

PUBLIC LAW BOARD NO. 4402

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

- (1) The dismissal of Track Laborer B. L. Steiner for alleged violation of Rule 566 was without just and sufficient cause and on the basis of unproven charges (System File Reg. Gang/Gr.- 10 BI - B. L. Steiner).
- (2) Claimant B. L. Steiner shall be afforded the remedy prescribed by Rule 40G.

OPINION OF BOARD

As a result of charges dated May 28, 1985, investigation held on June 3, 1985, and by letter dated June 19, 1985, Claimant, a laborer with approximately six years of service, was dismissed for being under the influence of a controlled substance.

On May 17, 1985, Claimant and several other employees were operating a track push cart down a grade. The cart was not properly controlled and it rolled down the hill and struck and injured another employee. In the process, Claimant jumped off the cart and cut his head. After requested by the Carrier, Claimant submitted to a urinalysis and the findings of a drug test showed positive for the presence of cannabinoids.

The Organization seeks a sustaining award arguing that the Carrier has not shown that Claimant was under the influence of a controlled substance since there was no evidence of abnormal behavior by Claimant and the drug tests do not show any degree of impairment. We recognize that there is a tremendous diversity of strongly held opinion (both legal and medical) on the issues raised in this case. Compare SBA 925, Awards 22, 30, 32; SBA 986, Award 32 with PLB 4148, Awards 17, 23, 43; PLB 4107, Award 6; PLB 4106, Award 1; PLB 4066, Award 7; PLB 3715, Awards 14, 21; PLB 3408, Awards 47, 44; PLB 2529, Award 34. Indeed, at the present time the United States Supreme Court

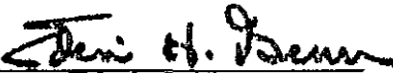
is considering a series of cases in our industry that will hopefully provide some future guidance for resolution of these matters. But in order to resolve this particular case and without prejudicing either party's positions on the issues and remembering that our function is not to engage in a *de novo* review of the facts and issues presented, our analysis must focus upon whether there is substantial evidence in the record to support the Carrier's position that the results of the drug test demonstrated a violation of Rule 566 which prohibits reporting for duty under the influence of marijuana or other controlled substance. See SBA 280, Awards 220, 223; PLB 4454, Award 14. Under the particular facts presented and under the current state of the law and the present medical knowledge, we are of the opinion that under a substantial evidence standard, that showing has been made.

However, although we find the existence of substantial evidence to support the Carrier's determination that a rule violation occurred, we are not of the opinion that the particular facts presented can sustain the Carrier's burden to demonstrate that dismissal was warranted. Under the circumstances, and further giving weight to the parties' respective positions on drug testing and the validity of those tests along with Claimant's particular record, we are of the opinion that Claimant should be permitted to return to service, but only after he passes a return to duty physical examination and drug test, successfully completes an Employee Assistance Program as designated by the Employee Assistance Counselor and does not test positive for drugs for a twelve month period from the date of his return to duty.

AWARD

Without prejudice to either party's positions concerning the right of the Carrier to test for drugs or the validity of such tests as determinative of the issues raised in the claim, Claimant shall be returned to service with seniority unimpaired but without compensation for time lost subject to the specific physical examination and drug testing requirements and

conditions set forth in the Interim Award dated July 26, 1988.


Edwin H. Benn
Neutral Member


E. J. Kallinen
Carrier Member


P. S. Swanson
Organization Member

Denver, Colorado
December 7, 1988