AWARD NO. 6
CASE NO. 6

PUBLIC LAW BOARD NO. 4187

PARTIES) BROTHERHOOD OF RAILROAD SIGNALMEN
TO)
DISPUTE) NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"An appeal on behalf of Signalman M. T. Daeges to remove the discipline of dismissal assessed as a result of the findings of an investigation held on October 2, 1986." (Carrier File: SG-STL-83-16; BRS File: 7108-NW)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

On February 25, 1986 Claimant underwent a routine return-to-service physical examination following an absence from work as a result of personal injury. A part of the physical examination included a drug screen urinalysis test. The Claimant tested positive for marijuana. He was therefore withheld from service pursuant to provisions of company policy on such matters which provides for employees to be withheld from service when they test positive for drugs and that employees so withheld from service would have 45 days in which to either elect to enter Carrier's Drug and Alcohol Rehabilitation Program (DARS) or submit a negative retest.

Formal notification of the test results was given to Claimant by letter from Carrier's Medical Director on March 18, 1986. This letter read as follows:

"A drug screen urinalysis conducted as part of your recent physical examination was positive for marijuana. The Company's medical policy forbids the active employment of persons who are dependent upon or use drugs which may impair sensory, mental, or physical functions. Thus, I cannot permit you to return to service at this time.

In accordance with Company policy, you are instructed to rid your system of marijuana and other prohibited drugs and to provide a negative urine sample at a medical facility to which you have been referred by the Company, within 45 days of the date of this letter. If you fail to comply with these instructions, you will be subject to dismissal.

> If you feel that you have a physical or psychological dependency on marijuana or other drugs, I urge you to seek help from one of our DARS counselors. If the DARS counselor determines that you are addicted, you may elect to enter the DARS program. If you enter the DARS program, you will not be required to provide a negative urine sample until 5 working days after you complete or leave the DARS program. A list giving the names and telephone numbers of our DARS counselors is enclosed."

When Claimant failed to be in compliance with instructions contained in the company policy and as otherwise set forth in the above letter from the Medical Director, he was directed to report for formal investigatory hearing by notice of charge dated June 5, 1986. Following the company hearing, which was not held until October 2, 1986 as the result of numerous postponements, Claimant was advised by letter dated October 10, 1986 that he was dismissed from all service of the Carrier.

The transcript of hearing, including Claimant's own statements, support the conclusion that he was knowledgeable of company operating and safety rules against the use of drugs or intoxicants, and of his obligations under Carrier's medical policy. He testified that he was aware that when he went to take a return to work physical examination that he would be required to take a drug urinalysis test and to provide a negative result of such test in order to be permitted to return to work. Thus, that Claimant would urge that he had not personally received copy of letters which the Carrier states had been sent to the home address of each of its employees under date of February 12, 1985 and August 1, 1985 regarding the company's medical policy poses an interesting technical question, but does not serve to excuse Claimant's personal knowledge of the drug testing program.

Even if it was to be assumed, arguendo, that Claimant had not been personally provided copy of the company policy, the fact remains he was duly informed of the policy and program in the letter he had received by certified mail from Carrier's Medical Director, supra. He offered no challenge, protest, or inquiry regarding such letter and the need to be in compliance with the company policy before he could be returned to service. Instead, Claimant proceeded to follow the dictates of such policy and instructions by offering several urine samples for analysis, albeit they continued to test positive for marijuana.

The two aforementioned Carrier letters to its employees read as follows:

> "February 12, 1985
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> To All Employees:
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> Our general policy and rules provide for the dismissal of employees who report for duty under the influence of drugs or alcohol or who use or possess such substances while on duty. They continue in full force and effect.

In addition, our medical policy will not allow the active employment of those who depend upon or use drugs which may impair sensory, mental or physical functions. All company physical examinations now include a drug screen urinalysis. An employee with a positive drug screen will not be permitted to perform service until a negative retest. This is a medical action aimed at those who represent a threat to their own safety or that of their fellow employees and the general public.

