PUBLIC LAW BOARD NO. 4418 CASE NO. 26

Parties to the Dispute: Transportation Communications Union

and

National Railroad Passenger Corporation

Statement of the Claim: Claim of the General Committee of the TCU that:

1. Carrier violated Rule 24(a) when it held Ms. Stephanie Payne from service pending a disciplinary hearing.

2. Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rules 24 and 23 of the Agreement, when by notice of September 4, 1987, it assessed as discipline the termination of Reservation Sales Agent, Ms. Stephanie Payne from its employ.

3. Carrier shall now be immediately required to reinstate Ms. Payne to her regular position as a Reservation Sales Agent and to compensate her an amount equal to what she could have earned, including but not limited to daily wages, overtime and holiday pay had she not been withheld and subsequently dismissed, as mentioned above.

4. Carrier shall now be immediately required to clear Ms. Payne's record of the charges made against her in this matter and restore all her rights, privileges and seniority unimpaired.

5. Carrier shall now also be immediately required to reimburse Ms. Payne for any amounts paid by her for medical, surgical or dental expenses for herself and her dependents to the extent that such payments would be payable by the current insurance carriers covering her fellow employees in the Craft. Ms. Payne shall also be reimbursed for all premium payments she may have to make in the purchase of substitute health, dental and life insurance. This and the above claims shall be considered as on-going and therefore shall continue until such time as this dispute is settled.

Opinion
of the
Board: Claimant Stephanie Payne entered service with the Carrier on November 1, 1983. On May 21, 1987, the Carrier removed Claimant from service as a Reservation and Information Clerk at the Carrier's Chicago Union Station, pending an investigation of disciplinary charges alleging that she had falsified exchange vouchers. The investigation of those charges was held on June 16, 1987, and on June 24, 1987 the Carrier announced its determination that the charges were not sustained. By this time, however, Claimant had been held out of service in excess of 30 days.

After having been cleared of the disciplinary charges, Claimant displaced and began working as a Reservation Sales Agent at the Carrier's Chicago reservation office, effective July 1, 1987. She worked in that capacity for approximately six hours on July 1 before the Carrier realized that, having been out of service for more than 30 days, Claimant was required by Carrier policy to submit to a back-to-work physical examination including a drug urinalysis before resuming work. Accordingly, after about six hours of her tour on July 1, 1987, Claimant was again removed from service by the Carrier. This was pursuant to the Carrier's policy known as PERS 19.2, which provides in part as follows:

> Except as specifically provided in an applicable labor agreement, all employees returning to work after an absence, for any reason other than vacation, of 30 days

> or more will be tested by urine sample for drug presence as a part of a return-to-work physical.1

The Carrier does not allege that Claimant was under the influence of or using drugs at the time she was removed from service to take the test.

Claimant was not given a complete physical examination, but was simply subjected to a drug urinalysis by a Carrier nurse. That occurred on July 3, 1987. It was evidently the Carrier's practice to give such an employee a complete physical examination only if he or she first passed the drug test conducted by the Carrier's nurse. Claimant was informed by the Carrier on July 3, 1987 that the drug test results were positive, indicating traces of cocaine metabolites in her system. The Carrier then informed Claimant of her options, under PERS 19.2, in light of the initial positive test result. In such circumstances, Section III of PERS 19.2 provided:

> C. Medical Disqualification
>
> > 1. An employee who tests positive for drugs or alcohol, and who does not have a negative confirmation test result, shall immediately be removed or withheld from service. Such employee shall be disqualified for service until he/she achieves a negative test result.

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1. The PERS 19.2 policy was promulgated by the Carrier effective January 1, 1987, applicable to the Carrier's employees who were not covered by the Hours of Service Act, 45 U.S.C., Sec. 61 et seq. Shortly after the events in this claim, the Carrier merged PERS 19.2 with a similar policy it had promulgated applicable to employees covered by the Hours of Service Act. The substance of the policy was unchanged, however.

2. An employee who tests positive for drugs or alcohol must, within 30 days, either be retested by an Amtrak nurse or a medical facility designated by Amtrak, or, if eligible, enter the Employee Assistance Program (EAP). Any employee entering the EAP shall be governed by the provisions of Section PERS 39 of the Procedures Manual.

