

REV. 2
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PUBLIC LAW BOARD NO. 4104

R.M.W.E.

Case No. 70

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 discipline imposed upon Welder Foreman R.K. Malcolm and D.D. Jennings and Welder R. A. Newberry for alleged violation of Rules G, 564, 565 and 566 '...by refusal to submit to a urinalysis when requested at about 4:00 p.m., August 15, 1985...' was unwarranted, unfair, without just and sufficient cause and on the basis of unproven charges.

2. The Claimants shall each be compensated for all wage loss suffered from the date of their dismissal to the date the Carrier reinstated them to service. Their records shall be cleared of the charges leveled against them and the Carrier shall remove the entry of November 21, 1985 from their respective records."

OPINION OF BOARD: Claimant, R.K. Malcolm, was regularly assigned as a Welder Foreman on Regional Welding Gang #7. Claimants D.D. Jennings and R.A. Newberry were regularly assigned as Welder Foreman and Welder, respectively, on Regional Welding Gang #6. This dispute arose when Roadmaster D.R. Haun was informed by a gang member that Claimants allegedly used marijuana while on duty. Haun confronted the three Claimants and advised them that they were suspected of being in violation of Rule G. They were requested to submit to a urinalysis and told that refusal to do so would constitute presumption of guilt of Rule G. Claimants refused to submit to the testing and were withheld from service pending investigation results.

An investigation was held on August 27, 1985 and all three Claimants were dismissed from service by letters dated September 23, 1985.

The Organization appealed Carrier's dismissals of Claimants. 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 Carrier did not show probable cause to request the Claimants to submit to a urinalysis. It asserts that Carrier's request was based solely on alleged information received from an unnamed gang employee that the Claimants allegedly used marijuana while on duty. It maintains that Claimants did not exhibit any indication of being under the influence of any substance on the date in question. Haun stated that he observed Claimants during the course of the day and did not observe any abnormal behavior and, in fact, did not approach Claimants until they had completed their tour of duty.

Second, the Organization denies that refusal to submit to a urinalysis constitutes a violation of Rule G. It asserts that since Carrier did not establish a probable cause, Claimants were not required to submit to the urinalysis and such request could be construed as a random drug test. For all the foregoing reasons, the Organization asks that Claimants' records be cleared of all reference to this matter and that they be compensated for all wages lost.

Carrier, on the other hand, denies that Claimants were improperly disciplined. It asserts that Claimants were informed of the suspicion of their alleged Rule G violation. In order to deal with the matter, Carrier requested that Claimants submit to

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a urinalysis. It contends that when they refused to do so, they were in violation of Rule G. It maintains that the reported marijuana usage of Claimants by other employees constitutes probable cause for Carrier to investigate the situation. As such, Carrier states that Claimants refused to be tested even though they knew that such refusal would result in presumed guilt of Rule G violation and insubordination. Accordingly, Carrier argues that the discipline imposed upon Claimants was justified and asks that the claim be denied.

A review of the record evidence convinces the Board that the discharge of the three Claimants is unjustified. While the evidence does support Carrier's determination of guilt, dismissal is excessive in this case. Under these particular circumstances, a suspension from September 23, 1985 to October 1, 1985 is justified. This suspension serves as notice to the Claimants of their obligation to follow the orders of their supervisor. An employee must comply with the properly directed instructions and then pursue the established grievance procedure if they believe the instructions to be in error.

In addition, we note that Claimants had already been restored to service, thus reducing Carrier's liability to some extent. Accordingly, and for the foregoing reasons, the claim is sustained to the extent indicated in the Opinion.

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

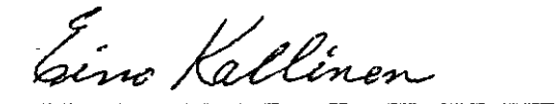
That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

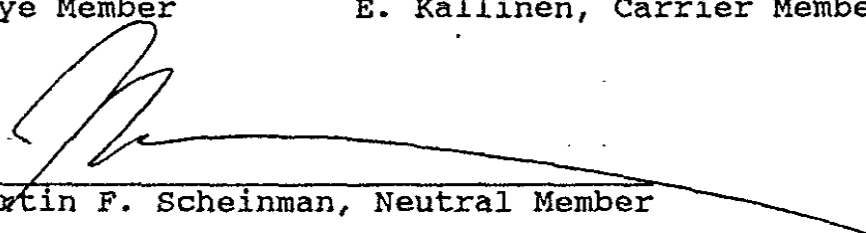
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member