SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.

CASE # 76 – AWARD #77 – Juan Leal
[Termination – Drug & Alcohol Policy]

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement ("MOA") between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal, bearing only the Referee's signature, is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

Jual Leal, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on August 23, 1978. At all relevant times, the Appellant worked on a system region (Tie) gang, (TP01), as a machine operator. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about August 20, 2004, following an Investigation conducted on July 27, 2004 by Curtis J. Froscheiser, Superintendent of Operations and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Safety Rule 1.5 and BNSF Policy on the use of Alcohol and Drugs dated September 1, 2003, when the urine sample taken from the Appellant on July 2, 2004 was reported as positive for cannabinoids (marijuana), the second such confirmed positive test for a controlled substance within a ten year period. As a direct result, the Carrier seeks the Appellant's termination from employment.

D. Facts Gathered from the July 27, 2004 Investigation

On July 27, 2004, a formal investigation was conducted by Mr. Curtis J. Froscheiser, Superintendent of Operations for the BNSF located in Willmar, Minnesota, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Roger Bobby, Vice General Chairman, BMWE. The record created at this formal investigation established that:

- Rule 1.5 in the Maintenance of Way Operating Rules, dated January 31, 1999, as revised on April 2, 2000, provides, in relevant part: "The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property." (TR 7, Exhibit B)[1]

[1] References to the official transcript of July 27, 2004 shall be referred to as "TR" followed by the applicable page number. References to Exhibits appended to this Official Transcript shall be referred to as "Exhibit" followed by the appropriate Exhibit Number.

- On July 2, 2003, the results of a "reasonable suspicion" urine test provided by the Appellant on June 30, 2003 confirmed positive for the presence of cannabinoids (marijuana). The Appellant was identified by Donor ID No. 464881181. (TR 8, Exhibit C.) Appellant was notified of this test result on July 9, 2003. (Exhibit D) Pursuant to BNSF Policy Section 7.1, the Appellant was removed from service pending an evaluation by a Substance Abuse Professional ("SAP"). (Id.) As a further requirement, Appellant attended an Educational Training program that lasted eight (8) hours. (TR 28)

- By letter dated August 4, 2003, the Appellant was notified by the Carrier as follows:

You have satisfactorily completed the necessary requirements following your positive test. Please be advised that you are now subject to periodic drug and/or alcohol testing for a period of five (5) years from the date you return to work. When a follow-up-test is required, you will be notified by the proper authority. Before you may return to active service, it is your responsibility to contact your supervisor and comply with any other conditions that have been set forth as a result of your positive test.

Violation of any one or more of the following conditions will subject you to dismissal:

- More than one confirmed positive test either for any controlled substance or alcohol obtained under any circumstances during any 10-year period. . . . .

Appellant acknowledged his understanding of the foregoing with his signature on August 5, 2003. (See Exhibit E)

- Subsequent to the date of his reinstatement the Appellant received a negative test result for each of six (6) drug and alcohol tests taken up through June 2004. (TR 15, 22, 29)

- On July 2, 2004, the Appellant was subjected to a seventh follow up Drug test. This test was assigned Test #2614734. Appellant, Social Security No. 464-88-

1181, signed the Chain of Custody form acknowledging that the urine specimen provided was his, in its totally unadulterated form. (See Exhibit H) On July 4, 2004, Ron Shearon, Certifying Scientist for Northwest Drug Testing, confirmed the Appellant's drug test as positive for marijuana. (Exhibit G) On July 8, 2004, Karl S. Saffo, MD, the Medical Review Officer ("MRO") confirmed and reported the Appellant's drug test as "positive". (Exhibit H) The result was forwarded to the Carrier noting the positive test results detecting the presence of cannabinoids (marijuana). (Exhibit F) By letter dated July 8, 2004, Martin Crespin, Manager Medical Support Services, informed Tim Koerting, Appellant's supervisor, of the positive drug test result, the second in a ten-year period, and directed Mr. Koerting to remove the Appellant from service. (Exhibit F, TR 16-17) Appellant was thereinafter notified of the test results and removed from service. (TR 26-27, 32)

