

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY
- and -
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 35

AWARD NO. 35

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. Bryan K. Kautt, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on July 12, 1978. He was subsequently transferred to the position of Sectionman, and he was occupying this position when he was dismissed from the Carrier's service effective June 23, 1986. The Claimant was dismissed as the result of an investigation which was held on June 13, 1986 in the Trainmaster's Office at Whitefish, Montana. 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 for being under the influence of marijuana while working as a Section Laborer on June 3, 1986.

Findings and Opinion

On May 30, 1986, Special Agent John Sitton received information from other Carrier officials regarding an anonymous source who alleged that the Claimant had been observed using marijuana while on duty for the Carrier. On June 3, 1986, Special Agent Sitton observed the Claimant for approximately 20 to 30 minutes while he was working. Mr. Sitton testified that the Claimant was "extremely nervous" and that "his motor coordination was not quite what it

should be". Mr. Sitton also testified that when he spoke with the Claimant he noticed redness in and around the Claimant's eyes and that the Claimant's voice had an irregular pitch and decibel level. Roadmaster Jerry E. Whetham had also participated in the observation of the Claimant on the morning in question, and he also testified regarding the Claimant's condition. Special Agent Sitton then requested the Claimant to accompany him and Roadmaster Whetham to North Valley Hospital for urinalysis testing.

When the Claimant was asked to produce a urine sample, he was, at first, unable to do so. He was given some time to go to a rest area and drink some coffee, and then he was able to provide the hospital with a urine sample. The Claimant's urine sample was sent to Deaconess Medical Laboratory in Spokane and the results of that test showed positive for marijuana. The test further indicated "specific gravity very high/ng/ml". Special Agent Sitton spoke to Dr. Barclay, the head of the laboratory at Deaconess Hospital, regarding this notation and he testified that he was advised that there had been a lethally excessive amount of salt found in the Claimant's urine sample. There is no evidence to establish how the excessive amount of salt found its way into the Claimant's urine sample. The Claimant testified that it was his understanding, based upon consultation with a Carrier doctor, that the "specific gravity very high/ng/ml" notation is evidence of extreme dehydration. There is no evidence in the record to confirm or dispute the degree to which, if any, the Claimant was in a state of dehydration.

After completion of the urinalysis, Roadmaster Whetham drove the Claimant back to the job site. The Claimant then drove himself back to North Valley Hospital and took a blood test, approximately 15 or 20 minutes after he had taken the urinalysis test. The results of the blood test showed negative for both marijuana (THC) and ethyl alcohol.

A number of the Claimant's co-workers testified that while working with the Claimant on the morning of June 3, 1986 they observed no abnormalities in his behavior.

It is clear that the Carrier dismissed the Claimant from service based upon its determination that he tested positive for marijuana and that he was physically impaired while on duty on the morning of June 3, 1986.

The Claimant and the Organization have raised a number of defenses challenging the Carrier's conclusion.

Initially, the Claimant contends that he was deprived, under Schedule Rule 40, of procedural due process because the Carrier did

not produce the informant (the anonymous source) at the June 13, 1986 investigation. The Board finds this contention lacking in merit for two reasons. First, there is no showing that the Carrier knew the identity of the anonymous phone caller, and therefore there can be no finding that the Carrier failed to produce a critical witness. Secondly, and more importantly, there is no showing that the Carrier considered the information conveyed by the anonymous source as evidence. The record does not reflect that the Carrier found that the Claimant was "smoking marijuana on the job site". Therefore we find no basis to conclude that the Claimant was deprived of any procedural rights as the result of the non-appearance of an unknown witness.

The Claimant has also contended that the contradiction between the blood test results and the urinalysis is sufficient cause for this Board to discount the Carrier's reliance upon the positive results of the urinalysis. The Board disagrees. It is generally recognized that urinalysis testing provides a more sophisticated and reliable method for discovering drug presence while blood testing is ordinarily used to detect the presence of alcohol. Accordingly, it is this Board's opinion that the Carrier could rely upon the results of the urinalysis and conclude that the Claimant was on the job site with marijuana (THC) in his system. The Carrier could also rely upon the objective evidence of two eyewitness observers and conclude that the Claimant was somewhat impaired on the day in question. There is also evidence in the record, through the Claimant's own admission, that he occasionally smoked marijuana while off the job. This fact lends further support to the Carrier's conclusion that the positive finding of the urinalysis was reliable.

The Organization has also contended that there was testimony offered by one of the Claimant's co-workers who stated that it was he who was tightening the bolts in securing the saw to the rail, and that this testimony contradicts Special Agent Sitton who allegedly observed the Claimant performing this act in an impaired manner. The Carrier was entitled to credit the testimony and recollection of Special Agent Sitton; and this Board finds nothing in the record to support a conclusion that Special Agent Sitton was motivated to be untruthful or was not in a position to make the observations that he did. Therefore we reject the Organization's contention that Special Agent Sitton's testimony should not be credited.

This Board is going to deny the claim. This Board has heard a number of cases involving alleged use or "being under the influence of" marijuana on Carrier property. We have, in a number of those cases, in spite of positive urinalyses, sustained claims for reinstatement. However, in this case the Carrier had probable cause to test the Claimant and additionally the Carrier had eyewitness

evidence to establish a degree of impairment. The Claimant came on the job site, as an admitted occasional user of marijuana, knowing full well that as part of his job duties he was required to responsibly and safely operate a 75-100 pound saw, the equipment he was handling on the day in question. Where employees, such as the Claimant, are charged with the responsibility of operating heavy and potentially dangerous equipment, which could, if improperly handled, cause serious injury to themselves and their fellow employees, this Board is of the opinion that such employees must be held to a particularly high standard of conduct. We find that the Claimant failed to meet that standard.

In the Board's view the Carrier had good and sufficient cause to discharge the Claimant based upon substantial evidence in the record of his violation of Rule G. Accordingly, the claim will be denied.*

Award The claim is denied. This Award was signed this 16th day of September 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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