NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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| BURLINGTON NORTHERN RAILROAD COMPANY | |
| - and - | CASE NO. 60 |
| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES | AWARD NO. 60 |

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. R.O. Frailey, hereinafter the Claimant, entered the Carrier's service as a Laborer on August 9, 1972. He was subsequently promoted to a Machine Operator's position and was occupying that position when he was dismissed from the Carrier's service, effective August 22, 1988.

The Claimant was dismissed as a result of an investigation which was held on August 8, 1988 in the Carrier's offices at 1670 South Henderson Street, Galesburg, Illinois. 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 of the Carrier's Safety Rules applicable to Maintenance of Way employees.

Findings and Opinion

On July 29, 1988 an on-track accident occurred involving Train No. 57, BN Engine No. 7802 being operated by Engineer A.F. Treadway and Brushcutter BNX 110031 which was being operated by the Claimant.

The Claimant, who had track and time permission to be occupying track no. 2, apparently, allowed the head of the counterbalance of the Brushcutter to extend over the adjacent track. As Train No. 57 with right of way on track no. 1 came around a 15 degree curve at approximately 2:00 p.m. on July 29, 1988, Engine No. 7802 collided with the Brushcutter, knocking the head off the Brushcutter and causing some damage to the grab irons and other equipment on the engine.

When supervision arrived on the scene the Claimant, with assistance, was engaged in using a hy-rail vehicle to clear the track.

The Claimant was then requested to submit to a urinalysis in accordance with the Carrier's rules. The Claimant agreed to do so, and both a urine sample and a blood sample were drawn that day at the Mercy Center for Health and Care Services in Aurora, Illinois.

THC, the active chemical ingredient in marijuana, was detected in the Claimant's urine sample; the Claimant's blood sample tested negative for both drugs and alcohol. There is no challenge to the accuracy of the Claimant's urine sample.

The question before this Board does not concern responsibility for the accident. The Claimant was not disciplined because of the accident. He was dismissed because of his alleged violation of Rule G.

Due to the nature of the Claimant's activities regarding the placement of the Brushcutter, this Board concludes that the Carrier had reasonable and probable cause to conduct body fluids testing.

On the other hand, as in numerous cases that this Board has decided in the past, there is no showing that the presence or amount of THC in the Claimant's urine caused or contributed to the accident. Nor is there any evidence of an independent, objective finding that the Claimant was "under the influence" of illegal drugs at the time the accident occurred or when he reported for duty on July 29, 1988.

The Organization Representative is obviously well-aware of the fact that this Board has, on several occasions in the past, overturned discipline based upon facts and circumstances similar to

those here under consideration. In his closing argument the Organization Representative pointed out that "Special Board of Adjustment 925 has always stated that an employee that showed no signs of being under the influence and was able to continue to work like Mr. Frailey was for a period of time after the accident has always been able to return to duty".

We are pleased that the Organization has, apparently, read our previous words of wisdom with such care. We would therefore assume that the Organization fully appreciates and understands this Board's total inability to comprehend why employees, particularly those charged with the operation of heavy and dangerous equipment, would ingest illegal drugs or even sit in a room where they might by some "unfortuitous circumstance" inadvertently be subject to passive inhalation of the smoke from such illegal substances. In a number of our recent decisions, we have observed that the only reason we can discern that one would take such a risk is because that employee is not a "casual" or "recreational" user of drugs, but because that employee has some form of addiction which leads he/she to knowingly violate the laws of society and risk violation of the laws of his/her workplace. Having imputed this knowledge to the Organization, we find that the Organization was obligated to convey this opinion of the Board to its membership. Therefore we assume that the Claimant, who had no reasonable explanation for the presence of THC in his system, knowingly violated statutory laws and risked being in violation of the rules of his Employer. He must have done this because he is addicted to marijuana.

Accordingly, we find that the Carrier did not have just cause to terminate the Claimant's employment because there is no showing that he was in violation of the "under the influence" or "possession while on Company property or subject to duty" standards of Rule G.

However, we conclude that the Carrier is not obligated to maintain the Claimant in active status, as he presents a potential danger to the Carrier, the public and his fellow employees. Therefore, the Claimant may be restored to service, without back pay, if he presents proof to the Carrier that he has tested "clean" for thirty (30) consecutive days, and if he further presents proof that he has successfully completed an approved program of drug rehabilitation. The Carrier shall have the option of affording the Claimant with the services of its Employee Assistance Program and Counselors. However, since the Claimant was not the moving party in identifying his problem or seeking assistance, the Carrier shall have the option of denying the Claimant the use of its Assistance Program and requiring the Claimant, if he seeks reinstatement with seniority unimpaired, to obtain the services of outside testing and rehabilitation facilities.

In the event that the Claimant successfully meets the rehabilitation criteria discussed above, and returns to employment with the Carrier, then the Carrier may conduct body fluids testing of the Claimant on an unscheduled basis for a period not to exceed one (1) year, based upon the premise that the Claimant's previous use of an illegal drug represents ongoing reasonable cause to verify the Claimant's continued successful rehabilitation.

Award: The claim is sustained. The Carrier did not have just cause to terminate the Claimant's employment under Rule G. However, in view of the Claimant's use of an illegal drug and his apparent addiction to same, the testing and rehabilitation requirements, discussed in the above findings, must be met before the Claimant can be reinstated to service with seniority unimpaired, but without back pay.

This Award was signed this 3rd day of November 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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