

PUBLIC LAW BOARD NO. 4375

AWARD NO. 7
CASE NO. 7
UTU File 1678-107(D)
L&A File 013.3-3504 (7)

PARTIES' TO THE DISPUTE:

LOUISIANA & ARKANSAS RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T-C)

STATEMENT OF CLAIM:

Claim of brakeman P. A. Meshell to be reinstated to service with seniority, vacation and all other rights unimpaired and with compensation for all time lost from May 29, 1987, until returned to service.

OPINION OF BOARD:

Claimant is a diabetic whose physical condition mandates a Carrier physical examination every six months. On April 9, 1987 Carrier directed Claimant to report on or about April 15, 1987 to a Company physician for his semi-annual physical. Claimant did not report until May 8, 1987 at which time he underwent a physical examination, including a blood-sugar fasting test and submission of a urine sample. It is important to the outcome of this case to note that Claimant was never informed by the examining physician or any Carrier official that these body samples would be subjected to drug screening procedures.

In addition to other testimony, the urine sample was sent to a testing laboratory routinely used by Carrier, where it was submitted to a screening test using the "Secondary TLC

Qualitative Method". The initial test and a backup test using the screening procedures indicated the presence of marijuana in the urine sample. At that time the sample was forwarded to another testing laboratory for confirmatory testing using the Gas Chromatography/Mass Spectroscopy (GC/MS) method. That test also showed the presence of marijuana in Claimant's urine sample.

The test results were sent to Carrier but Claimant was never provided with a copy until after he was accused. Upon receiving the test results Carrier removed Claimant from service, charged him with Rule G violation and cited him for investigation. At the investigation on May 26, 1987 Carrier introduced the laboratory reports through Superintendent Morrison. The Superintendent merely parroted the written test results but under cross examination he was not able to explain the test methodology or to interpret the test results. Objections to this procedure were timely raised and preserved by the Organization on the record of the investigation, on grounds that the Claimant and Organization were deprived of any reasonable opportunity to cross-examine Carrier's evidence regarding the security, the integrity or the reliability of the tests. Claimant testified without contradiction at the investigation that he had never been notified and was unaware that he would be subjected to drug screening in connection with his semi-annual diabetic examination. He also testified without refutation that he was not allowed to seal and label the urine specimen nor was he provided with the opportunity to give a voluntary blood sample

for screening at the time the urine sample was taken. Finally, Claimant testified that he never was provided with a copy of the results.

Rule G under which the termination of Claimant was effected reads in pertinent part as follows:

"Employees reporting for duty, reporting for any Company medical examination as required by the rules or otherwise, on duty or subject to duty or on Company property, are prohibited from having in their possession, using or being under the influence of alcoholic beverages or intoxicants.

Employees reporting for duty, reporting for any Company medical examination as required under the rules or otherwise, on duty or subject to duty or on Company property, are prohibited from having in their possession, using or being under the influence of any drug, medication, or controlled substance, questionable cases involving prescribed medication shall be referred to a Company medical officer.

The illegal use, possession or sale, while on or off duty, of a drug, narcotic or other controlled substance is prohibited.

An employee may be required to provide a urine sample as part of a Company medical examination or if the Company reasonably suspects violation of this rule. An employee who refuses to comply with such requirement will be promptly removed from service. Any evidence of alcohol or illegal drug, narcotic or other controlled substance in the urine, as indicated by a test of the urine sample, will be considered a violation of this rule. An employee may request a blood sample to be taken at the time of the required urine sample.

A violation of this rule may be determined without testing based on other evidence. An employee may request a blood sample to be taken at such time.

In addition, under certain circumstances, a blood test may be required by the Company. Any evidence of alcohol or illegal drug, narcotic or other controlled substance in the blood, as indicated by any blood test, will be considered a violation of this rule. The results of any urine sample or blood test shall be made available to the Company and employee."

