

**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. 30
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★ AWARD NO. 30
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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. Randy L. Byram, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on June 27, 1979. He was occupying this position when he was dismissed from the Carrier's service effective December 16, 1985. The Claimant was dismissed as a result of an investigation which was held on November 19, 1985 in Gillette, Wyoming. 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 Safety and General Rules for being under the influence of marijuana while working as a Laborer on November 6, 1985.

Findings and Opinion

At or about 8:30 a.m. on November 6, 1985, the Claimant was involved in an accident at his work site. The Claimant was working with Speed Swing Operator Bruce L. Foster and they were attempting to repair the swing cylinder spin at the time that the accident occurred. While both employees were underneath the machine it rolled backwards and the Claimant's head was struck by the drain plug on the differential, which resulted in his head being pinned between the

machine and Mr. Foster's stomach. As a result of the accident was taken to a hospital by his supervisor, Mr. S.T. Heidzig. Xrays were taken, as the Claimant was bleeding from a cut on his head, and ten to eleven stitches were needed to close the cut on the top of the Claimant's head. At or about the same time the Claimant voluntarily took a urinalysis. Mr. Heidzig testified that it is Carrier policy to have employees involved in accidents on the job to undergo urinalysis.

The results of the Claimant's urinalysis, which were received by the Carrier on or about November 11, 1985, showed no alcohol content but did indicate the presence of THC (marijuana). As a result, the instant investigation was convened.

There is no reason to dispute the fact that there was a positive finding of THC in the Claimant's system. It may be that the Claimant directly ingested marijuana or, as the Claimant contended, he may have been exposed to marijuana when others were smoking it in his presence.

There is also no reason to doubt the substantial and corroborative evidence, offered by both the Claimant's and the Carrier's witnesses, to the effect that the Claimant showed no signs of impairment on the date of the accident or on the subsequent dates that he worked prior to his dismissal from service.

The Notice of Dismissal charges the Claimant with "being under the influence of marijuana (THC) while working as Laborer of Regional Construction Gang #1 at Rozet, Wyoming on November 6, 1985". The Carrier found that the Claimant was "under the influence" based upon the "results of your urinalysis test".

The instant case, in terms of arbitral principles, does not differ from Case/Award No. 22 decided by this Board on November 5, 1985. In that case we concluded, in sustaining the claim and in restoring the claimant there to service, that there was no 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. If anything, there is less proof in the instant case that Claimant Byram was in possession of drugs on Carrier property or reported to service under the influence of drugs. Accordingly, we are constrained to sustain the claim.

In Case/Award No. 22 this Board expressed its sensitivity to the Carrier's need to provide a safe work place for its employees and to maintain safe operations so that the public will be ensured that its safety is not being jeopardized by the indiscriminate use of

legally prohibited substances by Carrier employees who are charged with the operation and maintenance of heavy and dangerous equipment. Although the Board is restoring Claimant Byram to service with seniority unimpaired and with pay for time lost, we will require that his service record carry a notation that a positive THC (marijuana) finding was made as a result of his November 6, 1985 urinalysis.

This Board is presently not in possession of sufficient medical data to determine to what extent an individual who tests positive for THC would then be presumed to be "under the influence of marijuana". This Board intends to explore that question because we are extraordinarily concerned about returning employees to service who may, because of their use of drugs even if that use takes place some substantial time prior to their reporting to duty, be impaired in terms of their ability to respond to the needs of their positions.

In the instant circumstances we are sustaining the claim in accordance with the above findings.

Award The claim is sustained.

This Award was signed this 14th day of February 1985 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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