NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 57
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 57

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. Timothy J. Penner, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 5, 1976. He was subsequently promoted to Bus Driver and was occupying that position when he was dismissed from the Carrier's service on July 26, 1988.

The Claimant was dismissed as a result of a two (2) day investigation which was held on June 24, and July 6, 1988 in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule G of the Rules of the Maintenance of Way Department.

Findings and Opinion

Sometime prior to June 17, 1988 the Carrier had received an "anonymous tip" that certain of its Maintenance of Way crews were drinking alcoholic beverages at certain restaurants/bars in the vicinity of northeast Minneapolis during their lunch periods.

As a result of this information, Special Agents Robert Borries and Eric Collins and Patrolman Thomas Belch were assigned to place two (2) establishments, The Spring Inn and The Vegas Inn, under surveillance.

When Agents Borries and Collins saw the Claimant and other members on his crew enter The Spring Inn, Agent Collins followed the Claimant and the others into the establishment, while Agent Borries went to pick up Patrolman Belch who had been "staking out" The Vegas Inn in order that Mr. Belch might also provide eyewitness testimony.

As a result of Agent Collins' observations, the Carrier determined that it had probable cause to test the body fluids for the presence of alcohol of four (4) members of the crew involved, the Claimant, Mr. John L. Rank, Mr. Greg Johnson and Mr. Thomas Grant.

The urine and blood tests results of Messrs. Johnson and Grant were negative; Mr. Rank first agreed and then refused to have his blood or urine tested; the Claimant tested positive for cocaine and marijuana.

The Carrier scheduled an investigation for the Claimant and Mr. Rank and that investigation, which began on June 24, 1988 and was recessed and then concluded on July 6, 1988, provided the basis for the Carrier's concluding that the Claimant was properly dismissed for violation of Rule G of the Rules of the Maintenance of Way Department.

The transcript of the investigation in this matter runs for 168 pages; and many, if not most, of those pages contain evidence which is not directly applicable to the resolution of the grievance filed by the Claimant.

Several issues raised by the two Organization Representatives, who individually or in concert represented Mr. Rank and the Claimant, are not germane to the question of whether the Carrier had just cause to terminate the Claimant; for example, there is no evidence that the Claimant consumed any alcoholic beverages or that Agent Collins observed him drinking beer; there is no question regarding the timeliness of the notice of the investigation insofar as the Claimant is concerned; and there is no question of whether the Claimant

should have been disciplined, as was Mr. Rank, because of a refusal to submit to a urinalysis or blood test.

There is the question of whether the Carrier had probable cause to require the Claimant to submit to body fluids tests. Agent Collins testified that he was in The Spring Inn for approximately twenty (20) minutes between 12:00 noon and 12:30 p.m. on June 17, 1988; that he saw the Claimant and three (3) other crew members, whom he identified as Messrs. Rank, Johnson and Thomas, sitting at the bar with a pitcher and mugs in front of them; that he saw Mr. Rank drink beer; and, that when the Claimant and the other three (3) members of the crew reboarded the crew bus outside of The Spring Inn, he detected an odor of alcohol emanating from the group, although he could not determine from which individual(s) the odor was coming.

In this Board's view, Agent Collins' observations, which the Carrier chose to credit, provided probable cause for the body fluids testing of the four (4) crew members, including the Claimant.

The issue before this Board is whether the Carrier had just cause to discharge the Claimant based upon the results of the body fluids test.

As this Board was reading the transcript, we were preparing to address the question of whether the discovery of cocaine and marijuana metabolites in the Claimant's urine sample, collected at the Unity Medical Center Laboratory on the afternoon of June 17, 1988 and transported for testing to Medtox Laboratories, Inc. in St. Paul, Minnesota, provided the Carrier with sufficient cause to discipline the Claimant.

Our preparation to consider that issue was obviated at page nos. 158 and 159 of the transcript where the Organization Representative asked the Claimant the following questions and received the following answers:

"Q. Mr. Penner, would you read the date on which this sample collected has been tested here?
A. It says on this is was 6/16/88.

Q. Were you at Unity Medical Center on 6/16/88?
A. No I was not.

Q. Were you at Unity Medical Center on 6/17/88?
A. Yes, I was.

Q. Are you being charged with an incident which allegedly occurred on 6/16/88?

A. According to the Medtox Report, I am.

Q. But according to the investigation notice, you are being charged with an incident which occurred on 6/17/88, is that correct?
A. That is correct.

Q. Would it appear to you in reading this that the date of collection is the date of collection of another urine sample other than yours?
A. That would appear so.

Q. Would it appear that the urine sample was collected a day earlier although it was alleged to have been yours?
A. That's what it says here."

After reading this colloquy, the Board reviewed the Laboratory Report submitted as an exhibit in the investigation. Medtox Laboratories showed that its client was the Unity Medical Center; that the patient was the Claimant; that the urine sample was received on June 20, 1988; and that the urine sample was collected at 1330 (1:30 p.m.) on June 16, 1988.

This Board has every reason to <u>suppose</u> that a proper chain of custody of the Claimant's urine sample was maintained; that the urine sample was properly verified as that submitted by the Claimant; that, in fact, there was cocaine and marijuana residue in the Claimant's system on June 17, 1988; and, that the date of June 16, 1988, as opposed to June 17, 1988 as the date the sample was collected, was a clerical/typographical error. However, our supposition or the Carrier's is not sufficient proof that the sample tested by Medtox was the sample submitted by the Claimant.

If, in fact, the Carrier believed there was a clerical error in showing that the Claimant submitted the urine sample on June 16 as opposed to June 17, 1988, then the Carrier could have continued the investigation to present evidence from Unity Medical Center or Medtox Laboratories to clear up the confusion generated by the inconsistent date shown on the body fluids test.

With such confusion in the record, this Board has a very strong doubt regarding the reliability of the body fluids tests administered to the Claimant, and we are, therefore, constrained to conclude that there is neither substantial nor convincing evidence for us to conclude that the Claimant was in violation of Rule G.

Accordingly, the claim will be sustained.

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

This Award was signed this 29th day of September 1988 in Bryn Mawr, Pennsylvania.

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