Employees withheld from service under this medical policy are not subject to discipline. However, failure to provide a prompt negative retest will result in a reassessment of their status.

Our Alcohol Rehabilitation Service counselors are available to all employees who feel they may have any problem in complying with this policy."

"August 1, 1985

To All Employees:

Norfolk Southern Corporation and its railroad subsidiaries ('the Company') have always had a strong commitment to their employees and to the public to provide a safe work environment. The business of railroading requires that employees meet the highest standards of safety and performance. Accordingly, the Company has established a clear policy on the use of drugs. Our goal is to maintain a work environment that is free from the effects of prohibited drugs.

While the Company has no intention of intruding into the private lives of employees, involvement with drugs off the job eventually takes its toll on job performance and employee safety. Our concern is that employees report to work in condition to perform their duties safely and efficiently, for the sake of their fellow workers and the general public, as well as their own. The presence of prohibited drugs on the job and the influence of such substances on employees during working hours are inconsistent with this objective.

The Company's policy is clearly spelled out in the attachment to this letter. Please carefully review it. We strongly encourage any employee with a drug problem promptly contact one of our Drug and Alcohol Rehabilitation Service (DARS) counselors."

As concerns the DARS program, the record reveals that when the Medical Director advised Claimant that another urine sample he

had given had also tested positive for marijuana, he reminded Claimant about the opportunity for participation in the DARS program. The Claimant did not avail himself of such opportunity and in this regard, when asked at the company hearing as to why he did not seek help or assistance from the DARS counselors, the Claimant merely responded: "Because I don't need counseling."

It is clearly evident from testimony adduced at the company hearing that Claimant was afforded opportunity to demonstrate that he was physically fit for his job and free of prohibited drugs, or to have voluntarily entered the DARS program. He failed to do so. He may not now properly maintain that he was drug free; the Carrier tests were invalid; or, a false positive test could have resulted from his use of over-the-counter drugs, i.e., Tylenol 3, ADVIL, and antihistamines, which drugs Claimant says his personal physician had prescribed at that time for arthritis pain. If he had valid reason to controvert the test results and the test control procedures, he should have voiced those beliefs in a timely and appropriate manner.

As the Carrier states in its submission to this Board, drug and alcohol abuse in the railroad industry is a problem of tremendous magnitude and public awareness and concern about this problem is evidenced by the recent promulgation of the Rule for Control of Alcohol and Drug Use in Railroad Operations by the Federal Railroad Administration.

Although the FRA Rule does not have direct application to this situation, it is significant that the FRA, in Subpart B - Prohibitions, 219.101(c), stated:

> "(c) Railroad rules. Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes."

This Board likewise finds worthy of note the Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, in Railway Labor Executives Association v. Norfolk and Western Railway (No. 86 C 20646) (January 30, 1987), in denying RLEA's petition for a preliminary injunction to enjoin Carrier's imposition of the drug screen urinalysis as part of its routine medical examinations, and granting Carrier summary judgment on the grounds that the RLEA action involved a "minor dispute" rather than a "major dispute" under the Railway Labor Act. Amongst other things, the court said the following:

> "N&W's right to require medical examinations is clearly an established practice recognized by the parties to the collective bargaining agreement. The Unions admit that these examinations are part of the agreement between the parties, and are governed by rules unilaterally promulgated by N&W. They have never objected to N&W's requirement of a periodic physical examination of employees which includes a urinalysis; nor have they objected to

any other changes in the battery of tests used by N&W in its physical examinations.

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Thus, the issue for the court is whether N&W's use of an employee's urine sample to conduct an additional test to determine his fitness for work is arguably based on the contract between the parties. The court finds that the record supports N&W's claim that inclusion of this second component to the standard urinalysis is authorized by the past practices of the parties. The Unions have always accorded N&W complete authority to determine the appropriate tests for its medical examinations. This new test is not such an extreme departure from the prior tests conducted in the course of routine medical examinations that N&W should have to engage in collective bargaining over the issue before it can implement it. Therefore, under the facts of this case, the court concludes that N&W's allegation that the parties' existing agreement permits this new test cannot be characterized as frivolous.