E. <u>The Appellant's Defenses to the Second Positive Test Results</u>

The Appellant denies the allegations made by the Carrier that he had a second reported positive test result for the presence of drugs (cannabinoids) within a ten-year period. Appellant's defenses in this regard are as follows:

1. That the Second Positive Reported test result was not his. In this regard, Appellant alleges as follows:

   - The Appellant testified that he was "shocked" after having heard that he failed to pass his seventh drug test. The Appellant denied use of any controlled substance, and further maintained that the test result reported to the Carrier that provided the basis for his removal was not his. (TR 29, 33) In response to the following questions, the Appellant testified as follows:

Q. How about the results, did it give you the results, positive for Canabinoids?

A. I didn't, I didn't do the test. Whatever they, they did this. I didn't do it there. According to my knowledge, they might, they might have thousands there and testing a lot of them at the same time and then they just, we're all humans, we all make mistakes. So I think they just could have made a mistake.

Q. So, do you believe this is your test?

A. No (TR 33)

2. That the Appellant was Subject to Disparate Treatment

During the instant hearing, it came to light that at or about the same time as the Appellant received his first confirmatory positive test for the presence of drugs (canabinoids) in 2003, a second employee named Jack Demaris had also received notice of a first confirmatory positive test result. (TR 15, 23) Accordingly, Mr. Demaris was subjected to the same follow-up testing requirements as was the Appellant. (TR 23) During his testimony, Greg Mackley, Production Roadmaster, TP01, testified that he recalled that Mr. Demaris was taken out of service following one of his early tests. (Id.) Mr. Mackley testified that although he recalled that Mr. Demaris was returned to service as a result of "[s]omething to do with the test." (Id.) Appellant testified that as best as he could recall, that while he was not privy to the test results, Mr. Demaris was initially taken off the job on a Wednesday morning, but reported back to work on Thursday, the following day. (TR 31) Appellant testified that while Mr. Demaris was offered the opportunity to take a follow-up test, which tested negative, the Appellant was not offered the same opportunity. (TR 32)

3. Appellant's Follow-up Test

Finally, Appellant testified that following notice by the Carrier regarding his second positive test result on July 8, 2004, he sought to have a follow-up drug test performed on July 9, 2004. (TR 30) The test reported Negative for the presence of any prohibited drug. (TR 31. Exhibit I)

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;
2. To determine whether substantial evidence was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

B. Compliance With Rule 40

During the formal investigation, the Appellant acknowledged that the hearing had been conducted "[i]n a fair and impartial manner under the rules of your agreement", and both the Appellant and Mr. Bobby noted on the record that they had been afforded full opportunity to ask questions of witnesses and principals at the investigation. (TR 35) Given the Appellant's and the Organization's responses noted above, I find and conclude that the investigation at issue complied with Rule 40 in all respects.

C. Substantial Evidence Exists to Support the Instant Charge

Initially, this Referee notes that he sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, I must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record. In the instant matter, it is apparent that the Carrier made its credibility determination against the Appellant, and I find that its decision to do so was supported by the record.

Addressing the Appellant's defenses in the order noted above, I find as follows:

1. With respect to the Appellant's claim that the positive test result as reported on July 8, 2004 was not his, the record evidence is to the contrary, supporting the fact that the test was, in fact, the Appellant's. This conclusion is supported by:

(a) The chain of custody forms, one of which bears the Appellant's signature acknowledging that the urine sample given was his, (Exhibits G & H)

(b) both chain of custody forms bear the Appellant's social security number, the same number listed on the confirmatory test results of July 8, 2004. (Exhibit F),

(c) the Carrier is governed by Regulations promulgated by the Federal Railroad Administration (FRA), who establishes minimum Federal Safety requirements for the control of alcohol and drug use in railroad operations. To properly comply with its intricacies, Carriers are expected to devote quality personnel and apply sufficient operational resources to make this essential safety program successful. FRA holds carriers fully accountable and responsible for the proper performance of its program, its program personnel, and its program service providers.

