SBA No. 1112
BNSF/BMWE
Case No. 10
Award No. 11

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112

BURLINGTON NORTHERN/SANTA FE

AND **CASE NO. 10**
AWARD NO. 11

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

On July 29, 1998 the Brotherhood of Maintenance of Way Employes ("Organization") and the Burlington Northern/Santa Fe ("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. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievance under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, and Organization Member, and a Neutral Referee, awards of the Board contain only 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 choose to appeal their case 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.

This Agreement further established 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 the 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 the proceedings and are to be reviewed by the Referee.

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 applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assess was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

The Claimant, Gerald Pilarski, established seniority with the Carrier on October 18, 1971. His personnel record shows that on May 9, 1972 he was suspended for ten days without pay because he was AWOL. Subsequently he was discharged on September 5 of that same year because he was again AWOL, but he was reinstated on July 22, 1974 pursuant to an award of the National Railroad Adjustment Board. In 1995 the Claimant submitted to a drug screen as part of a required periodic physical exam to retain his Commercial Driver's License. The results of that drug screen tested positive for cannabinoids and the Claimant was withheld from service, placed on a medical leave of absence and enrolled in treatment in the Carrier's Employee Assistance Plan under then-existing Carrier drug and alcohol policy. The Claimant successfully completed that program and on March 18, 1996 he was released to return to work. He was also notified, in writing, that he would be subject to dismissal if, *inter alia,* he again tested positive for controlled substances under any circumstances.

The Claimant was the subject of an investigation on March 8, 1999 for the purpose of ascertaining his responsibility, if any, in connection with an alleged violation of Operating Rule 1.5 and BNSF Policy on Use of Alcohol and Drugs. Following the investigation on April 5, 1999 Carrier discharged the Claimant for those alleged violations, declining to permit him to sign a Rule G waiver. Operating Rule 1.5 and BNSF Policy on Use of Alcohol and Drugs read, in relevant part, as follows:

Operating Rule 1.5

> ...Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

BNSF Policy on Use of Alcohol and Drugs

> ...Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

FINDINGS AND OPINION

On February 10, 1999, a day on which the Claimant worked as a truck driver, the Claimant submitted to a random drug screen pursuant to Department of Transportation rules. On February 12, 1999 the results of the drug screen from an independent laboratory showed a positive reading for marijuana metabolites. On February 16, 1999 the Carrier was informed of the results and its Manager of Drug and Alcohol Testing notified the Claimant by telephone. The Manager also notified the Claimant's Roadmaster, by letter of that same date, indicating that it was the second time that the Claimant had tested positive for a controlled substance and that the Roadmaster should conduct an investigation into Claimant's violation of the above-cited Rule and Policy. As noted above, the investigation was conducted and the Carrier discharged the Claimant for this second positive drug screen for a controlled substance.

The Organization first attacks the discharge on the basis that the investigation was not timely conducted as required by Schedule Rule 40. Under Schedule Rule 40 the Carrier is to conduct an investigation within fifteen days (15) of the incident or its knowledge thereof. The Organization contends that the operative date for calculating the timeliness of the Carrier's action is February 12, the date on which the independent laboratory "reported" the results of the drug screen. We disagree. That date is only the date on which the laboratory determined the results of the drug screen and, on the basis of this record, nothing more. The unrebutted evidence is that the Carrier itself did not have notice of the results until February 16 and its subsequent investigation was within the time frames established by Schedule Rule 40 when that date is used as the date on which the Carrier's obligation was fixed.

The remaining contention raised by the Organization is with respect to the fact that the Claimant was not permitted to sign a Rule G waiver and seek medical treatment as an alternative to discharge. On this point the Organization contends that when the Claimant was first tested positive, in 1995, he was not charged with a Rule G violation, but rather was permitted to enter into medical treatment pursuant to a medical leave of absence. Thus, when he tested positive once again in 1999, it was not his second Rule G violation and he should not have been discharged. To buttress this argument the Organization points to the Claimant's testimony that he was not charged with a Rule G violation nor given any notice of a disciplinary investigation in that regard. In addition, the Organization relies on a October 6, 1995 letter from a physician acting on behalf of the Carrier which

states, in relevant part, "(y)ou are being withheld from service and placed on medical leave..." On the other hand the Claimant's Roadmaster testified that although no investigation was conducted at that time, the Claimant was charged with a Rule G violation and his personnel record contains a notation to that affect. In addition, the March 18, 1996 letter from the Carrier's EAP physician notes that the Claimant was being released to return to work "...following medical disqualification due to a urine drug screen that showed the presence of an illegal drug..." and further put the Claimant on notice that another positive drug screen would subject him to dismissal.

Thus we are faced with documentation, in one case internal to the Carrier and the other shared with the Claimant, which on the one hand shows that he was deemed to have violated Rule G in 1995 and the Claimant's assertions to the contrary. Under such circumstances we are more inclined to place greater weight on the former because it is quite likely that the Claimant was simply, either at the time of the incident in 1995, subsequently upon his second positive drug screen in 1999, or in both instances, wrong as to the meaning and impact of the processes used in 1995. In addition, to adopt the Claimant's desription of the 1995 incident would require this Board to conclude that he somehow ended up in a medical treatment program without explanantion. We find nothing in this record that enables us to reach that conclusion. In fact, the record evidence, such as it is, compels a contrary conclusion in light of the fact that the the drug and alcohol policy in effect in 1995, unlike the current policy, did not provide for voluntary referral or enrollment. Accordingly, we find that on that occasion he was in fact deemed to be a Rule G violator and that, upon his second positive drug screen in 1999 subject to dismissal.

AWARD: The claim is denied.

Robert Perkovich, Chairman and
Neutral Referee, SBA No. 1112

DATED: July 16, 1999