NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 182

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 182

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (hereinafter the Organization) and the Burlington Northern Railroad Company (hereinafter the Carrier) entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the Board).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

Although the Board consists of three members, a Carrier Member, an Organization Member and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or

censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

The Agreement further establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Michael F. Gettert, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 6, 1976. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying that position when he was dismissed from the Carrier's service effective January 18, 1994 for his alleged violation of General Rule G and other safety rules of the Carrier.

The Claimant was dismissed as a result of an investigation which was held on December 21, 1993 in the Carrier's Conference Room in Gillette, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rule G and rules associated with urinalysis collection when he allegedly provided an adulterated urine sample on November 9, 1993.

Findings and Opinion

On November 9, 1993 the Carrier, pursuant to Federal Regulations promulgated by the Department of Transportation and the Federal Railroad Administration, which regulations have been codified in policies and procedures established by the Carrier, had the Claimant submit to a random drug test; because, according to the testimony of Roadmaster Rodney Hughes, "he [the Claimant] was the driver of Vehicle 1883 that day".

Ms. Penny Markland, a medical examiner/specimen collector for a company known as Porta Medic, testified regarding the procedures administered for the collection of a urine specimen from the Claimant.

Dr. Thomas Mears, Carrier Vice President of Occupational Environmental Health and Wellness, testified that he served as one of the Carrier's Medical Review Officers, and that he was the recipient of a report from the laboratory, CompuChem, which tested the Claimant's specimen; and that that test had indicated that the Claimant had provided a specimen that had been adulterated by a chemical known as Glutaraldehyde. Dr. Mears testified that a product on the market known as Urinaid, which is advertised as providing a clean urine sample for drug screening, contains the active constituent Glutaraldehyde. Dr. Mears testified that one of the confirmatory methods for establishing that a urine specimen has been adulterated by Glutaraldehyde is to smell the urine.

Dr. Michael Peat, Vice President of Toxicology for CompuChem, testified regarding the standardized testing procedures performed by his laboratory, which procedures involve the immunoassay and the gas chromatography/mass spectrometry confirmatory test, which is performed when the immunoassay detects a positive specimen. Dr. Peat testified regarding the "sight" and "smell" procedures which are utilized in determining whether a specimen has been adulterated or diluted. Dr. Peat testified "There is no doubt in my mind" that the urine specimen submitted by the Claimant was adulterated; and that "indicator for glutaraldehyde is the positive amphetamine response".

The Organization submitted a written statement from Dr. John P. Morgan, a Professor of Pharmacology at New York University, in which Dr. Morgan challenged the reliability of the "sniff" test to determine if glutaraldehyde has adulterated a urine specimen. Dr. Morgan's written statement and his credentials were submitted

in lieu of his presence, because the Conducting Officer was unwilling to adjourn the investigation until Dr. Morgan could become available on January 18, 1994. Dr. Morgan, in composing his written statement, had the benefit of reviewing CompuChem's report/litigation package and among his various observations he wrote the following:

> There is an accompanying page "Run 12," November 15, 1993, indicating the glutaraldehyde was not found. As I stated earlier, I could not be absolutely sure as to the meaning of these documents. I do not know if CompuChem did an illegal test for glutaraldehyde, and if they are competent enough to do it right, or if they are unbiased enough to report it honestly. I do, however, know that your union member has not been shown by any stretch of the imagination to have used illegal drugs or to have adulterated his urine. (emphasis by Dr. Morgan)

Prior to the commencement of the investigation, the Organization Representative wrote on two occasions to the Conducting Officer requesting either a postponement of the December 21, 1993 investigation or an adjournment after the testimony of Drs. Mears and Peat and others so that he could obtain the presence of his "expert" Dr. Morgan. The Organization Representative renewed his request for an adjournment several times during the course of the investigation and the Conducting Officer denied each request and closed the evidentiary record.

The request for an adjournment or a postponement by the Organization Representative was premised upon his most reasonable contention that he did not believe that he possessed the necessary expertise to properly explore the question of when and under what circumstances a urine specimen could be considered "adulterated"; and for this reason, he literally "begged" the Conducting Officer to extend the investigation until January 18, 1994.

The job of a Conducting Officer is to ensure that when the Carrier reviews the evidence developed at an investigation it has all of the necessary facts in order to render an informed decision as to whether an employee is properly subject to discipline. If a conducting officer unreasonably does not permit the introduction of relevant evidence then the claimant has been denied a fair and impartial hearing; because necessary evidence readily available was not presented for the reviewer [the Carrier] of fact and the ultimate trier [the Board] of fact.

Maybe the Conducting Officer in this case considered himself to be an expert in urinalysis testing, DOT Regulations, and when

and how adulterants can be detected in urine specimens. Dr. Mears, on the other hand, conceded, when questioned by the Organization Representative (page 34), that he could not "interpret the spectrographic reports of the immunoassay" because he was not a "biochemist". That response by Dr. Mears was offered in the context of the Organization Representative's stating that he, the Organization Representative, could not find the test for glutaraldehyde in the laboratory package sent to him. The specialized field of "body fluids testing" has developed its own esoteric, medically-specific terminology and a field of "experts". Understandably, the Organziation Representative is not such an expert, and his request for the assistance of a medically trained witness/advisor was reasonable and responsible.

The Chairman of this Board has conducted several de novo arbitration hearings, involving airline employees, pipeline employees, and over the road truck drivers, all of whom are subject to similar random drug testing mandated by Federal Regulations and implemented by their respective companies. In the context of those hearings the Chairman of this Board has listened to testimony of nationally-known and respected forensic toxicologists, presented by both sides, when there has been a question concerning interpretation and/or reliability of urinalysis tests. In that context informed and, hopefully, correct decisions were reached.

In this case the Conducting Officer deprived not only the Claimant and the Organization of a fair opportunity to present a full evidentiary record, but he also deprived this Board of the opportunity to have an expert witness, proffered by the Claimant, appear and testify.

Adjourning the investigation over the Christmas and New Year's holidays and resuming on January 18, 1994, less than thirty days after the beginning of the investigation, could not, in any material way, have prejudiced the Carrier. The Claimant was going to remain out of service in any event. This is the railroad industry, where, frequently, employees dismissed from service wait years before their claims are adjudicated and where multiple postponements of investigations are the rule rather than the exception. Why the rush when the record was obviously incomplete? The Organization Representative in this case, unlike some of his colleagues, was polite, respectful and made an intelligent and equitable request for the record to be held open for a short period of time so that he could obtain the presence of what he believed to be a critical witness. The arbitrary

denial of the request was fatally prejudicial, and requires that the claim be sustained.

This Board is sustaining the claim because the Carrier deprived the Claimant of a full and fair investigation in violation of Schedule Rule 40 and contrary to judicial common sense. Sustaining the claim on procedural grounds should not lead to the implication that there was merit in the determination that the Claimant's urine specimen was adulterated or, if it was, that the Claimant was responsible for the adulteration. Dr. Morgan may have testified, for instance, that glutaraldehyde and/or amphetamines would have remained in the Claimant's system and been detected, which they apparently were not, in the drug test that the Claimant voluntarily took on November 29, 1993. We will never know.

Based upon the foregoing facts and findings, this Board concludes that the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with full back pay and benefits and seniority unimpaired. The Carrier is further directed to physically expunge any reference to this discipline from the Claimant's Personal Record.

This Award was signed this 5th day of April, 1994.

Richard R. Kasher

Richard R Kasher
Chairman and Neutral Member
Special Board of Adjustment No. 925