The Department of Transportation (DOT) regulations and FRA Regulations describe requirements for laboratories conducting urine drug testing for all but FRA mandatory post-accident testing. While the Carrier is permitted to employ one or more laboratories to conduct its urine testing, all laboratories conducting Federal Testing under FRA Rule must hold a special qualification (DHHS/SAMSHA certification)[2].

The DOT and FRA regulations also govern the requirements for Medical Review Officers (MRO) under the urine testing portions of the FRA rule. The role of the MRO is to receive all urine drug test results from the Carrier's laboratory. In the case of negative results, the MRO's role is purely administrative, reporting the findings to the employer.

[2] It has not been established that the Medtox Laboratories used by the Appellant for his July 9, 2004 follow-up test, held this certification.

With laboratory positive and other non-negative results, the MRO is responsible for determining if the doner has a verifiable, legitimate medical explanation for the test findings. If not, the result must be reported to the Carrier as a verified positive, adulterated, substituted, or invalid result.

As an initial matter, the Appellant has not shown that the laboratory selected by the Carrier, identified as Northwest Drug Testing, who conducted its urine tests, had not met DOT and FRA standards. Accordingly, absent such a showing, it must be assumed that such strict standards/requirements have been met.

Next, while the Laboratory reported the Appellant's test results as positive for the presence of Cannabinoids (marijuana), the determination could not be confirmed positive without the review by an MRO. Appellant's positive test result was reviewed by the Karl Saffo, a medical doctor, and MRO, who provided the Appellant with an opportunity to persuade him that the positive test report was, in fact or in some manner, flawed. The MRO's confirmation of a positive test result on July 8, 2004 is proof per se that he found no reason to invalidate the result of the testing laboratory's result. Accordingly, the MRO reported the test result as Positive to the Carrier, as he is obligated to do under the Regulations.

2. With respect to the Appellant's claim of disparate treatment, (referring to Jack Demaris), it is apparent, when reviewing the limited testimony in this regard, that either the laboratory or the MRO found either the test or the testing mechanism used for Mr. Demaris as flawed. Moreover, it is uncontested that Mr. Demaris was ultimately subjected to the strict standards of another drug test which provided negative test results. In the instant matter, there has been no showing that the urine/drug test performed on the Appellant's July 2, 2004 urine sample was in any way flawed.

3. Finally, in addressing the Appellant's follow-up test performed on July 9, 2004, one week following the taking of his July 2nd urine sample, it is not clear that the test was performed by a certified laboratory. However, assuming it was, it is apparent that the Appellant's use of marijuana was of such limited frequency so as to test at a level below the screening threshold of 20 ng/ml.[3] While this may be the case, it does not nullify the July 8, 2004 positive test result as reported by the MRO.

Given the foregoing, it is the conclusion of this Referee that there is substantial evidence in the record to support the Carrier's conclusion that the Appellant tested positive for a controlled substance, the second such positive result within a ten-year period.

The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains a question as to the appropriate penalty. In this regard, the Carrier seeks to terminate the Appellant's service. It is well accepted that unless "shocking to ones sense of fairness" the Carrier's proposed penalty will not be disturbed. Having carefully reviewed the record in this case, with particular emphasis on the Appellant's signed that a second confirmed positive test for a controlled substance during "any 10-year period" would result in his termination, I find that the penalty imposed by the Carrier to be a reasonable one.

[3] In this regard, the Health Care Clinical Laboratory lists the detection period of THC (Marijuana metabolite) as up to 2 weeks for a usage of 4 times weekly, and 3 to 6 weeks for daily usage.

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CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that:

1. The Carrier has substantially complied with Rule 40;
2. Substantial evidence exists to support the charges at issue, and
3. I find the penalty imposed by the Carrier, the termination of the Appellant's employment, to be, under the circumstances of this case, just and reasonable.

10-27-04
Dated

Dennis J. Campagna, Referee
SBA No. 1112