

Proceedings Before Public Law Board 4354

Award No. 1
Case No. 1164-W

Parties to Dispute:

The United Transportation Union
The Chicago and North Western Transportation Company

Statement of Claim:

Claim of Trainman D. L. Hansen, Central Division, for reinstatement to the services of the Transportation Company, with vacation and seniority rights unimpaired, in addition to the payment of any and all health and welfare benefits until reinstated, and that he be compensated for any and all lost time, including time spent attending an investigation held on September 2, 1986 on Clinton, Iowa. Claimant was charged with an alleged responsibility for his violation of Rule G while he was employed as Trainman on Extra 874 East, EMGCA, on duty 10:45 a.m., July 28, 1986 at Marshalltown, Iowa. Request and claim based upon the provisions of Road Rule 83 of the applicable schedule.

Findings:

This Board upon the whole record and all the evidence, finds that:

The Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

Claimant was dismissed from service, after investigation, for "violation of Rule G while you were employed as Trainman on Extra 874 East EMGCA on duty 11:45 a.m. July 23, 1986 at Marshalltown, Iowa." The circumstances surrounding the Claimant's dismissal are as follows. On July 23, 1986, Claimant was employed as the Head Brakeman on the train identified in the Statement of Claim and Dismissal Notice. The Claimant, the conductor and the rear brakeman, for some reason, failed to place back in the proper position a derail and also did not properly align a main line switch after completion of their station work at Beverly, Ohio. This failure gave the Carrier reasonable cause to test the crew for drug and alcohol abuse under Federal Railroad Administration Regulations. In accordance with these regulations Claimant was directed to provide a urine sample, which subsequently showed positive for marijuana. Consequently, the Claimant was directed to attend the formal investigation referred to herein and subsequently was dismissed from service.

The Carrier maintains that at the hearing it was determined that the urine sample was obtained and tested in accordance with the Federal Railroad Administration Regulations. These same regulations permit a presumption of impairment as a result of a positive urine test. Since the Carrier's revised Rule G prohibits being under the influence of drugs while on duty and also the illegal use of drugs while off duty, the Carrier maintains that it was reasonable to conclude that the Claimant was under the influence of marijuana and had used it either on or off duty. Under these circumstances it is the Carrier's conclusion that the discipline assessed was warranted.

The Organization raised a number of objections to the procedures leading to the dismissal of the Claimant, the principal ones of which will be summarized here and addressed under the forthcoming Opinion of the Board. These objections were as follows:

- 1) The Carrier's refusal to have both an Organization representative and a private attorney represent the Claimant at the investigation hearing.
- 2) The dismissal notice was issued under the date of September 26, 1986, even though the record was not complete until October 26, 1986.
- 3) The Carrier changed Rule G to also apply to off-duty use of drugs without negotiating with the Organization.
- 4) Questions with respect to the testing procedures used and the chain of custody of the urine specimen.
- 5) The fact that the Claimant requested that a blood sample be taken at the same time that he provided the urine specimen, but the tests on the blood sample were not for the same drugs as those that were tested with the urine sample. Claimant independently had a urine test taken the day following the test administered under the Company's direction and the findings were negative for marijuana. This independent test was presumably not given any consideration by the Carrier.

Opinion of the Board:

The Board does not feel the Claimant's rights were prejudiced by the hearing officer's refusal to permit both an Organization representative and a private attorney to represent the Claimant at the formal investigation hearing. The hearing officer ruled that the Claimant had the choice of which one would be designated to represent him at the hearing and that the other individual could be present as an observer. Under these circumstances it seems to us adequate protection of the interests of the Claimant were afforded to him.