3. If an employee who has previously had a positive test does not enter the EAP and elects to be retested and the retest result is positive, the employee shall be subject to dismissal and shall not be entitled to enter the EAP. A confirmation test shall be conducted at Amtrak's expense on the sample that has initially tested positive in this retest.

4. An employee who has tested positive for drugs or alcohol and is returned to service after achieving a negative test result shall, as a condition of being returned to service, be subject to testing for drugs or alcohol by breath or urine sample, each calendar quarter, for a period of two years.

5. The requirements of Subsection III.C. shall be in addition to, and shall have no effect upon, any disciplinary action that may be taken or pending in connection with the use of drugs or alcohol by an employee.

At about 7:30 p.m. that same day, July 3, 1987, Claimant went to West Suburban Hospital in Oak Park, Illinois, and voluntarily submitted blood and urine samples to be tested for drugs. The results of those examinations, reported to Claimant on July 6, 1987, were negative.

On July 9, 1987, while still being withheld from duty, Claimant returned to be re-tested by the Carrier nurse in accordance with Section III.C.2 of PERS 19.2. She did not actually

submit to the re-test on that date, however, due to a dispute over whether she should pay a $30 fee for the test.2 Eventually, Claimant returned and was retested by the Carrier's nurse on July 23, 1987. She was informed that the results of that test were again positive for cocaine metabolites.

Consequently, Claimant remained out of service and, on August 3, 1987, was charged with a violation of the Carrier's Rule L prohibiting insubordination. The written charges stated:

> Violation of Rule "L" of the National Railroad Passenger Corporation Rules of Conduct, which reads:
>
> > "Employees must obey instructions and orders from Amtrak supervisory personnel and officers, except when confronted by a clear and immediate danger to themselves, property, or the public. Insubordinate conduct will not be tolerated."
>
> In that you allegedly on July 3, 1987, failed the Company's return to work physical examination. After being advised of your rights and responsibility, you elected to be re-examined July 23, 1987, and again you were unsuccessful in passing physical examination.

The investigation of these charges was initially scheduled for August 11, 1987 but was postponed upon agreement of the parties to August 19, 1987. At the investigatory hearing, the Organization interposed several objections and defenses to the charges, some of which will be discussed shortly. Nevertheless, the investigation

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2 That dispute eventually was resolved in Claimant's case, and the Carrier's current policy is not to require an employee to pay for the required re-test in situations like this.

went forward and the Carrier, on September 4, 1987, announced its determination that Claimant was guilty of the charges. She was therefore discharged effective that date. This appeal followed, and has been progressed to this Board for final determination.

The Organization first argues that the Carrier violated Rule 23 of the parties' Agreement when it required Claimant to submit to the return-to-duty physical examination and drug test. Paragraph (a) of Rule 23, governing "Physical Examinations and Disqualification," provides as follows:

> Employees, after completing sixty (60) calendar days of service, will not be required to submit to physical examination unless it is apparent their physical condition is such that an examination should be made.

It is the Organization's position that Rule 23(a) is violated whenever, without apparent grounds, the Carrier requires a clerk to submit to a physical examination before returning to work.3 The Organization also argues that Rule 23 was violated when the Carrier had Claimant examined by a mere nurse, rather than a licensed physician, and when the Carrier failed to permit Claimant's fitness for duty to be resolved finally by an impartial or third-party physician.

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3 The Organization also points out that Claimant in fact was back to work before she was ordered to submit to the examination. However, Claimant worked for only a few hours before the Carrier realized that, under its policy, she should have been examined first. If the Carrier's policy is valid, the fact that it was overlooked for a few hours did not preclude the Carrier from rectifying the error.

The Carrier argues that Rule 23(a) is inapplicable to this situation. According to the Carrier, Rule 23(a) is intended to apply only to employees in active service, and not to employees like Claimant who are on leave at the time a physical examination is demanded. The Carrier also argues that the parties have not in the past viewed Rule 23(a) as prohibiting the Carrier from requiring back-to-work physicals of employees like Claimant.4 However, in Cases 16 and 28, decided at the same time as this claim, this Board has rejected such contentions. In those cases, the Board held that Rule 23(a) is clear and unambiguous, and that the Carrier has failed to show that an established practice contrary to that Rule existed between the parties. Accordingly, we have held that Rule 23(a) forbids the Carrier to routinely require back-to-work physical examinations, including drug tests pursuant to PERS 19.2, of clerks represented by the Organization.

