NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	*	
	*	CASE NO. 47
- and -	*	
	*	AWARD NO. 47
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Jon W. Cornell, hereinafter the Claimant, entered the Carrier's service as a Extra Gang Laborer on October 16, 1978. He was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed from the Carrier's service effective November 24, 1987. The Claimant was dismissed as a result of an investigation which was held on November 5, 1987 in the Hooker County Courthouse in Mullen, 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 565. Specifically the Claimant was dismissed for having cocaine present in his system at or about 9:30 a.m. on October 28, 1987 at or near M.P. 256.3 while assigned as a Relief Group # 2 Machine Operator on Brush Cutter BNX 11-0027.

Findings and Opinion

Roadmaster S.T. Heidzig testified that at approximately 9:30 a.m. on October 28, 1987 he observed that the Brush Cutter, which the Claimant was operating, had tipped over in the vicinity of MP 256.3. He testified that the Brush Cutter had been driven onto some fill and that the tipping was caused apparently when the Claimant attempted to back the machine up. The Claimant agreed that the Brush Cutter tipped over when one of the wheels "gave way", and "I stopped the machine I thought I could just back it down the hill, because it was a real good climber". The Claimant further testified that as he backed up a couple of feet, the ground gave way and the Brush Cutter "just tipped over slowly on its side".

As a result of this incident/accident the Claimant was required to provide a urine sample, and he willingly complied with that request from Roadmaster Heidzig.

The urine was provided in the presence of Roadmaster Heidzig at the Mullen Hospital in Mullen, Nebraska. Assistant Special Agent R.K. Harris then was given responsibility for maintaining the "security and chain of custody" of the specimen which was split by a nurse at the hospital so that confirmatory testing could be done.

Test results from the Western Pathology Consultants in Scottsbluff, Nebraska and the American Institute for Drug Detection in Rosemont, Illinois reflected that there was cocaine metabolite in the urine specimens and residues of no other drugs or alcohol were found.

As a result of these findings, the above referred to investigation was held.

Although the Claimant and the Organization implied that the Carrier was not sufficiently diligent in maintaining the security of the urine sample, this Board finds insufficient evidence in the record to support that challenge, and we are further persuaded that the urinalysis was accurate based upon the following colloquy between the Conducting Officer and the Claimant:

"Q. Mr. Cornell, did you hear Mr. Harris' testimony that the results of the analyzing of your urine came back positive with the detection of cocaine in your urine. Is that correct?

A. Yes, sir.

Q. Mr. Cornell, do you take exception to these

reports or to the detection of cocaine in your urine?

A. No, sir.

Q. Mr. Cornell, had you used or ingested cocaine prior to October 28, 1987?

A. Yes, sir.

Q. Mr. Cornell, did you use cocaine on October 28, 1987?

A. No, sir."

Roadmaster Heidzig, Truck Driver Kody A. Sherman and Laborer Douglas M. Young, all of whom were at the scene of the accident, but none of whom actually observed the accident occur, all testified that the Claimant manifested no signs of "being under the influence" of either alcohol or drugs. They testified that he acted normally in the circumstances.

Rule G, Safety Rule 565 provides in relevant part as follows:

"The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited. Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance, or medication, including those prescribed by a doctor that may in any way adversely affect their alertness, coordination, reaction, response or safety."

The Carrier, apparently, determined that the Claimant should be discharged because of the presence of cocaine in his system and presumably because the cocaine was ingested at a time that the Claimant was subject to duty or he could have reasonably understood that he would be subject to duty.

The record evidence before this Board contains no proof as to when the Claimant ingested cocaine, the amounts of cocaine that he ingested, the amount of cocaine remaining in his system, or that the presence of cocaine in his system, in any way, adversely affected his performance.

Additionally, there is not one scintilla of evidence to

establish that the presence of an undetermined trace of cocaine in the Claimant's system had anything to do with the tipping of the Brush Cutter. In fact, the evidence better supports a conclusion that the accident was caused, in part, by the Claimant's inexperience with that particular piece of equipment and, in part, by the fact that the Brush Cutter traversed unstable ground.

In light of these facts, this Board must conclude that the Carrier did not have just cause to discharge the Claimant.

As we have observed in a previous case heard by this Board, Case No. 22, cited for support by the Organization, where there is no showing that a claimant's off-duty use of prohibited substances caused him to jeopardize his safety, the safety of his fellow employees or the safety of the public, this Board is constrained to sustain the claim.

We cannot, however, state with sufficient emphasis how distressed we are by the Claimant's off-duty conduct. The Claimant freely admitted that he engaged in the illegal activity of using cocaine. By this activity he is not only responsible for supporting criminal elements that prey upon all segments of our society, but he potentially jeopardizes the safety and well-being of himself, his fellow employees and the Carrier. We stated above that we were "constrained" to sustain the claim, and we meant that literally. If there was any evidence that could have established a possible link with the Claimant's cocaine use and any impairment on the job we would have readily denied the claim and supported his discharge from service. In reading the Claimant's testimony at the investigation it is obvious that he anticipates that the Carrier, his Organization and this Board will "respect and apply all the rules" which result in the securing of his job; yet by his off-duty conduct, he obviously believes that he has the right to disregard societal rules and laws.

More importantly, the Claimant, by his illicit off-duty conduct, leads this Board to believe that one day he will ingest more cocaine and that that illegal act will result in sufficient impairment so that he will jeopardize the safety and welfare of his fellow employees and the public.

As a machine operator, the Claimant is charged with the immense responsibility of being in control of heavy duty equipment, which equipment is capable of causing severe and fatal injuries if it is mishandled. In light of the Claimant's admission regarding his cocaine usage, we find that the Carrier is justified in disqualifying the Claimant from the Machine Operator position, until he is able to prove for a period not to exceed one (1) year that he is free from his addiction to cocaine.

We also conclude, in light of the Claimant's admitted use of cocaine, that the Carrier has "continuing probable cause" to require the Claimant to submit to chemical dependency testing, on a "random" or "unscheduled" basis, in order to determine whether the Claimant is free from his dependency and whether he may be properly re-qualified as a Machine Operator.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with seniority unimpaired and with retroactive benefit coverage. The Claimant shall be entitled to receive back pay computed at the Trackman's rate for the hours he would have worked had he not been discharged. The Carrier may disqualify the Claimant from his position as a Machine Operator, and require the Claimant to submit to unscheduled chemical dependency testing for a period not to exceed one (1) year. If after one (1) year or any lesser period of time, subject to the Carrier's discretion, the Carrier is persuaded that the Claimant is no longer using prohibited substances, the Claimant's qualifications as a Machine Operator shall be reinstated, consistent with his ability to pass any operating and safety rules testing ordinarily required of the employees in the Maintenance of Way Craft or Class.

This Award was signed this 29th day of January 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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