The Board is concerned over the circumstances surrounding issuance of the dismissal notice. The investigation hearing in this case commenced on September 2, 1986 and continued over for a second day's hearing on September 23, 1986. At the conclusion of the hearing on that date the hearing officer stated, "...even though the investigation is concluded today that the

proceedings will be held open until October 21, 1986, pending receipt of additional information." The record shows, however, that the Claimant received his dismissal notice on September 26, 1986. This lends support to the Organization's argument that the action to be taken against the Claimant was a foregone conclusion even before the investigation process was completed.

The Organization challenges the Carrier's changing of Rule G to extend to off-duty use of drugs without negotiating with the Organization under the terms of the Railway Labor Act. It is the Organization's position that this change amounted to altering the "working conditions" of the employees in violation of Section 7 of the Federal statute. It is this Board's opinion and ruling that it has no jurisdiction to question the authority of the Carrier to unilaterally change the provisions of Rule G.

In the Board's opinion, serious questions were raised by the Organization to the testing procedures used and the validity of the chain of custody employed. When asked at the investigation hearing why he had an independent urinalysis taken the day following the one furnished at the request of the Carrier, the Claimant indicated that it was because of his concern over the procedures at the medical facility used by the Company to take the urine samples. The Claimant stated that the staff of the firm taking the urine sample did not seal his sample in front of him, nor did he see them codify the forms that were to accompany the sample. He testified that after the sample was taken, it was passed along to the lab technician without having a tape on it or his signature or initials. The representative of the Claimant also introduced at the investigation hearing statements by other railroad employees tested on the same day that they did not see the technician seal their samples or encode the samples or the accompanying forms. In addition, they were not requested to sign the Railroad Urinalysis Report form as is required to meet appropriate testing standards. A careful review of the entire transcript indicates in the testimony of the Claimant and the Carrier's Medical Director that in a number of ways the testing and procedures employed did not meet the standards outlined in the regulations of the Federal Railroad Administration.

As indicated above, because of the Claimant's concern over the procedures followed by the organization that took the urine sample, on the following day he went to a private hospital to have a urinalysis taken. This test did not detect any product from the cannabinoid family or any other drug. The Board has serious concerns as to why the Carrier officials at the investigation hearing did not attach any significance to the fact that this second sample tested negative.

On the same day that the urine sample was taken, the Claimant requested that a blood sample be taken and analyzed. His request was complied with but the Carrier failed to request that the blood be tested for the same drugs that the urine was tested for. As indicated in an article from the American Bar Association Journal that was introduced into the record of the investigation hearing, "urine retains a trace of drugs for a period of days, sometimes even weeks, long after the drug ceased to affect mental capacity. But drugs remain in the blood for only hours, so blood tests can reveal the recent ingestion of drugs." Thus, in this case if the blood had been tested for marijuana usage,

it would have also indicated whether marijuana had been used recently.

Upon a review of the entire record this Board concludes that serious questions arise with respect to the manner in which the urinalysis was conducted and examined and the extent to which the Claimant was afforded the due process to which he is entitled. Obviously, both the Carrier and the Organization should have serious concerns over the use of drugs by employees and every effort should be undertaken to discourage their use. Under these circumstances, dismissal from service is an appropriate penalty. However, at the same time, every effort must be exerted so that employees are dismissed from service only when there is substantial evidence to support the conclusion that a drug use violation took place. This is particularly true with respect to the use of a testing procedure to determine whether an employee has taken illegal drugs. As the Organization pointed out in its submission to the Board, numerous commentators and critics have raised a host of questions with respect to how reliable independent medical laboratories are in protecting the chain of custody and in detecting the presence of particular drugs. It seems to us at a minimum that procedures should be worked out between the Carrier and the medical laboratories to meet as precisely as possible the standards promulgated by the Federal Railroad Administration.

This Board feels that in the light of the objections raised by the Organization, and the Board's concurrence in the validity of most of these objections, the Carrier failed to meet the required burden of proof that the Employee had used marijuana on or about the date in question, whether such usage was on duty or off duty. Under these circumstances we feel the claim should be sustained.

