

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 179

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 179

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (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. Adam C. Henry, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 21, 1976 and he was occupying that position when he was dismissed from the Carrier's service on November 4, 1993 for his alleged violation of Rule G and Rule A.

The Claimant was dismissed as a result of an investigation which was held on October 14, 1993 in the Burlington Northern Depot in Lincoln, Nebraska. 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 and Rule A, while assigned as a Laborer on CG-31 as evidenced by probable cause testing performed on Monday, September 27, 1993, the results of which were known on Friday, October 1, 1993.

Findings and Opinion

Mr. Roger L. Thompson, the Roadmaster on Construction Gang 31 and the Claimant's ultimate supervisor, testified that at approximately 8:00 a.m. on Monday, September 27, 1993 he was approached by a BN employee who told him that he observed the Claimant "smoking dope" on "Burlington Northern property". Roadmaster Thompson testified that this informant, whose identity he refused to disclose because the individual had asked for anonymity, told him that the observation of the Claimant had been made "last week".

Roadmaster Thompson testified that he then contacted the Carrier's special agents to assist him in the investigation of a possible Rule G violation; that the Claimant was located in the yard at approximately 1:50 p.m.; that it appeared to him, Roadmaster Thompson, that as the Claimant saw the special agent "drive up, he hopped on his four-wheeler immediately and tried to round the switch to get away from him or it would appear that he tried to get away from him"; that "I pulled up on the other side of the switch to block him so that he could not drive off"; and that "at the time and to me now, [his action] appear[ed] suspicious". Roadmaster Thompson testified that the Claimant was asked what had occurred; and that the Claimant was asked to remove his safety glasses so that the Special Agent could "look at his eyes". Roadmaster Thompson testified that based upon a recommendation of the Special Agent, who had observed that the Claimant's eyes were "glassy", coupled with the report he had that the Claimant had been observed "smoking dope", he concluded that "probable cause" existed to have the Claimant submit to urinalysis testing. Roadmaster Thompson testified that the Claimant was asked to submit to a urinalysis test, and that he agreed.

Roadmaster Thompson testified that the results of the urinalysis testing were returned on October 1, 1993 and disclosed a positive for marijuana.

Mr. Michael J. Beran, a Carrier Special Agent, testified that he was contacted at approximately 1:30 p.m. on September 27, 1993 and advised that a report had been made that the Claimant had been observed "smoking marijuana while on the job". Special Agent Beran testified that after approximately twenty minutes he located the Claimant and "I conducted an oral interview with Mr. Henry and was able to discern some physical characteristics of someone who consumed marijuana"; and that he observed "Mr.

Henry's eyes", and "They appeared to be glassy to me, and his speech was somewhat rapid, and he appeared to be quite nervous".

Special Agent Beran testified that in his judgment probable cause existed for urinalysis testing and that such a test was conducted at a facility ordinarily used by the Carrier in such circumstances.

Special Agent Beran testified that results of the urinalysis testing were obtained from "Roche Labs" and "CompuChem Labs" and indicated "positive" for cannabinoids. Special Agent Beran testified that the testing revealed an amount of cannabinoids/THC greater than "200 nanograms per milliliter".

Special Agent Beran testified that during his conversation with the Claimant the Claimant did not state that he was taking any medication which might account for a positive result on the urinalysis test.

Mr. Lyle Miller, a Group 3 Operator, Mr. Aaron Shunk, a Laborer on Construction Gang 31, and Mr. Steve Newlon, who also worked on Construction Gang 31, testified that they worked with the Claimant on September 27, 1993, that they observed him during the course of the work day, and that they did not observe any behavior or demeanor which, in their opinion, would indicate that he was "under the influence" of alcohol or any drug.

The Claimant testified that he was not under the influence of marijuana on Monday, September 27, 1993; that he had not smoked marijuana on that date or "done anything over the weekend"; that he has smoked marijuana; that the most recent episode occurred "at a party, three to four weeks prior to the incident"; that "It was a mistake"; and that "I shouldn't have done it, but it was quite sometime before I was approached by the Special Agent and Roadmaster Thompson". The Claimant testified that "I was quite confident I would pass any drug test"; and that he had been told by counselors that "marijuana stays in your system for quite some time".

The Claimant testified that, in his opinion, he did not violate Carrier rules because he was not "under the influence at any time when -- while on duty or on Company property".

The Claimant testified that he is presently in "treatment" and he sponsored documentation to establish that fact.

The Organization has raised several arguments on behalf of the Claimant and contends that the investigation was not fair and impartial and therefore violated Schedule Rule 40.

First, the Organization and the Claimant maintain that he was denied a proper investigation because he did not have the opportunity to "face his accuser", the individual who allegedly reported having observed the Claimant "smoking dope" on Carrier property. There is no merit in this defense. This Board has given no weight to the testimony of Roadmaster Thompson regarding the substance of the alleged information he received from the anonymous informant regarding the Claimant's alleged drug use. The anonymous informant was merely used to instigate an investigation. The anonymous informant, if in fact one existed, was not the Claimant's accuser. The Claimant was not subject to an investigation or disciplined because of the anonymous information given to Roadmaster Thompson. The Claimant was subject to an investigation and discipline was issued because Special Agent Beran observed indicia of drug or alcohol use and because a probable cause test resulted in a finding of drug use.

The Organization has also, by implication, argued that the Carrier sought to subject a maintenance of way employee, one who is not subject to Department of Transportation "random drug testing", to a random drug test. This was not a random drug test. The Carrier had sufficient probable cause to suspect that the Claimant used drugs, and therefore it had the right to request that he submit to body fluids testing.

The Organization has also argued, directly and by implication, that Special Agent Beran was not sufficiently "expert" to determine if an employee manifested signs of drug or alcohol use. Without demeaning Special Agent Beran's prior specific training and experience, both as a police officer and a special agent with the Carrier, it is well-established that lay people are capable of discerning the standard indicia of drug or alcohol use; such as speech mannerisms, gait, odor of breath, condition of the eyes, and various other signs of substance use. Accordingly, it is this Board's opinion that there is no merit in the Organization's position that Special Agent Beran was not qualified to determine whether probable cause existed to have the Claimant submit to body fluids testing.

The Organization also suggests that because the Claimant has entered a rehabilitation program(s) that the Carrier is required to permit him to complete that program and, upon proof that he is "clean" or "cured", return him to service.

The evidence establishes that the Claimant began his "partial care treatment program" at a facility known as "Alternate Paths" as of October 12, 1993; more than two weeks after he was confronted by Roadmaster Thompson and Special Agent

Beran, and ten or eleven days after the positive drug test results were issued and he was sent a notice of investigation regarding his possible Rule G violation. The Claimant entered his rehabilitation program after he had been placed on notice that he was in a "job jeopardy" status. The Claimant did not come forth voluntarily and disclose to Carrier management or EAP personnel that he had a problem with potential addiction, which might redound to the detriment of himself, the Carrier and his fellow employees. Accordingly, it is this Board's opinion that because the Claimant did not seek "assistance" prior to his being placed in job jeopardy status, the fact that he subsequently sought help for his addictive problem is not a mitigating factor which the Carrier was obligated to consider before it imposed discipline.

Finally, the Organization argues that the Claimant was not proved to have been "under the influence", and relies, in part, upon the decision of this Board in Case/Award No. 22 to support its position that mere presence of a controlled substance in an employee's system is not sufficient cause for termination.

Award No. 22 of this Board is distinguishable because, among other factors, the claimant in Case No. 22 did not manifest any signs of drug use while he was on Carrier property; unlike the Claimant, who by the testimony of Special Agent Beran, appeared to have been affected by the use of some substance, be it alcohol or drugs. The Carrier also had the right to consider and weigh the testimony of Roadmaster Thompson, to the effect that it appeared "suspicious" to him when the Claimant attempted to avoid the special agent. Additionally, the Claimant in this case had a positive test result of greater than 200 nanograms per milliliter for THC. This Board takes arbitral notice of the fact that 200 nanograms per milliliter is twice the established cutoff used by the Department of Transportation and NIDA-certified laboratories to ensure that a positive reading is not due to ambient smoke or passive inhalation.

In conclusion, although the Organization has implied that the laboratories used by the Carrier were not "certified" [presumably referring to NIDA-certification] and that there may have been problems with the "chain of custody", there is no evidence of record which persuades this Board that the urinalysis testing was not conducted by a NIDA-certified laboratory or that there were any defects in the manner in which the Claimant's specimen was collected and/or tested.

Based upon the foregoing analysis, this Board is persuaded that the Carrier has established by clear and convincing evidence that the Claimant violated Rule G. The Board would observe that the Claimant was not unfamiliar with Rule G, as his Personal Record discloses that in August, 1985 he had been previously put on notice regarding his obligation to comply with that specific rule.

Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 24th day of December, 1993.

Richard R. Kasher

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