The Unions argue that N&W's addition of the drug screen test to the urinalysis already conducted in the course of a routine medical examination represents a change in the manner in which N&W detects violations of Rule G, the safety rule prohibiting use of drugs by active employees. See supra note 2. They assert that this test is a change in the working conditions because, prior to this time, N&W's detection of Rule G violations was limited to observations by supervisory personnel. The Unions rely principally on a district court case, Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., 620 F. Supp. 163 (D. Mont. 1985), appeal pending, No. 85-4138 (9th Cir. argued July 8, 1986) ('BLE I'), in support of this argument. In BLE I, the Burlington Northern ('BN') unilaterally imposed a program designed to detect the use of on-duty intoxicants. Prior to May of 1984, BN relied primarily on sensory observations of supervisory personnel to detect Rule G violations. In May of 1984, BN intensified its efforts to detect these violations by adopting a new surveillance-search program based primarily on the use of dogs to detect the presence of drugs. Employees were subjected to 'dog sniffs' on a random basis. Failure to submit to a search after a positive dog sniff resulted in dismissal for violation of Rule G. BLE I, 620 F. Supp. at 166-67.

The District Court held that BN's adoption of the policy was a major dispute, and enjoined BN from enforcing the policy. It rejected BN's argument that methods of enforcing Rule G were not subject to the collective bargaining agreement . . . . It found that addition of the dog sniff test changed the working relationship of the

parties because it permitted random searches without cause, while the prior method had limited searches to those based on 'modicum' of evidence. Id., 620 F. Supp. at 171-72.

The plaintiffs in BLE I also objected to BN's implementation of a mandatory urine-testing policy. In a separate opinion, the same court held that BN could not utilize drug screen urinalyses on a random basis to detect Rule G violations, but it could require a urinalysis test when an employee is believed to have violated an operating rule violation. The latter circumstance is 'arguably justified' by the contract, and involves a minor dispute subject to the exclusive jurisdiction of the NRAB. Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., 620 F. Supp. 173, 175 (D. Mont. 1985)('BLE II').

In contrast to the dog sniffs in BLE I, N&W has not made any unilateral changes in its enforcement of Rule G. It still relies on sensory observations to detect violations of Rule G. The record before the court does not support the Unions' argument that the medical policy was implemented in order to detect Rule G violations, and not to ensure an employee's fitness for the job. 8/ Although Rule G and the new medical policy have a similar objective (elimination of drug use among employees), infractions of the policy and the Rule produce much different results. If an employee violates Rule G, he is subject to immediate dismissal. In contrast, if an employee's drug test reveals a positive presence of drugs, the employee is given the option of entering the DARS program or providing a drug-free urine sample within 45 days of the negative test results. Unlike Rule G, the drug screen does not punish an employee for using drugs; it merely forbids him from reporting to work until he can demonstrate that his system is drug-free. Under the new medical policy, the examinations are not random searches of employees; they are conducted in the same manner and with similar frequency as the medical examinations in the past. Accordingly, the court finds that the fact that the medical policy contains a similar objective to Rule G does not undermine N&S's (sic) defense that this urinalysis testing is supported by the parties' prior accepted conduct with respect to medical examinations. 9/

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[T]his court . . . . finds that N&W's addition of the drug test to its urinalysis test in all physical examinations is 'arguably justified[']' by the past practices of the parties. The policy thus involves a minor dispute between the Union and N&W. 10/"

In the circumstances of record, it must be concluded that the

Carrier testing procedure is a proper and reasonable exercise of rights in an employee-employer relationship in providing for the safe conduct of business, and that the Carrier had just cause to dismiss Claimant for his failure to be in compliance with those rules and instructions that prohibit active employment of those who depend upon or use drugs which may impair sensory, mental or physical functions.

AWARD:

Claim denied.

Robert E. Peterson, Chairman
and Neutral Member

W. L. Allman, Jr.
Carrier Member

V. M. Speakman, Jr.
Organization Member

Roanoke, VA
July 31, 1987