Award:

Claim sustained. The Claimant shall be reinstated to service and compensated for any and all time lost since he was removed from service, subject to deduction for outside earnings.

Donald F. Markgraf
Donald F. Markgraf, Employee Member

Concurrence attached

Barry E. Simon - *Dispute attached*
Barry E. Simon, Carrier Member

John N. Gentry
John N. Gentry
Neutral Member and Chairman

Chicago, Illinois
January 15, 1988

PUBLIC LAW BOARD NO. 4354

UNITED TRANSPORTATION UNION
vs.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANYCARRIER MEMBER'S DISSENT
AWARD NO. 1
CASE NO. 1164-W

While the Carrier appreciates the majority's concern for accuracy and fairness in drug testing, it must point out that requirements must be reasonable. The chain of custody procedures discussed by the Board at Page 3 of the Award are those applicable when blood and urine testing is required by the FRA in post-accident situations. In such a case, a uniform protocol is employed throughout the industry and all samples are collected with a standardized kit and tested by a single laboratory. Under these circumstances, the FRA has prescribed all of the procedures to be followed. For reasonable cause testing, however, the Federal Regulations provide:

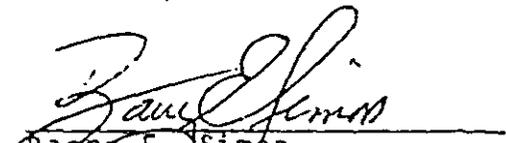
"The railroad shall establish procedures with the medical facility and the laboratory selected for testing to ensure positive identification of each sample and accurate reporting of laboratory results." 49 CFR §219.305(b)

It is ironic that, despite the majority's criticism of the Carrier's sample collection procedure, they have "serious concerns as to why the Carrier...did not attach any significance to the fact that this second sample tested negative." This was a sample which was tested the following day. There was no guarantee that the sample was, in fact, Claimant's as the collection was unobserved. Furthermore, the evidence submitted by Claimant does not identify the test used on this second sample. Had the Carrier proffered this evidence, would the majority have attached any significance to it?

It is important to note that the apparent weak link in the chain of custody was at the facility at which the sample was collected. While the testimony indicates there may be some question concerning the proper identification of the samples of the various crew members, there is no basis in the record for questioning the procedures of CompuChem, the independent testing laboratory.

Finally, with respect to the blood test, the Carrier submitted that the test was ordered by the Claimant. It was he who identified the drugs which should be screened, not the Carrier. The record shows that the blood sample was subjected to a coma/overdose profile, which only tested for 3 of the 9 drug classes screened by the laboratory used by the Carrier. Nevertheless, even if the blood had tested negative for cannabinoids, Claimant's positive urine test, taken at the extreme, showed that he had used marijuana within the past three weeks. This still constitutes a violation of Rule G, which prohibits the illegal use of drugs on or off duty.

For these reasons, I must dissent.


Barry E. Simon
Carrier Member

UNITED TRANSPORTATION UNION
VS
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ORGANIZATION'S CONCURRENCE
TO THE ARBITRATORS DECISION
IN AWARD NO. 1 OF
PUBLIC LAW BOARD NO. 4354

Carrier's dissent follows the dictates we are accustomed to on this property. I.e, Carrier is correct; regardless of the correct and fairness factor to the rank and file employee.

The Arbitrator in his judgement, and rightly so, clearly understood the magnitude of fairness and the necessity to afford due process in handling of employees allegedly charged under Rule "G".

We commend the Arbitrator on his perception to induce the gravemen of the issue out of the chaotic circumstances and he clearly illuminated the problem of the failure of the Carrier to prove the use of marijuana and the proper handling of the employees. Therefore, he sustained the employee's position.

The Carrier's dissent manifestly ignores a good labor/management relationship as dissents of this nature only engender further strife.

A sustaining award was required and for the above reasons we support the Arbitrator's positions.


Donald F. Markgraf
Organization Member