Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28551
THIRD DIVISION Docket No. MW-28940
90-3-89-3-352

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Welder Helper G. Serio for alleged violation of '... Rules and Regulations ... Rule B ... and Rule G ***' on August 1, 1988 was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File MW-88-155/474-40-A).

(2) As a consequence of the violations referred to in Part (1) hereof, the Claimant shall be reinstated with seniority, vacation and all other rights accruing to him unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The operative facts of this case are reasonably straightforward. The Claimant was employed by Carrier as a Welder-Helper. He had seniority in the Maintenance of Way Department dating from July, 1978. During the period from July 15 to August 1, 1988, Claimant was off duty with proper permission. He returned to service on Monday, August 1, 1988, and, during that tour of duty, he was instructed by his Supervisor to submit to a toxicological test in compliance with U.S. Department of Transportation regulations dealing with employees who operate motor vehicles which weigh one and one-half (1 1/2) tons and over. Claimant operated such a Carrier vehicle on a regular basis. Other

similar employees at this same location who also operate vehicles which weigh 1 1/2 tons and over had previously been tested in accordance with these U.S.D.O.T. regulations. Claimant was off duty with permission at the time these other employees were tested. Claimant signed a consent form for the toxicological tests. The results of the tests indicated positive for cannabinoid (marijuana). Thereafter, by letter dated August 9, 1988, Claimant was notified to attend a Hearing on August 16, 1988, to develop facts in connection with an alleged violation of Company Rules "B" and "G" concerning his "alleged use of an illicit drug as indicated by urinalysis taken at Morgan City, Louisiana, during your tour of duty on August 1, 1988, ..." Claimant was present and represented throughout the Hearing. He offered direct testimony and he, and his representative, were permitted to cross-examine Carrier's witness. Subsequently, by letter dated August 19, 1988, Claimant was notified that he was, as a result of the testimony developed at the Hearing, dismissed from service.

Company Rules "B" and "G" read, in pertinent part, as follows:

Rule "B" -

> "Employes must be familiar with and obey all rules and instructions, - -."

Rule "G" -

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

An appeal on behalf of the Claimant was initiated by the Organization and was handled in the usual manner through the grievance procedures on the property. Failing to reach a satisfactory resolution of the matter on the property, the case has come to this Board for final adjudication.

The role of this Board is appellate in nature. We are bound by the record which is developed by the parties during their on-property handling of the dispute. Of particular importance in a discipline case is the Hearing transcript itself. Our Board does not develop facts or evidence; we do not interrogate witnesses. Neither are we permitted to entertain evidence or argument which was not timely handled by and between the parties prior to the listing of the case with this Board.

The foregoing citation of jurisdictional authority is necessary because, in this case, both parties have raised "new evidence" and/or "new argument" issues. The Organization points to Carrier's first time argument in its Ex Parte Submission relative to the remedy portion of the Statement of Claim. The Carrier points to the Organization's Exhibit "A" of its Ex Parte Submission and contends that it post dates the Notice of Intent to file the case with this Board. Both parties are correct in their assertions and both items have been disregarded by the Board.

Upon a review of the proper record, this Board has concluded that Carrier's right to require the toxicological test in question is well founded. While the Organization did initially challenge Carrier's right to make these tests, its Ex Parte Submission acknowledges Carrier's right in this regard but questions the application of formal discipline to those who test positive. We have not, in this case, been presented any probative evidence to support the Organization's argument relative to a practice of withholding employees from service when they test positive and holding them out of service until they test negative. We must, therefore, based upon the record before us, reject that contention.

There can be no doubt about the serious concern over the use of drugs by employees or about the obligation of the Carrier to provide a safe work place for all of its employees or about the right of the Carrier, and the concomitant responsibility of the Organization, to attempt to remove such violators from the service.

The Organization, in this case, raises an argument relative to the chain of custody of the specimen which was provided by Claimant. They point with particular favor to Award No. 1 of Public Law Board No. 4354 in this regard. While we are aware of the necessity of properly protecting specimens, especially in situations which can, and quite often do, result in the termination of employees, and while we are aware of many of the arbitral opinions which have been expressed in this regard, we do not, in the record of this case, find that there is any first-hand indication of failure in the chain of custody of the specimen. In Award No. 1 of PLB 4354, the Claimant testified extensively relative to the apparent and obvious failures in the procedures at the medical facility where the specimen was taken. In the Hearing transcript of this case we do not find a single word of complaint or objection by the Claimant relative to the taking or handling of his specimen. From this record, the Board has no basis on which to question the chain of custody of the specimen. It apparently was properly protected inasmuch as we have no testimony to the contrary.

To be sure, Claimant's representative at the Hearing attempted to make this an issue by his vigorous questioning of Carrier's witness. And, to be sure, Carrier's witness in this case left much to be desired. And, to be sure, Carrier must be aware of its responsibility to present knowledgeable, credible witnesses in this type of situation. This is so because, when a

Claimant testifies that the chain of custody of a specimen is, based upon the Claimant's personal observations, prejudiced or otherwise flawed, Carrier, as the moving party in the action, must support the propriety and validity of the chain of custody of the specimen by credible, knowledgeable witnesses. Here, however, we do not reach that degree of required support because there is no first-hand contention of violation of the chain of custody of the specimen.

Based upon the record in this case, Claimant by his own admission, attended a party on July 30, 1988, where, he says, "I was at a party the following week before I returned to work and a bunch of people there and you could smell it in the air. So I guess that's how it turned up in my urine sample being in a closed house (sic)." When he returned to work on August 1, two days after allegedly attending the party, he tested positive for marijuana. The record reflects that two tests of the urine specimen were made. The first was done by the radio immunoassy method and tested positive. Because the initial test was positive, and, because this type of testing may indeed be less than conclusive, the specimen was retested for confirmation and analysis using the gas chromatography-mass spectrometry method which showed that Claimant's specimen on August 1, two days after he allegedly attended a party and allegedly experienced passive inhalation of marijuana smoke which others were using, contained 26 nanograms/milliliter, an amount well above the 10NGML determined by the gas chromatography-mass spectrometry method as being significant. The report on these two tests was issued over the typewritten signature of James R. Vasser, M.D., and formed the basis of Carrier's action.

It is the Board's determination that there is in this record substantial probative evidence to support the conclusion that Claimant did use marijuana on August 1, 1988. It is not reasonable to conclude that this high level of toxicity (26NGML) would be found two days after an incident of passive inhalation. The more logical conclusion for finding this level of toxicity on August 1 is that the Claimant had actively used the substance prior to the testing. That was the conclusion reached by the Carrier and we concur with it.

Our Board will not substitute its judgment for that of the Carrier. The penalty assessed, while severe, is not arbitrary, capricious or excessive in light of the proven circumstances and evidence as supported by this record.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.