Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36033
Docket No. MW-35810
02-3-99-3-807

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. R. D. Martin for alleged violation of Union Pacific Operating Rule 1.6 of the General Code of Operating Rules (effective April 10, 1994), Union Pacific Railroad Drug and Alcohol Policy and Procedures (effective March 1, 1997) and the Transportation Code of Federal Regulations Title 49 Part 382, Section 211 as a result of an investigation July 1, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File BMWE M8-MKT154/1161091 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. D. Martin shall have the charges leveled against him cleared from his record, he shall be reinstated with all seniority restored and compensated for all wage loss."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant commenced employment with the Carrier on April 24, 1994. Thereafter, the Claimant established seniority in the Maintenance of Way Track Subdepartment as an Assistant Foreman, and was assigned and working as such in Hillsboro, Texas, under the supervision of Manager Track Maintenance L. Alcala, when this dispute arose. The Claimant tested positive on a random drug test administered on October 22, 1997, for which he was initially dismissed from the Carrier's service. Following participation in the Carrier's Employee Assistance Program, however, he was reinstated on a "last chance basis," on condition that he submit to random testing for drugs and alcohol. After he tested negative in unannounced tests on February 16 and April 17, he was tested again on May 12, 1998. The test collector took no exception to the Claimant's sample but, after receiving a lab report refusing to test the sample due to reported lack of Creatine, the Carrier filed a Notice of Charge dated May 21, instructing the Claimant to attend an Investigation on June 10, 1998 into alleged violation of Section IX of the Carrier's Drug and Alcohol Policy, namely that he had tampered with or submitted an adulterated urine sample.

On or about June 15 and 16, 1998, the Carrier notified the General Chairman and the Claimant that the Hearing would be conducted again because the tape recorder had malfunctioned during the June 10, 1998 Hearing. The Claimant and the Organization participated under protest in the reconvened Hearing of June 29, 1998. Thereafter, the Carrier notified the Claimant that he had been found guilty as charged and assessed a Level 5 Upgrade penalty of permanent dismissal from employment.

Careful review of the record shows that there was no "double jeopardy" or any other demonstrated denial of the Claimant's contractual right to a full and fair Investigative Hearing, notwithstanding the mechanical glitch with the tape recorder. Turning to the merits of the claim, however, the Board is persuaded that the Carrier failed to meet its evidentiary burden of proving the Claimant guilty as charged by at least a preponderance of the record evidence. In that connection, the Organization made out a persuasive showing that the fact pattern presented on the record of the present case is indistinguishable from the matter decided by First Division Award 24789. In that case, which in every material element is squarely on all fours with the matter now before us, the Board held as follows:

> "The only evidence in support of the finding made on the property that Claimant tampered with his sample was the lab report that the sample contained no Creatinine and was not urine. Thus, the inference from the lab report is not that Claimant adulterated his sample, or even that he diluted it with water. Rather, the inference is that Claimant substituted something else for his urine in the collection cup.
>
> The laboratories that analyze urine specimens for DOT regulated drug tests are subject to safeguards designed to ensure the accuracy of their results. In the typical case where a claimant's denial of drug use or other

misconduct is weighed against the lab report, the presumed accuracy of the report will result in this Board deferring to a decision reached on the property not to credit the claimant's denial.

The instant case, however, is far from typical. The drug test at issue was random. Claimant did not know he was to be tested until 15 to 20 minutes before he actually voided the specimen. During that period, Claimant had a cup of coffee, completed the necessary paper work and was accompanied into the bathroom by the specimen collector.

The collector testified that all mandated safeguards to ensure the integrity of the sample were followed. Thus, Claimant was precluded from carrying any coats or jackets which could have concealed a substance to be substituted for his urine. The toilet water was dyed blue to prevent its use and the collection area was arranged to prevent Claimant from having access to any possible adulterant. The collector testified that he was immediately on the other side of the toilet stall partition and listened for the sounds of urination. He took no exception to the sample. He took the temperature of the sample within four minutes of its production and found the temperature to be within the acceptable range, i.e., between 90 and 100 degrees Fahrenheit. The collector also testified that Claimant was not acting in any way abnormally at the time of the collection.

Thus, to credit the inference from the lab report that Claimant provided a sample that was not urine, one must conclude that, with no advance notice, Claimant procured a substance to use in place of his own urine and concealed that substance when he was in the presence of the collector, that the substance looked like urine and had the temperature of urine, and that Claimant placed the substance in the collection cup in a manner that conveyed to the collector who was listening on the other side of the partition the sounds of urination. Carrier has not suggested any theory as to how this could have occurred. The likelihood that this occurred is so minuscule, that to find that Carrier proved the Claimant's guilt by substantial evidence based solely on a single lab report concerning a single metabolite would go way beyond recognition that the lab reports are generally highly accurate and reliable. There is nothing to corroborate the lab's suggestion that the sample was not urine and everything to contradict it. To find that Carrier's reliance solely on the lab report in this case proved Claimant's guilt would be tantamount to finding that the lab report was infallible."

