

PUBLIC LAW BOARD No. 4381: Case No. 23

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

v.

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM

1. The dismissal of Machine Operator M. K. Brecht for alleged "...violation of Burlington Northern Company Rule G." was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File REG-SP-142/AMWB 86-05-13B)
2. The Claimant shall be reinstated to service with seniority unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

The Organization and the Carrier agree that Cases No. 16, 17, 18, 19, 20, 21, 23, and 24 are identical as to the issues in dispute. Therefore, in an effort to reduce redundant preparation of submissions, the submissions prepared for Case No. 23, and the arguments and defenses raised therein, shall cover and apply equally to Cases No. 16, 17, 18, 19, 20, 21, and 24.

Based upon information provided by two informants, on October 21, 1985, the Carrier requested nine (9) members of Gang #7, including the Claimant, Mr. Michael K. Brecht, to undergo urinalysis drug testing. They complied, and the results of the test were positive. Following investigative hearings, the nine men, including Mr. Brecht were dismissed from service for having violated Rule G (having used marijuana while on duty or subject to duty).

Subsequently, the Carrier agreed to reinstatement to service on a leniency basis if each man accepted and complied with specific conditions, including successful completion of the Carrier's Employee Assistance Program and a waiver of rights to any claims as a result of the Rule G violation. Eight (8) of the men, including Mr. Brecht, agreed to the conditional reinstatement.

The threshold issue ... does the waiver signed by Mr. Brecht 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. Brecht discussed the waiver with the Organization. The Organization, as the collective representative, must retain the right to pursue the matter if it believes Mr. Brecht's waiver was improper. The

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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. Brecht submit to the urinalysis. The Carrier's officers had sufficient reasons to believe that the two reports of marijuana use by members of Gang #7, including Mr. Brecht, were reliable.

The test results of Mr. Brecht's urinalysis indicate that at the time he underwent the test, Mr. Brecht 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. There is substantial evidence from which to conclude that Mr. Brecht violated Rule G (in effect in 1985). Mr. Brecht had marijuana in his system and was therefore "under the influence" of marijuana while he was on duty or subject to duty.

The investigation was not defective. The Carrier was not obligated to produce the two informants as witnesses. The basis for disciplinary action taken against Mr. Brecht was the test results, not the informant's information. 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.

Discipline has served its purpose in this matter. The Carrier's action to conditionally reinstate Mr. Brecht on a leniency basis is fair and appropriate.

AWARD


Claim denied. However, Mr. Brecht shall be conditionally returned to service on a leniency basis with seniority restored. This reinstatement is subject to Mr. Brecht's acceptance of and compliance with the following conditions:

(1) Mr. Brecht shall submit to and pass the required physical, urinalysis, visual, color-test and hearing examinations, including examinations on the Operating or Maintenance Rules, if required by proper authority, prior to returning to service.



(2) Mr. Brecht shall follow any instructions and comply completely with any program prescribed by the Carrier's Employee Assistance Program Coordinator.

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(3) Mr. Brecht shall serve a twelve (12) month probationary period, starting from the date of his return to service. If Mr. Brecht does not fully follow the prescribed employee assistance program, the EAP Coordinator may extend Mr. Brecht's probationary period for an additional twelve (12) months. If, during the second probationary period Mr. Brecht fails to comply with the prescribed employee assistance program, an investigation will be held to determine the facts of how Mr. Brecht failed the program.



Ronald L. Miller
Chairman and Neutral Member


Bruce G. Glover
Organization Member
Maxine M. Timberman
Carrier Member

15 Aug 90
Date