We do not denigrate the tests used by Carrier, per se, particularly the GC/MS method which is well known to be a reliable verification test if properly performed. Nor do we condone the use of illegal controlled substances prohibited by Rule G. The absolute necessity of maximum safety and the potential risk to the travelling public, fellow employees, and Carrier's valuable property far outweigh any so-called rights of employees to enjoy illegal "recreational" drugs. The validity of Rule G and the appropriateness of the discharge penalty for proven violations of that rule through full, fair and impartial investigations have been upheld frequently by boards of arbitration between these Parties. See PLB 1938-10 (N. Zumas); PLB 2511-3 (L. Edwards); PLB 3843-3 (R. Cluster).

But especially because Rule G charges are very serious matters which often result in termination, Carrier must be particularly careful and scrupulous to ensure that its officers understand and comply with Carrier's own obligations under Rule G. It seems to us fundamental, that under the express language of Rule G an employee targeted for drug screening has the right to be informed that his urine-sample will be screened, the right to request donation of a contemporary blood sample for testing, and the right to receive the test results. Nor can it be reasonably argued that Carrier also has a fundamental responsibility as the charging and investigating party in disciplinary matters to ensure that an employee receives a full and fair investigation, including the right to confront and cross

examine the evidence against him. With respect to sufficiency of evidence, part of Carrier's burden of persuasion in drug testing cases is to show the security and integrity of the chain of custody of the sampled material. In that connection, if written hearsay laboratory reports are challenged, Carrier must provide evidence from a credible source that the tests were conducted in accordance with acceptable scientific procedures. Bare assertions regarding the reputation or pedigree of the testing laboratory are not sufficient for that purpose.

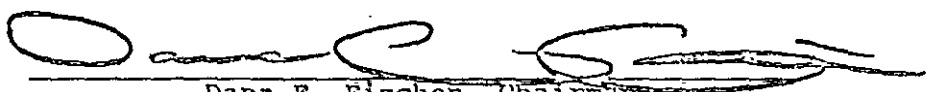
In the circumstances presented on this record, we must find that Carrier failed to fulfill its obligations under Rule G and failed to establish the security and integrity of the laboratory tests upon which it based the termination. These significant deficiencies effectively undermined Carrier's finding that Claimant was guilty of violating Rule G and require reversal of the disciplinary action in this case.

It has been said that the price of protecting the innocent from unjust prosecution is the occasional escape from justice of a "guilty" party due to a "technical" violation of due process. On the other hand, it has been observed that if one lives long enough, this is a just world. Subsequent to the events of this case, Claimant was arrested in September 1987 for criminal possession of cocaine. On April 22, 1988 Claimant Meshell pleaded guilty at trial to a criminal charge of possession of a controlled substance, methamphetamine, for which he was sentenced to six months in jail, with credit for time served. Upon

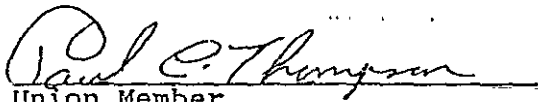
learning of this arrest and guilty plea, Carrier brought another set of Rule G charges for that incident and following investigation terminated Claimant again. The propriety of that termination was sustained in a companion case before this Board, Award No. 8 (Case No. 8). For purposes of the present case, these subsequent events are mentioned to explain why we are cutting off the compensatory damages awarded in this case.

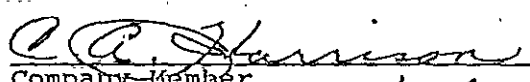
AWARD

Claim sustained to the extent that Carrier shall compensate Claimant for all time lost from May 29, 1987 forward to the date of his arrest in Caddo Parish for possession of illegal drugs in September 1987.



Dana E. Eischen, Chairman
Dated: September 28, 1989 at Ithaca, New York


Union Member
Dated 11-07-89 at KC, Kan.


Company Member
Dated 10-25-89 at KC, Mo.