Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28846
THIRD DIVISION Docket No. MW-29476
91-3-90-3-411

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of Mr. M. T. Kenick, Jr. for his '... alleged failure to pass DOT physical examination taken at Pueblo, Colorado on October 30, 1989 while on duty and under pay as a Welder due to the presence of illegal substances in your system....' was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File D-89-92/MW-03-90).

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

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 Claimant worked as a Welder for the Carrier. On October 30, 1989, he was required to take a Department of Transportation Physical. Included in the physical was a drug screen. The urinalysis indicated the presence of 2900 nanograms per milliliter of benzoylecgonine, a cocaine metabolite, codeine in excess of 1000 nanograms per milliliter, and a positive reading of less than 100 nanograms per milliliter for cocaine.

The Claimant was subsequently notified to appear for a formal investigation to determine his responsibility in violating Rule G, prohibiting the use of illegal substances.

This was the second time the Claimant tested positive for an illegal drug. He also had a positive drug screen test in 1986. At that time, he signed a letter of understanding dated June 30, 1986 and was on six months probation. During the first incident, the Claimant was made aware of the Carrier's General Notice and Rules, which included the Alcohol and Drug Policy (revised October, 1985). This policy was attached to the Letter of Understanding and the Employe was counseled through the Carrier's EAP program.

It is not unusual for carriers to require a drug test for employees who have been involved in accidents. This has constituted probable cause. Increasingly, the courts have accepted the transportation industry's prerogatives to set up additional drug testing procedures which help to assure a drug-free environment and the safety of the general public. Often these drug screen tests are part of general physical examinations. These examinations are not only required by the carriers under various circumstances, but, as in this case, they are required by government agencies, such as the Department of Transportation. Such tests are beyond the prerogatives of the Carrier, they are legal requirements.

In the matter before this Board, the Claimant has a previous Rule G violation. When the Claimant was required to take the DOT physical, the drug screen was automatically part of that test. The urinalysis was positive for cocaine metabolites. Barring any inaccuracies, the positive drug test constitutes a second offense for the Claimant. The Organization attempts to discredit the results of the test, in part, by raising the issue of a lost blood test which was completed at the same time as the urinalysis. This Board sees no relevancy between the missing blood test and the charge against the Claimant. A positive urinalysis is sufficient to prove the use of an illegal substance.

The Board is then left with the question of whether or not the Organization raises a legitimate challenge relative to the chain of custody of the urine sample once it left the doctor's office. In arbitration, not unlike litigation, burdens of proof sometime shift from one party to the other. Once the Carrier introduces evidence that the Claimant's urine contained metabolites of an illegal drug they have established usage. If the Organization then raises the issue of improper custody, they raise an affirmative defense. It is their burden to show there is at least some reason to believe an improper chain of custody occurred. They did not in this case. If the Organization came across improprieties in the handling of the urine sample there would have been a reason to request the presence of the lab technician. It would have been appropriate to request such a witness prior to the actual investigation. In lieu of that, they should have at least been prepared to introduce concrete evidence that the sample was mishandled. Otherwise, the Carrier is correct is describing the Organization's attempt to challenge the chain of custody as a "fishing expedition."

The procedure used by the Carrier was consistent with the methods the Carrier had been using. The sample was drawn at the doctor's office and forwarded to the laboratory. It was labeled and sealed in front of the Claimant. Initial test results were confirmed by two additional tests. Appropriate precautions seem to have been taken. In addition, the Carrier had used the same procedure and laboratory for some time. While this isn't absolute proof of infallibility, it is an indication of a certain amount of expertise.

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 25th day of June 1991.

LABOR MEMBER'S DISSENT
TO
AWARD 28846, DOCKET MW-29476
(Referee Zamperini)

This is a dispute that involved the dismissal of an employe for having an illegal substance in his system while on duty. As in all discipline cases and as in the precedent by this Board, it is incumbent on the Carrier to present evidence of probative value to establish the guilt of the employe. Such evidence was not presented by the Carrier and the Organization timely and properly challenged that fact at the Investigation.

To circumvent that principle, the Majority accepted the Carrier's presumption of guilt and held "*** A positive urinalysis is sufficient to prove the use of an illegal substance." The Organization objected to the information supplied on the form and raised numerous questions concerning the test's validity. The Carrier witness could not answer the questions posed by the Organization and the Hearing Officer stonewalled our repeated requests to have a lab technician made available to answer the questions. Hence, the Carrier failed to meet its burden of proving the charge and this claim should have been sustained.

However, the Majority accepted the alleged evidence and then placed the responsibility on the Organization to establish that an impropriety in the test results occurred, i.e., an affirmative defense. The responsibility for proving a charge rests with the Carrier, not with the Organization. The evidence needed to prove

the charge in this case was not presented at the investigation and the Organization properly challenged the lack thereof. The Majority chose to ignore the hundreds of awards that deal with the burden of proof and it is not my intent here to list all those awards. It is quite clear from a reading of this award that it is an anomaly and of no precedential value.

Therefore, I dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 28846, DOCKET MW-29476
(Referee Zamperini)

Organization's Dissent asserts that the Carrier did not establish Claimant's guilt. Yet, the on-the-property record substantiated, with confirming testing, that Claimant had 2900 ng. of Benzoylecgonine, a cocaine metabolite, in his system. Cocaine is an illegal substance!

The Dissent then goes on to complain that the Majority did not consider the:

"...numerous questions concerning the test's validity..."

IN ITS SUBMISSION to this Board, this Organization, for the first time made a number of new assertions concerning Claimant's prior record, his knowledge of the Carrier's Policy and several contentions involving the chain of custody. It now voices its displeasure that such untimely and unsupported pleadings are properly found wanting. This Division, in prior Awards 27081, 28117, 28267, 28268, to list but a few involving this SAME Organization, has consistently noted that such tactics are neither productive nor supportive of the position the Organization may seek to advance.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost