Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29287
Docket No. MW-29409
92-3-90-3-341

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

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

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

(1) The dismissal of Mr. E. Aguirre for his '... alleged second failure to pass the drug screen test due to the presence of cannabinoids (marijuana) in your system on March 17, 1989 ***' was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File D-89-10/MW-16-89).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be paid for all 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 Claimant, a laborer and truck driver, had nine and one-half years of seniority, and had been furloughed since the fall of 1988. On March 17, 1989, the Claimant submitted to a return to duty physical which included an alcohol and drug screen. As a result, the drug screen reflected "positive" for cannabinoids, a marijuana metabolite. The quantitative results were 100 nanograms per milliliter.

Claimant was notified that an Investigation would be held on March 29, 1989. As a result of the Investigation, the Claimant was dismissed effective April 14, 1989.

The Organization argues the Carrier's imposition of discipline in connection with medical testing was in violation of the Agreement.

The Organization contends the Carrier failed to support the test result documents with critical corroborative testimony or evidence because there was no evidence whatsoever to prove that the Claimant's specimen was properly collected, there is no evidence of an unbroken chain of custody, and the Carrier presented no evidence that the procedures used by AnalytiTox were proper. The Carrier notes that alcohol and drug screens are a part of every company physical examination, and the Carrier uses a certified laboratory to conduct the tests.

The Organization maintains the Claimant was unaware that the alleged positive drug test performed in 1987 would be treated as discipline. The Carrier maintains the record reflects that Claimant was well advised of the charges against him. Claimant was aware of Carrier's Alcohol and Drug Policy, and he knew the consequences if he continued to violate the policy.

In our review of the record in this case, we find no substantial basis to overturn the Carrier's disposition. There is no real dispute that the laboratory report was the result of the Claimant's drug screen taken on March 17, 1989.

In this matter no evidence was produced by the Organization that would give substance to their conjectures. Therefore, there is no basis for this Board to reverse the Carrier's determination of guilt. Further, discipline as the result of a return to duty physical is not something new in this industry or on this railroad. See Third Division Awards 27004, 27937.

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 24th day of July 1992.

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENTS
TO
AWARDS 29287, 29289, DOCKETS MW-29409, MW-29431
(Referee DiLauro)

The Dissentor's seven page exposition on what was wrong with Awards 29287 and 29289 may look good, read well and may appear to be raising matters of genuine substance. However, when the Dissent is scrutinized for content with the records before this Board, we find, like the hyperbole of national political convention pontificators, its basis is as ephemeral as the faces and animals a child sees in the clouds.

Concerning these Awards, the following facts of record were pertinent to the Board's disposition:

a. No ISSUE on chain of custody was raised in the hearing or in the on-property correspondence in either of these cases. Perceived deficiencies were created and voiced for the first time in the Organization's Submissions.

b. Both Claimants had previously failed return to duty drug tests and, under Carrier's existing policy, the second violation subjected them to dismissal from service.

c. The test results substantiated that Claimants had 100ng of cannabinoids (Award 29287) and 630ng of benzoylecgonine (Award 29289) in their systems at the time of their test.

Concerning Item A above, this Board, in Award 28846, involving the SAME PARTIES and the same issue noted:

> "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...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...they should have at least been prepared to introduce concrete evidence that the sample was mishandled. Otherwise, the

Carrier is correct in describing the Organization's attempt to challenge the chain of custody as a 'fishing expedition.'"

Next, the Dissentor quotes from, "Alcohol and Other Drugs, Issues in Arbitration" by the Denenbergs. While the presentation in the book is interesting and wide ranging, the quote at page 2 of the Dissent states:

"...there may be a disagreement..." (Emphasis added)

In order to have a "disagreement" the matter must be raised and joined as a disputed issue. In railroad arbitration, such a "disagreement" must be made and supported in the on-property handling. As noted above, no chain of custody argument was made on the property in these cases. In fact the two arguments made by the Organization on the property, to wit: that Claimants were ignorant of Carrier's policy and that Claimants were not under the rules since they had not returned to active service, are given the attention they deserve in these Awards.

Finally, while this book is a good general overview of alcohol and drug related arbitration, it devotes less that seven pages to the railroad arbitration process and refers to eight railroad arbitration decisions (all but one predate the issuance of FRA regulations) in its 355 pages and hundreds of outside industry arbitration citations. More pertinent to the matter before this Board would be Third Division Awards 28846, 28118, 27004 and 26475 involving similar disputes with the Same Parties and Third Division Awards 28267, 28117 and 27081 in which this Board has commented upon this Organization's practice in similar matters of introducing

new argument and material in their submissions. In our response to the Organization's Dissent to Award 28846, quoted above, we noted:

> "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."

We cannot respond to AAA Case No. 72 300 002 91 since we do not know the parties or the issues involved. However, several arbitration decisions have been rendered in railroad arbitration where a legitimate and proper chain of custody argument has been made an issue.

Rather than being "anomalies" these Awards are consistent with this industry's precedent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost

LABOR MEMBER'S DISSENT
TO
AWARDS 29287 AND 29289
(Referee DiLauro)

These disputes are another in a series of cases involving this Carrier and its Drug Testing Policy. As in Award 28846, Docket Number MW-29476 (Zamperini), they involve the dismissal of employes for allegedly having an illegal substance in their system. The Claimants herein were returning to service following an extended furlough due to force reduction and were required to submit to a return-to-work physical that included a urine drug screen. The findings in these cases are just plain erroneous.

The Majority stated in its findings in both cases that:

> "In our review of the record in this case, we find no substantial basis to overturn the Carrier's disposition. There is no real dispute that the laboratory report was the result of the Claimant's drug screen taken on March 17, 1989."

The Organization took the position, at the investigations, that the Carrier failed to support its position, with the presentation of substantial probative evidence, i.e., an unbroken chain of custody report to verify that the sample tested was the Claimants'. The Carrier failed to present the chain of custody, if one existed, into the record of either hearing. As an arbitral principle the assurance of an unbroken chain of custody is a fundamental prerequisite to the validity of any test result.

In order to satisfy the demands of arbitration, testing services must adhere to the standards of "forensic toxicology" much like what is done in law enforcement. This principle is recognized throughout all industries in this country as stated in "Alcohol and Other Drugs, Issues In Arbitration:

> "As a threshold matter, before the accuracy of a laboratory result or the specific analytical methods are considered, there may be a disagreement in arbitration about the integrity of the urine sample at issue. Did it emanate from the grievant charged with misconduct? Was it properly handled and secured during all stages of the test procedure? ***" [1]

A secure chain of custody starts with witnessed, verified and documented sample collection. This is merely the beginning of the process, however. Each and every person who comes in contact with the sample must verify contact by signing the chain of custody document and list the time, date and condition of the sample. Proof must be offered where the sample was kept prior to testing and the identity of those handling the sample. Listing of analysis to be performed, time and date of completion and other pertinent information relating to the condition and disposition of the sample is required. Other pertinent information, such as type of container and numbered or coded evidence tape, must be verified in order to preclude valid argument that the sample had been tampered with. In complying with the guidelines listed above, the Carrier

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[1] "Alcohol And Other Drugs", Tia Schneider Denenberg, R. V. Denenberg, Page 189.

in these cases may have been able to prove substantively that the samples tested in these cases were actually the Claimants. We shall never know because the Carrier failed to present a mere scintilla of evidence that could reasonably be construed as a chain of custody in either case. Therefore, on what basis the Majority grounded its opinion in this case is simply a mystery.

How could the Majority find the Carrier met its burden of proof when the chain of custody documents were never submitted into the record of the hearing in these cases? Apparently, the Majority in these cases has taken it upon themselves to overturn decades of precedent from not only the NRAB, but throughout the industry, wherein the moving party must meet its burden through the presentation of substantial evidence. The Opinion of the Majority in these cases now replaces that burden with speculation, assertion and conjecture. This Board has held in awards too numerous to cite that speculation, assertion and conjecture are not proof and cannot be used to support the moving parties position.

The Majority compounded its error when it asserted:

> "In this matter no evidence was produced by the Organization that would give substance to their conjectures. ***"

As a principle of American jurisprudence, the accused is innocent until proven guilty. Inasmuch as claimants in drug

testing cases face workplace "capital punishment" on the basis of the lab test result, the Carrier has the burden of producing the key element, i.e. the chain of custody. To accept the Majority's findings in these cases is like an accused murderer being forced to prove he did not commit the crime. At what point in the history of this Board did the principles of arbitration require that the Organization bare the burden of proof in a discipline matter? This Board has consistently held that in this industry, as well as in industries nationwide, the burden of proof in disciplinary cases is entirely upon the employer; there must be convincing evidence, not merely suspicion, to establish the guilt of the employe. In these two cases the Carrier, with the blessings of the Majority, has relied on surmise and suspicion rather than probative evidence to support its conclusion of the Claimants guilt. As in all discipline cases and as in the precedent of 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 investigations. In marked contrast to the findings in these cases is the well-reasoned holdings of the Majority in Award 28761 (Lieberman), which stated:

> "The Board is keenly aware of the implications of drug use in this industry, in particular, and of the efforts being made to eliminate the safety hazards inherent in that problem, both as they affect employees and the public. It is also clear that dismissal for drug use involves moral turpitude and could stigmatize an individual for life, jeopardizing all future employment. Thus, *the standards of proof required to dismiss an*

> *"employe for substance abuse are high. In this dispute the record, insofar as the burden of proof by Carrier, is woefully inadequate to establish Claimant's guilt.* Wholly aside from the questions raised with respect to the integrity of the chain of custody, the basic test results are in serious doubt. *** In this dispute the documentation is meager and provides no information as to the tests used or any confirmation of the findings; both of those elements are elementary requirements for any valid conclusions. On this score alone, Carrier has not met its burden of proof to validate its conclusion regarding Claimant and the ultimate penalty of dismissal."

The principle cited above is not confined to arbitration in the railroad industry, but has been equally applied in arbitration cases outside the railroad industry. We invite attention to AAA Case No. 72 300 0002 91, which held:

> "Grievant signed the consent form, the witness form, and the chain-of-custody form on April 27, 1990. However, he testified without contradiction that except for the first few times he submitted to the test, he did not observe the sample being poured into a bottle, sealed, labeled, and packaged for shipping. Grievant said that he was allowed to sign the forms and leave. There is no record evidence to the contrary. Although CompuChem's Chain of Custody and Collection Instructions form states that the person collecting the specimen should complete all paperwork and seal the specimen in its shipping container in front of the donor, Grievant's unrebutted testimony establishes that such procedures were not always followed. This raises significant questions about the chain of custody here.
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> * * *
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> Although Dr. Harkey testified that she saw no problems with the chain-of-custody form contained in the 'litigation package,' it has one apparent deficiency. Dr. Harkey discussed the importance of the chain of custody, describing it as a paper trail 'designed to establish, from the time the sample was collected until the time the sample arrived at the laboratory, that that sample was in a particular person's custody and for what

"reason that person had the sample in their custody.'[19] Although the form specifically requires the signature and printed name of each individual who releases or receives the specimen at every link in the chain of custody, the form used in this case does not include the signature of either the person who received the sample for Airborne Express or the person who released it from there. Indeed, the words 'Airborne Express' in the 'received by' box appear to be in the handwriting of Nurse Reichard. The 'released by' box is marked only with a rubber stamp and some handwritten numbers. The form does not include the required information, and nothing in the 'litigation package' bridges that evidentiary gap. While this is perhaps a minor point, it is one more strike against the unauthenticated hearsay relied on by the Company.

* * *

For the above reasons it is my conclusion that the documentary evidence submitted and relied on by the Company is fatally flawed and thus unreliable. As there is no other evidence in this record that Grievant continued to use cocaine, I find that the Company has failed to meet its burden of proving by clear and convincing evidence that Grievant did so. It follows that the Company did not have just cause for discharging Grievant and thereby violated the parties' Agreement. ***

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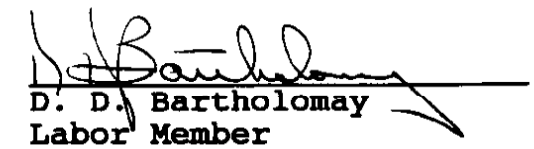
[19] Reporter's Transcript, Volume II, 20."

To circumvent the principles cited above, the Majority accepted the Carrier's presumption of guilt absent any probative evidence whatsoever. Hence, the Carrier failed to meet its burden of proving the charge and this claim should have been sustained. The responsibility for proving a charge rests with the Carrier, not with the Organization. The evidence needed to prove the charges in these cases 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 of those awards. It is quite clear from a reading of these awards that they are anomalies and of no precedential value. May history never recall the Majority's errors found in these cases and, if it does, such should be taken as a lesson never to be repeated.

Therefore, I dissent.

Respectfully submitted,



D. D. Bartholomay
Labor Member