

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 22

AWARD NO. 22

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 is limited to disciplinary disputes involving employees dismissed from service. 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 are dismissed from the Carrier's service may chose to appeal their dismissals to this Board. They have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual channels (Schedule Rule 40) or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. An employee who is dismissed 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 dismissed 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 dismissal and the dismissed 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. J.J. Buettgenbach, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 12, 1976. The Claimant was subsequently promoted to the position of Machine Operator, and he was occupying this position when he was dismissed from the Carrier's service effective September 9, 1985. The Claimant was dismissed as the result of an investigation which was held on August 15, 1985 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 566 of the Carrier's Safety and General Rules, by having marijuana in his system when he reported for duty at 7:30 A.M. on July 30, 1985.

Findings and Opinion

On July 30, 1985 the Claimant was operating a Ballast regulator in Yutan, Nebraska when he was told to report to the office of Mr. Zimmerman, the Nebraska Division Superintendent. At this meeting in the presence of Mr. B.E. Harris, Special Agent, Mr. H.D. Robinson, Acting Superintendent, Mr. T.H. Carlson, and Mr. R.L. Boyce, Roadmaster, the Claimant was advised that Mr. Carlson had received an anonymous letter stating that the Claimant was using marijuana on and off the job.

The Claimant denied using marijuana on the job but did admit that he had used marijuana on the previous Wednesday (July 24, 1985) during off duty hours. The Claimant was then requested to go to Lincoln General Hospital for a urine drug analysis. The results of that analysis were received by the Carrier on July 31, 1985 and showed positive for marijuana. The Carrier subsequently determined that based upon the test results the Claimant would be removed from service.

After thoroughly reviewing the record, this Board concludes that the Carrier has failed to present substantial or convincing evidence that the Claimant violated Carrier rules.

While this Board clearly does not condone the use of illegal drugs either on or off the job site, Rule 556 of the Carrier's Safety Rules and General Rules definitively states that "Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance". There is no indicia that the Claimant was "under the influence" on July 30, 1985. Testimony by all who participated in the August 15, 1985 investigation establishes that the Claimant was, at that time, not "under the influence". The fact that the Claimant was allowed to return to duty after his testing on July 30, 1985 demonstrates that he was deemed capable of performing his duties in a safe and conscientious manner by Carrier officials.

The Carrier contends that as the drug analysis testing performed by Lincoln General Hospital showed positive on the marijuana screening, the Claimant was subject to discipline for violating Rule 556. However both Exhibit No. 2 and No. 3, the first and second urine test reports, state: "This test may detect the cannabionid metabolites for several days after smoking a single marijuana cigarette. Detection of the metabolite does not indicate the person was intoxicated at the time of sample collection". These exhibits do not provide this Board with any conclusive proof that the Claimant was using controlled drugs on the job site or that he had reported to duty under the influence of said drugs. In point of fact, as previously noted above, all the evidence points to the Claimant's being available for service and capable of performing his job safely.

We are not persuaded by the Organization's arguments that there is reason to doubt the validity of the urine/drug analyses. The Claimant admitted use of illegal drugs prior to the tests being taken and thus this Board concludes that the Carrier had reliable proof that there were drugs in the Claimant's system. However, the Rule does not provide that an employee will be subject to discipline for having drugs in his system. Thus, although the Carrier attempted to change the import of the Rule when it drafted the Notice of Dismissal the change in language does not convert the Claimant's misconduct to an offense subject to discipline.

This Board is well aware of the Carrier's understandable sensitivity where employees engaged in the operation of heavy equipment and motive power are accused of illegal drug use and abuse. However, in the instant case there is no showing that the Claimant's off-duty use of marijuana caused him to jeopardize his safety, the safety of his fellow employees or the safety of the public. Accordingly, we are constrained to sustain the claim.

We would observe again that this Board is deeply disturbed that an employee engaged in the operation of heavy equipment is not sufficiently mature and law abiding so as to avoid the use of prohibited substances. The Claimant, who has established a fine record of employment of almost ten years with the Carrier, would be well-advised to avoid at all times the use of marijuana and other drugs recognized by the society as being illegal; he is particularly advised that his on-duty conduct in the future should be free of such activity.

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Award: The claim is sustained in accordance with the above findings. The Carrier is directed to restore the Claimant to service within five (5) days after receipt of this Award. The Claimant shall have his record cleansed of the charge, and he shall be made whole for all lost pay and benefits. The Claimant's seniority shall be restored unimpaired.

This Award was signed this 5th day of November 1985 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

Richard R. Kasher
Chairman and Neutral Member
Special Board of Adjustment 925