

PUBLIC LAW BOARD NO. 4104

Case No. 48

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
vs.
Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Laborer M.R. Mackey for alleged violation of Rule 565 of the Burlington Northern Safety Rules was arbitrary, capricious, without just and sufficient cause, excessive and an abuse of the Carrier's discretion (System File 7 Gr GMWA 85-4-1B)

2. The Claimant shall be reinstated to service with seniority and all other benefits unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, Laborer M.R. Mackey, had been employed by Carrier for over six (6) years. Prior to being dismissed, he was assigned to Gang No. 919 with headquarters at Fall City, Nebraska. During October 1984, Carrier officials received information regarding alleged on-duty drug use by employees assigned to Carrier's 8th Sub-division. Undercover investigations commenced and, on October 22, 1985, Special Agents, D. Samp and M. Beran, witnessed three employees using marijuana on Carrier's property while on duty.

As a result of this incident, Carrier conducted an investigation on October 31, 1984. On November 26, 1984 Claimant was dismissed from service.

The Organization appealed Carrier's dismissal of Claimant. Carrier denied the appeal. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that the discipline assessed Claimant was excessive. It argues that of the three employees observed to be smoking marijuana, Claimant was the only employee dismissed; the discipline of the other two employees was reduced to a suspension. Accordingly, it maintains that Carrier's failure to reinstate Claimant represents disparate treatment. Additionally, it contends that Claimant was not in possession of any marijuana or drug paraphernalia, but merely exercised poor judgment when he took one puff from a lighted pipe containing marijuana. In the Organization's view, dismissal is excessive considering Claimant's six year clean service record and asks that the claim be sustained.

Carrier, on the other hand, insists that it was justified in dismissing Claimant. First, it argues that Claimant did not receive disparate treatment. It maintains that the other two employees dismissed for the incident were reinstated after lengthy suspensions because they availed themselves of the opportunity to participate in Carrier's Employee Assistance Program. It contends that because of Claimant's refusal to participate in the Program, a reinstatement was not considered. Additionally, it avers that testimony of the two special agents who observed Claimant smoking marijuana is supported by that of Claimant himself. Because of the seriousness of the violation, Carrier asks that the claim be denied in its entirety.

A review of the record evidence convinces this Board that the claim must fail. The testimony of the special agents is clear and

convincing in this case. It is further buttressed by Claimant himself admitting that he was smoking marijuana on the date in question. Claimant's guilt is clearly proven in this case. Furthermore, the Board does not agree with the Organization's allegation that Claimant received disparate treatment. Claimant did not avail himself of the opportunity to participate in the Employee Assistance Program and must face the consequences of dismissal.

The evidence of record clearly establishes Claimant's guilt. Under the circumstances of this case, Carrier's dismissal was not excessive. Accordingly, the claim must be denied.

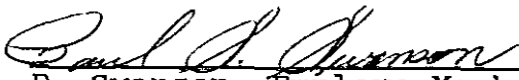
FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

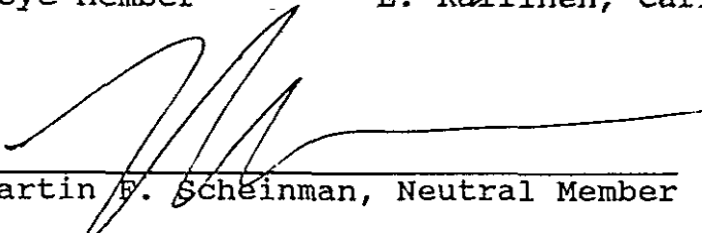
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD: Claim denied.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

1/20/90