

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

V.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

1. The dismissal of Machine Operator E. J. Sundberg for alleged '... violation of Burlington Northern Railroad Company Rule "G"' was arbitrary, on the basis of unproven charges and without just and sufficient cause in violation of the Agreement (System File REG-6P-135/AMWB 86-05-08B).
2. The claimant shall be restored with seniority and all other rights unimpaired, his record cleared of the charge levelled against him and he shall be compensated for all wage loss suffered.

FINDINGS

The threshold issue... does the waiver signed by Mr. Edward J. Sundberg bar the Organization from appealing the claim... must be decided in favor of the Organization. The Organization has the right and the duty to police the Agreements to which it is a party. The Organization must assure that individual settlements do not adversely affect collective rights. It is not sufficient that Mr. Sundberg discussed signing the waiver with the Organization. The Organization, as the collective representative, must retain the right to pursue the matter if it believes Mr. Sundberg's waiver of rights is wrong. The duties associated with fair representation require the Organization to consider and to reconcile individual and collective interests. There is no evidence in this case that the Organization acted in an arbitrary or capricious or discriminatory manner by deciding to go forward with the appeal.

The Carrier has established probable cause for the request that Mr. Sundberg submit to the urinalysis. Therefore, the Carrier did not engage in random testing. The Carrier's officers had sufficient reason to believe that the two reports of use of marijuana by the Claimant were reliable.

The test results of Mr. Sundberg's urinalysis indicate that at the time he underwent the test, Mr. Sundberg had in excess of 440 nanograms of marijuana in his system. The results of the emit test were confirmed by a thin-layer chromatography test. Given: (1) the level of nanograms

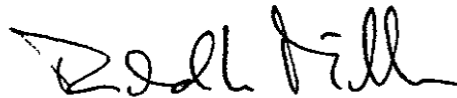
of marijuana in Mr. Sundberg's system, (2) the confirmation of the test results, and (3) the testimony of Mr. Sundberg that he used marijuana on October 18, 1985 (Friday night prior to the Monday morning test)... there is substantial evidence from which to conclude that Mr. Sundberg violated Rule G (in effect in 1985). Mr. Sundberg had substantial marijuana in his system while he was on duty or subject to duty.

The investigation was not defective, as claimed by the Organization, because the Carrier did not produce the two informants as witnesses. The basis for disciplinary action taken against Mr. Sundberg was the test results, not the informant's information. No important due process benefits would have accrued to Mr. Sundberg by having an opportunity to cross-examine the informants. Furthermore, the program to bring forth information about the use of controlled substances and alcohol by employees on duty or subject to duty could be severely handicapped by subjecting the informants to public identification.

The Carrier acted in a timely manner to initiate an investigation. The fifteen (15) days period provided for in Rule 40 began when the Carrier received the results of the urinalysis. Although the information provided by the informants established probable cause for the testing, the Carrier did not have substantial evidence of a Rule G violation until it received the test results.

# AWARD

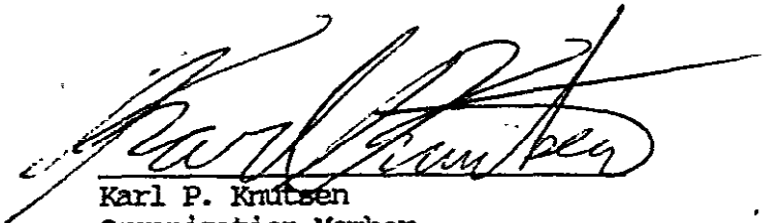
Claim denied



Ronald L. Miller  
Chairman and Neutral Member



Maxine M. Timberman  
Carrier Member



Karl P. Knutsen  
Organization Member  
DISSENT (SEE ATTACHED)

20 May 1988

Date

EMPLOYEE MEMBER'S DISSENT

While concurring with the majority decision that the Organization had the right to pursue this claim as part of its right and duty to police the Agreement, the Organization respectfully but firmly dissents from the majority's conclusion that the Carrier was not required to produce the alleged informant's as witnesses at the hearing. If the Carrier is not required to produce the informant as a witness, the Carrier then acquires the ability to allege the receipt of report by an anonymous informant, whether or not such report did occur, as a basis for any urinalysis test. If the Company is not required to produce the informant as a witness, the Company de facto acquires the ability to engage in random testing.

The Organization respectfully maintains the Board is in error with respect to the "fifteen (15) days period provided for in Rule 40 (A)". Because Mr. Sundberg was withheld from service, the applicable rule is Rule 40 B which provides that the investigation shall be held "within ten days after date withheld from service" for any reason. The Organization respectfully maintains that the "fifteen (15) days period provided for in Rule 40" is inapplicable to this particular case and the Board's conclusions with regard to the time limits involved are therefore erroneous.

/ Karl Knutsen  
Employee Member