PUBLIC LAW BOARD NO. 4340
Joseph Lazar, Referee

AWARD NO. 23
CASE NO. 23

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM: "Claim in behalf of Welder J. B. Wade that he be reinstated to service with all rights intact, paid for all time lost and that the charges be removed from his service record as a result of his dismissal on August 8, 1989."

FINDINGS: The Board finds upon evidence of record that the parties are Carrier and Employe under the Railway Labor Act of 1934 and amendments thereto, that pursuant to Agreement of the parties the Board has jurisdiction over the parties and the subject-matter, and that oral hearing has been duly waived by all the parties, including Claimant.

Claimant Welder J. B. Wade was dismissed from the service of the Carrier on August 8, 1989 for alleged violation of Rule G. Rule G states:

"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." (Tr., p. 25).

The transcript of investigation shows the following testimony of Roadmaster Stanford:

"Q. Why did you feel you had probable cause?
A. Based upon anonymous tips of current drug impairment and observation of possible abnormal behavior.

....

Q. Before any testing was done did Mr. Moore have a chance to observe Mr. Wade or talk to him?

Q. Did he concur with your decision to test Mr. Wade?
A. Yes, he did. (Tr., p. 6).

....

Q. Was the urinalysis then performed?
A. Yes, it was.

Q. Did anyone observe this urinalysis take place?
A. I observed Mr. Wade void two samples in the restroom.

Q. This was at the Bethany Clinic?
A. Yes.

Q. What was the handling given these samples?
A. Mr. Wade carried both samples to the nurse at the desk. He gave them to the nurse and observed them being sealed and signed the seal on both samples.

Q. Did Mr. Wade observe the same actions taken by the nurse?
A. I observed those actions and also Mr. Wade did.

Q. Did you take any exceptions to the handling at that point?
A. No, I did not.

Q. What happened to those two samples?
A. One sample was tested at Bethany; the other sample was shipped to the American Institute for Drug Detection in Rosemont, Illinois." (Tr., pp. 7-8).

The record shows that the local test results, at Bethany Hospital, and the test results from the American Institute for Drug Detection showed positive for cocaine and also showed positive for Valium, a prescription drug prescribed by Claimant's physician as a tranquillizer. Claimant had not informed the Carrier of his use of Valium.

The transcript of investigation shows the following testimony of Roadmaster Moore:

"Q. Did you have a chance to observe Mr. Wade at that time?
A. Well, yes, sir.

Q. What were your observations?
A. Well, at that time, we went to the hospital and I noticed the drinking of water and he took his glasses off and I seen redness of the eyes and other than that the cocaine has no visibility to me and I made my observation through the seminar I attended.

Q. Did you have the formal seminar on drug and alcohol intoxication?
A. Yes, sir." (Tr., p. 21).

The transcript of investigation shows the following testimony of Claimant J. B. Wade:

"Q. After the test was complete, what did you and Mr. Stanford do then?
A. He took me, he stopped and bought me lunch...

....

Q. Have you had a chance to review exhibits "A" and "B", the results of your test?
A. Yes.

Q. You do understand that these reports, Carrier Exhibit "A" and "B" represent the lab report showing the results of your tests?
A. Yes.

Q. Exhibit "A", which was done at the Bethany Medical Center, shows positive for several items, one of them being cocaine. Are you aware this report did show you positive for cocaine?
A. Yes, I've read the report.

Q. It also shows below that it was a chemical called Benzodiazepine. It was consistent with person's medication, Valium. Is that a correct statement?
A. Yes.

Q. Were you taking Valium from, on a prescription basis?
A. Yes, I prescribed Valium, taken at night they have no effect on me the next day.

Q. Have you ever told anyone that you were taking this drug?
A. No, I didn't know I should. I didn't take it at work and it didn't affect me, it didn't affect my work anyhow. Some people it might, it doesn't me. It doesn't leave me drowsy or nothing.

Q. Have you had a chance to review Exhibit "B" the backup test from the American Institute for Drug Detection?
A. Yes, I looked at it.

Q. Are you also aware that this test shows positive for cocaine?
A. Yes.

....

Q. With the test results being positive on both the local test and the backup test for cocaine, had you been taking cocaine up to this time?
A. No, I hadn't.

Q. Do you have any reasonable explanation as to why both tests would come up positive for cocaine?
A. Well, the anonymous tip. The only thing I can think of they must have put it in something I ate for lunch or, it could a been put, that's why I don't agree with anonymous tip because anybody could put any kind of drug in somebody's coffee, their lunch and then turn 'em in and say he's on something and they he would have it in his system, but maybe they wouldn't be under the influence of it, but it would show up. That's why I don't understand anonymous tips. I mean, that could get out of hand.

Q. Are you stating that on August 8th, you did not have cocaine metabolites in your system?
A. If the test said it was in there, I just stating that I didn't do any cocaine. I don't know how it got into my system.

....

....

A. ...the weld does bother my eyes and I've had an operation on my eyes and they get red easily." (Tr., pp. 24-25, 28).

The Board finds that the Carrier had reasonable cause to test Claimant, in view of Claimant's observed behavior including his red eyes. Anonymous tips, alone and by themselves, would not be sufficient, but when accompanied by behavioral observations by an Officer trained in a special drug program, the anonymous tips, anonymous to the Claimant but not anonymous to the Officer receiving the tips from members of Claimant's gang, may be considered by the Officer in determining whether there may be probable cause for testing.

The Board has considered Claimant's argument that he was "set up", but notes that there is not a scintilla of evidence in the record in support of such an allegation. Claimant had his lunch after the test was administered. The Board notes the rebuttal testimony of Roadmaster Stanford that Claimant "told me that on the night of August 7th he had done one, he told me he had been turned on to a line of cocaine. That was the first time he's ever done it and it had been given to him by a member of the gang." (Tr., p. 30).

The Board has considered the entire record properly before it, including the Claimant's final statement with the plea: "The minority who are experiencing problems with alcohol and drugs should be given an opportunity to receive assistance allowing 100% employees to benefit. You know, if there is, I don't think I've got a problem but even if there was, I think I should be given a chance to deal with, you know, there ought to be some other measure to take than to dismiss me...". (Tr., p. 32). The Board notes that this is Claimant's second discipline for Rule G violation. The Carrier's policy on rehabilitation applies to a first violation and not to a second Rule G violation.

The record shows substantial probative evidence in support of the Carrier's determination that Claimant violated Rule G. In view of the gravity of the violation, and in view of Claimant's prior record of violation of Rule G, the discipline of dismissal is not excessive.

A W A R D

1. The Carrier is not in violation of the Agreement.

2. The claim is denied.

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

DATED: August 22, 1990.