on the ramifications of a positive THC urinalysis.

As a result of the investigation, the Carrier dismissed Claimant from service on March 29, 1985.

II. THE POSITIONS OF THE PARTIES

A. The Carrier's Position

The Carrier contends that it instituted a policy for policing the use of drugs by its employees following two fatal collisions on the Denver Region in April, 1984. Employee drug use contributed to causing both tragedies. The Carrier's policy provides that whenever there is a minor-human factor accident such as running through a switch, the Carrier has probable cause to demand that employees submit to a urinalysis. While the Carrier denies that it engages in random testing, it acknowledges that its policy, when applied, sometimes operates like a random selection testing program.

According to the Carrier, Claimant freely submitted to a urinalysis and the test yielded positive results for cannabinoids. The presence of a psychoactive chemical element in Claimant's body on February 18, 1985 shows that Claimant was in violation of Safety Rules 565 and 566. Perhaps, Claimant was not under the most intense and immediate influence of the drug but to protect the public, the Carrier must insist that employees be drug free. The only acceptable test result is negative. An employee's demeanor and appearance are woefully inadequate to detect the presence of marijuana. Symptoms of drug usage are not readily observable. Since an employee may escape detection by observation, the urinalysis is the only practical method of detecting the presence of drugs in Claimant's body.

A Rule G violation warrants dismissal. The Carrier may have reinstated Claimant on a leniency basis if he had been

willing to cooperate with the Employee Assistance Counselor. However, leniency is a Carrier prerogative and when Claimant refused to contact the Counselor, the Carrier legitimately exercised its discretion to permanently discharge Claimant from service.

B. The Organization's Position

At the onset, the Organization argues that Claimant was deprived of a fair and impartial hearing because the General Foreman of Locomotives preferred the charges against Claimant, presided over the hearing and imposed the discipline. The Organization also submits that Claimant could not confront his primary accuser since the author of the urinalysis report, Dr. Armstrong, did not appear as a witness at the investigation.

Turning to the merits, the Organization argues that the Carrier failed to meet its burden of proving that Claimant had used marijuana while on duty or while subject to duty on February 18, 1985. The Assistant General Foreman related that Claimant acted normally. The Carrier conceded that Claimant was properly performing his duties (and not under the influence of any drug) because it allowed him to work for six days after the February 18, 1985 incident. Moreover, there is nothing in the record to suggest that Claimant was derelict in performing his duties or that he was responsible for the minor mishap.

III. DISCUSSION

After carefully reviewing the transcript of the March 14, 1985 investigation, we find that Claimant was provided with a fair and impartial Rule 28 hearing. The Hearing Officer did not

prejudice Claimant's defense. On the contrary, Claimant's representative vigorously and ably defended Claimant at the hearing. Similarly, Dr. Armstrong's absence from the investigation did not undermine Claimant's defense. Carrier witnesses as well as the Carrier itself admits that a positive THC test result does not necessarily mean that Claimant was under the influence of the narcotic on February 18, 1985. The Carrier is basing its discipline solely on the presence of the drug in Claimant's body. Thus, Dr. Armstrong's testimony would not have added any material evidence to the investigation record.

In Award No. 86, this Board ruled that the Carrier bears the burden of showing probable cause (a reasonable suspicion) for requiring an employee to provide a urine specimen. As in Award No. 86, the Carrier herein failed to offer any evidence demonstrating that Claimant was partially or totally responsible for Unit 5124 running through the switch on February 18, 1985. Put differently, the record is void of any evidence showing that Claimant negligently performed his duties or otherwise contributed to the cause of the mishap.

When the Carrier restated and amplified its existing probable cause policy (on November 5, 1984), the Carrier's Senior Vice President declared:

"We want to emphasize that BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident. The Division Superintendent must have close involvement and it is mandatory that he sanction these

tests. It is also essential that the 'probable cause' requiring the urinalysis test be adequately documented along with the identity of the supervisory official requesting it.

"It is to be emphasized that continued implementation of BN's existing policy in this regard will be fairly and equally applied. Further, no employees submitting to a urinalysis test will be removed from service pending test results unless there are other circumstances requiring their removal from service. If the urinalysis tests are positive, the employee should be removed from service pending investigation." [Emphasis added.]

The above quotation shows that the Carrier itself did not intend for its policy to be applied in a perfunctory, mechanical fashion. It is vitally important for the Carrier to implement its policy in a fair and equitable manner as contemplated by the Senior Vice President. The Carrier may not require a urinalysis merely because an accident occurred. In this particular case, the Carrier failed to show a rational relation between the accident and the employee who was compelled to submit to a urinalysis. Probable cause was not "adequately documented." 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.

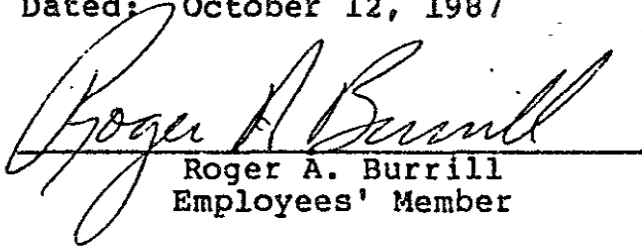
Finally, although the Carrier argued that Claimant freely provided a urine specimen, the record discloses that he only gave the sample under threat of severe disciplinary action. Thus, Claimant did not voluntarily consent to providing a urine specimen.

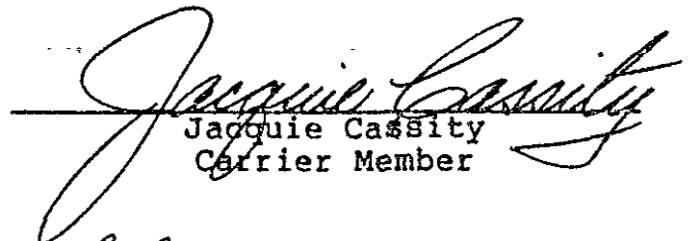
The Carrier shall reinstate Claimant to service with his seniority unimpaired and with back pay in accord with Rule 28(g). Claimant's request for retroactive health and welfare insurance coverage should be handled in accord with Section 5 of the 1982 National Agreement. The claim for interest on the back pay award is denied.

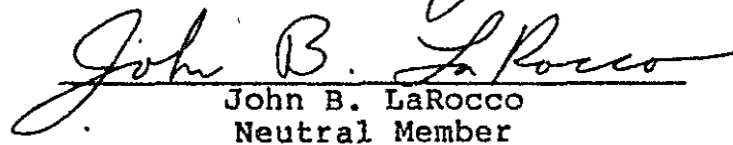
AWARD AND ORDER

Claim sustained. The Carrier shall exonerate Claimant in accord with Rule 28(g). Claimant's request for retroactive health and welfare insurance coverage should be handled in accord with Section 5 of the 1982 National Agreement. The claim for interest on the back pay award is denied. The Carrier shall comply with this Award within thirty days of the date stated below.

Dated: October 12, 1987


Roger A. Burrill
Employees' Member


Jacquie Cassidy
Carrier Member


John B. LaRocco
Neutral Member