

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
*****                                         *
                                           CASE NO. 32
                                           AWARD NO. 32
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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 arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Tom Garrett Harms, hereinafter the Claimant, entered the Carrier's service as a Sectionman on November 15 1974. He subsequently became a Laborer and was occupying this position when he was dismissed from the Carrier's service effective December 3, 1985. The Claimant was dismissed as a result of an investigation which was held on November 8, 1985 in Livingston, Montana. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 565 and 566 of the Burlington Northern Safety and General Rules for being under the influence of marijuana while working as a laborer on October 23, 1985.

Findings and Opinion

At or about 1:30 p.m. on October 23, 1985, the Claimant was involved in an accident at his work site. The Claimant and Laborer T.L. Kennedy were setting off a rail lifter when the Claimant lost his footing and the handle of the rail lifter fell on his right leg breaking his right tibia and fibula.

As a result of this accident the Claimant was driven to Townsend Hospital for x-rays where it was determined that the Claimant should be taken to an orthopedic surgeon at Deaconess Hospital in Bozeman. Prior to the Claimant's transfer to Bozeman, he was given a capsule of Tylox for his pain.

At or about that same time, at the Carrier's request, the Claimant voluntarily agreed to take a urinalysis. Roadmaster Olson testified that Division Superintendent Thiel had instructed him to have the Claimant undergo urinalysis because he had been injured in an accident.

The results of the Claimant's urinalysis, which were received by the Carrier on or about November 1, 1985, indicated the presence of THC (marijuana). As a result, the instant investigation was convened.

In this Board's view, there is no reason to doubt the testimony of both the Carrier's and Claimant's witnesses that the Claimant showed no signs of impairment on the date of the accident.

Additionally, there is absolutely no evidence that the Claimant was in possession of drugs or used drugs while on the Carrier's property.

Therefore, the Board is faced with an evidentiary record which is nearly identical to the transcripts of investigation which we reviewed in Case Nos. 22 and 30. The Board concluded in those cases that the Carrier had failed to meet its burden of proof since it had not demonstrated that the claimants in those cases had been in possession of or used controlled substances while on duty or had reported for duty under the influence of said controlled substances.

This Board continues to appreciate the Carrier's need to provide a safe work place for all of its employees and to maintain a consistent and high level of safety standards that will protect the public. However, all of us, the Carrier, the Organization and this Board, are currently operating in an area that has yet to be clearly and precisely defined. There are no definitive answers to many real and important questions; i.e. Are urine drug testing centers consistently reliable and accurate? Does a positive test for THC indicate that that person has participated in illegal drug usage or does it reflect a secondary smoke contamination? Does a positive THC test reflect no more than the taking of over-the-counter drugs? And, does a positive THC test, standing alone, establish that an individual is "under the influence of marijuana"? There is no concrete definition for the phrase "under the influence of marijuana"; and, when supervisors and co-workers testify that an individual behaved in a normal, everyday manner and did not manifest any of the indicia commonly recognized in those who are "under the influence", this Board does not believe that a positive result on a test for THC is sufficient cause for discipline. This Board is not aware of any firmly established criteria which would establish by

blood testing or urinalysis alone that an individual was under the influence; unlike the test for alcoholic intoxication where state laws have established a blood alcohol percentage above which an individual would be considered "legally intoxicated" we have no similar percentage test which would establish that an individual was "legally under the influence of marijuana".

Accordingly, this Board will sustain the claim. We should note that the Claimant vociferously denied having used drugs and strenuously disputed the results of the urinalysis. The Claimant requested the opportunity to be retested and the Carrier denied him that opportunity. This Board considered the Claimant's contentions, but did not consider the information provided by the Organization subsequent to our receipt of the documents referenced above.

In view of the above findings the claim will be sustained.

Award The claim is sustained. The Carrier is directed to reinstate the Claimant to service with seniority unimpaired and with pay for all time lost (if the Claimant would not have been in furlough status). The Carrier is also directed to cleanse the Claimant's record of the charges.

This Award was signed this 26th day of March 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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