That conclusion applies equally to this claim. However, this claim is somewhat different from Cases Nos. 16 and 28. In Case No. 16, the claimant passed the initial test and complained simply of being held out of service awaiting the results. The Board sustained her because the Agreement barred the Carrier from requiring the exam and holding her out of service in the

4 The Carrier further argues that the other provisions of Rule 23, specifying the procedures for holding an employee medically unfit for duty, do not apply here because Claimant was discharged for insubordination. The Board addresses the applicability of the insubordination rule hereafter.

meantime. In Case No. 28, the claimant failed the first test and refused to submit to a re-test under PERS 19.2. The Board sustained his claim because, absent reasonable cause, the Carrier was forbidden by the Agreement to demand that he submit to the examination. Therefore, the Carrier could not charge him with insubordination for refusing. Thus, our awards in Cases 16 and 28 establish that Claimant in this case could have refused to submit to the Carrier's routine drug testing demand without committing an act of insubordination. However, in this case Claimant complied with the Carrier's demands that she submit to drug tests under PERS 19.2, and then was discharged because she failed the exams.

The fact that the PERS 19.2 drug testing requirements violated the parties' Agreement controls that portion of this claim which objects to Claimant's having been withheld from service while her tests were being conducted. As this Board held in Case No. 16, Rules 23 and 24 of the Agreement barred the Carrier from holding Claimant out of service until she had been tested, unless the Carrier had grounds to suspect Claimant of being dangerously under the influence of drugs while subject to duty. The Carrier has never claimed to have had such grounds. Therefore, Claimant is entitled to be made whole for her loss of earnings between July 1, 1987 and her discharge on September 4, 1987.

That leaves the larger issue of Claimant's discharge, which turns on slightly different considerations. In this case, unlike

Case No. 28, the question is not whether Claimant is guilty of insubordination for refusing to submit to a drug test. The question is whether she committed insubordination by failing to pass that test.

The fact that the testing requirement itself is invalid as applied to Claimant obviously is relevant in answering that question. As we held in Case No. 28, the promulgation of PERS 19.2 represented a unilateral expansion of the Carrier's Rule G, which long ago became an established working condition between the parties. Rule G provides:

> Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances, including medication whose use may cause drowsiness or impair the employee's responsiveness.

Thus, Rule G is confined to regulating an employee's conduct and condition while on or subject to duty. Furthermore, it does not authorize compulsory toxicological examinations except after some on-duty behavior or event has established reasonable cause to suspect that the employee is in violation of the rule. The Carrier has not asserted that grounds existed to invoke Rule G as to Claimant. Yet, the Carrier has discharged Claimant based upon the results of a drug test which, even in a proper Rule G case, would not alone have been sufficient to warrant that result.

In Case No. 28, this Board held that the Carrier could not

charge an employee with a violation of Rule L simply for his refusal to go through with a drug test demanded under PERS 19.2. We said that the "obey now, grieve later" doctrine does not apply in such a setting. We reasoned that to require the employee to comply with the illegitimate test requirement and grieve it later would do damage to the parties' Agreement, by eliminating any effective curb on such improper orders by the Carrier. In support of that reasoning, the Board cited the following passage from P.L.B. 3139, Award No. 86 (LaRocco, 1987):

> When given a direct order, an employee must usually "obey now, and grieve later." The purpose of the "obey now, grieve later" principle is to prevent workers from constantly challenging their supervisors' orders, causing anarchy in the shops and the disruption of railroad operations. . . . However, in this case the "work now, grieve later" principle is inapplicable for two reasons. First, the Carrier's urine sample request must be premised on probable cause, reasonable cause or a reasonable suspicion. Probable cause gives validity to an order requiring a urine specimen. If the employee were obligated to obey an order (demanding a urine sample) issued without probable cause, the Carrier would be relieved of satisfying its threshold burden of demonstrating a necessity for the urinalysis. Compelling the Carrier to first show probable cause of suspected drug usage establishes the relationship between the workplace and the alleged off duty misconduct. The second reason for not applying the "work now, grieve later" principle to this case is the lack of a feasible remedy should a later grievance be sustained. If the employee obeys the order by submitting a urine specimen and it is later found that the Carrier did not have probable cause for requiring a urinalysis, it would be impossible to redress the effects of the Carrier's improper order. A grievance could hardly undo the personal humiliation and the unreasonable invasion of privacy associated with the administration of an invalid mandatory drug screening test. Thus, this Board rules that before the Carrier may impose discipline on an

employee who defies the Carrier's demand for a urine sample, the Carrier must show probable cause for issuing the order.