The analysis and conclusion of First Division Award 24789 are not patently erroneous, the reported facts are virtually identical with the record facts in the present case and we find no basis for reaching a contrary result in the case before us. For all of

the reasons set forth in First Division Award 24789, supra, and confining the result to the specific facts of record, this claim is sustained with compensatory damages "for wage loss, if any suffered," in accordance with Rule 12 (e).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of May, 2002.

Carrier Members' Dissent
to
Third Division Award 36033; Docket MW-35810

(Referee Nancy F. Eischen)

The Majority cites a lengthy portion of First Division Award 24789, finds that the fact pattern there is squarely on all fours with the instant dispute, and sustains the claim. The Award indicates no independent analysis of the issue.

Unfortunately, the Majority failed to realize that the conclusions found in Award 24789 constitute the exception to those reached by virtually every other arbitrator that has considered the same issue and which is squarely on all fours with those found here and in Award 24789. See, for example, Third Division Award 36039 (citing nine additional Awards) and 36040. These Awards are but two of many which have established the principle that where the evidence shows that there were no abnormalities in the collection process, or with respect to the chain of custody from the time of collection through the testing lab's analysis of the specimen, the burden of proof is upon the Claimant to establish a reason that would explain the result. The Claimant had no explanation at all.

In essence, the Majority was given the choice of relying upon the Rule or its exception and, for no apparent reason, opted to rely upon the exception. What is no less distressing is that the Majority has returned to service an employee who failed to provide a negative drug test result twice in seven months. The claim should have been denied.

M W Fingerhut
Martin W. Fingerhut

Michael C. Lesnik
Michael C. Lesnik

P V Varga
Paul V. Varga

May 21, 2002

SERIAL NO. 389

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 36033

DOCKET NO. MW-35810

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Union Pacific Railroad Company (former Missouri (Pacific Railroad Company)

On May 21, 2002, the Third Division of the National Railroad Adjustment Board, with Nancy Faircloth Eischen sitting as the Neutral Referee, entered its Award 36033 in Docket MW-35810. Award 36033 sustained the claim seeking the Claimant's reinstatement to employment, clearance of the charges from his record, restoration of seniority and compensation for all lost wages.

Following receipt of Award 36033, the Carrier made timely application for an Interpretation, requesting answers to the following questions:

"1. Does Award 36033 stand for the position that an accredited drug lab report of substitution or adulteration may not, by itself, be 'substantial evidence' used to support discipline even though the facts show: (1) all FRA collection chain-of-custody lab procedures have been followed, (2) there was opportunity and motive to cheat; and, (3) theories were presented on how cheating could occur? If the award does not stand for that proposition, what specifically in the facts of the case merited a sustaining award?

2. Should the Claimant be returned to service, what is his status concerning UPGRADE and follow-up testing?"

The Railway Labor Act permits parties to request Interpretation of Board rulings. 45 U.S.C. § 153, First (m). It is well established, however, that once the Board

rules on an Award, there is no longer a continuing dispute between the parties. Transportation Communications International Union v. CSX Transportation, Inc., 30 F.3d 903, 907 (7th Cir. 1994). Thus, 45 U.S.C. § 153, First (m) does not grant the Board authority to reconsider, alter, or modify the Award; it may only interpret the Award. Id.

Careful consideration of the Carrier's written Submission in support of its position regarding Question No. 1, supra, reveals a transparent effort to relitigate the merits of the case the Board decided against the Carrier in Award 36033. Under the guise of a request for an Interpretation, the Carrier manifestly seeks to persuade the Board to reverse its sustaining decision in Award 36033 and re-issue a denial decision. In that connection, the Carrier urges that we should "interpret" Award 36033 to produce the opposite of the result we intended; ostensibly to obtain consistency with Award 36039, also issued on May 21, 2002, wherein the Board, sitting with a different Referee, denied a different claim by a different employee under a different set of facts and circumstances.

We must decline the Carrier's invitation to reverse our decision in Award 36033. Our response to Question No. 1, supra, is to direct the attention of the Parties to the last sentence of Award 36033, wherein we emphasized that decisions in this type of case are sui generis.

As for Question No. 2, our intent in Award 36033 is to restore the Claimant to the same follow-up testing and UPGRADE status he had prior to the termination of his employment which was the subject of our decision in Award 36033.

Referee Nancy F. Eischen who sat with the Division as a neutral member when Award 36033 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2003.