If an employee is not insubordinate for refusing to submit to such an unauthorized examination, she cannot be insubordinate for submitting to the exam but failing to pass it. Here, relying on PERS 19.2, the Carrier demanded that Claimant produce a drug free urine specimen or enroll in the Employee Assistance Program within 30 days. The Carrier charged and eventually dismissed her for failing to do the former. That simply is not insubordination in the sense meant by Rule L.5

Nor can the Carrier successfully argue that Claimant was held out of work for medical reasons rather than disciplinary reasons. First of all, the charges upon which Claimant was investigated and dismissed explicitly were based on Rule L, insubordination. Moreover, there is simply no evidence that Claimant was disabled or medically unable to perform her work at the time in question. The disputed test results indicate not that Claimant was intoxicated or under the influence or in any way impaired by drugs on the days she was prevented from working. The results merely indicate that traces of an illicit drug were present in her bodily

5 The record contains some evidence that Claimant may previously have been enrolled in the Carrier's EAP. However, the Carrier has not developed that evidence, much less claimed that Claimant abused or failed to comply with the program. Also, Claimant was not charged with failure to enroll in the EAP, but with failure to successfully pass the urine test.

fluids.6 Under the Agreement between the parties, Rule G defines when drug involvement renders an employee medically unfit. Rule G requires some measure of impairment. The scientific evidence is undisputed that the mere presence of drug traces in bodily fluids does not necessarily denote impairment at the time of the test.

It is axiomatic that, under the Railway Labor Act, the Carrier must live up to its Agreement with the Organization and may not unilaterally abrogate or modify terms of the Agreement. In Cases Nos. 16 and 28, this Board has held that the pressing safety considerations which have permitted rail carriers to impose routine drug testing of certain employees do not apply in the case of clerical employees such as Claimant, whose duties are confined to ticketing passengers.7 If Claimant indeed was guilty of the use of cocaine, the Carrier could legitimately demand that she be free of any resulting impairment while on or subject to duty, per Rule G.

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6 The Organization disputes even that conclusion. The Organization challenges the accuracy of the Carrier's tests of Claimant's urine and contends that proper chain-of-custody standards were not met in her case.

7 The Board has carefully reconsidered Cases Nos. 16, 26 and 28, all of which involve drug testing applications, including in executive session after proposed awards were circulated. The Carrier has criticized the Board's proposed findings in elaborate supplemental submissions in each case. Having meticulously considered every contention, the board is convinced that the supplemental submissions do not demand reversal or substantial alteration of the Board's conclusions. One of the Carrier's arguments is that some clerks handle train orders, and therefore have responsibilities beyond merely ticketing passengers. However, no such duties were involved in this case.

However, the Carrier's undeniable concerns for the safety of its service do not authorize it to unilaterally depart from the parameters of Rule G. If the Carrier believes it must take further steps to assure a drug-free clerical force, it must negotiate them with the Organization as provided in the Railway Labor Act.

We must make completely clear that the Board does not condone any employee's abuse of drugs. On the contrary, the Board fully supports the Carrier's determination to see that none of its employees is impaired as a result of such abuse. However, the Board cannot approve measures to achieve that objective if those measures violate the Agreement which the Board is charged to uphold. We find such a violation in this particular case.

Consequently, this claim must be sustained. However, Claimant's remedy is simply to have her record cleared of the charges leading to her dismissal, to be reinstated to the position from which she was dismissed, and to be made whole for her net loss of earnings from the time she was removed from service until she is reinstated or declines reinstatement. Any further monetary recovery as sought in the claim is not within the authority of the Board.

The Board orders as a condition of reinstatement that the Claimant participates in Carrier's EAP program. If EAP so determines that Claimant is in need of assistance, Claimant must successfully complete the program.

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AWARD

Claim sustained as per opinion.

Lamont E. Stallworth, Neutral Member

Employe Member

Carrier Member

I dissent -
written dissent will be filed

Dated this 27th day of July, 1990.