

BEFORE PUBLIC LAW BOARD NO. 4547

PARTIES TO DISPUTE:

United Transportation Union)	
)	
and)	Award No. 19
)	Docket No. 1008-A
Chicago and North Western)	C&NW File No. 02-87-1249
Transportation Company)	UTU Case No. R-1249-329-83

STATEMENT OF CLAIM

Claim of Trainman J. W. Sommers, Central Division, for reinstatement to the services of the Chicago and North Western 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 July 28, 1987 at Boone, Iowa.

OPINION OF THE BOARD

On May 17, 1987, Claimant's train derailed, resulting in a major accident in excess of \$500,000 in damage. All four crew members were required to submit to toxicological testing for drugs and alcohol, in accordance with FRA regulations.

The Claimant tested positive for marijuana on both urine and blood tests. Following an investigation on July 28, 1987, Claimant was dismissed from service for violating Rule G.

The Carrier maintains that the federally-required tests demonstrate that the Claimant was in violation of Rule G, which prohibits employees from working while under the influence of drugs or alcohol. Although the Claimant testified that he did not observe all of the steps in the specimen collection procedure, as provided in FRA regulations, the Carrier contends that the process was not concealed from the Claimant. The hospital that collected the urine and blood specimens followed

all the instructions included in the official FRA test kit, the Carrier asserts, and the test results are beyond challenge.

The Organization raises several objections to the specimen collection process and testing procedures used in this case. The test results are suspect at best and cannot support a conclusion that the Claimant was impaired, the Organization avers. Moreover, the Carrier official who investigated the derailment testified that nothing in the Claimant's behavior at the time suggested he was under the influence of alcohol or drugs; and all of the crew members were exonerated of any responsibility for the derailment.

In addition, the Organization objects to the introduction of documents in the investigation on the property without the presence of appropriate witnesses who prepared these documents. Further, the Organization protests the Carrier's refusal to call other crew members to testify at the investigation.

Addressing the Organization's complaints regarding the investigation on the property, we find nothing in the conduct of the investigation to render it unfair. The investigating officer had offered to recess the proceedings in order to bring the Carrier's doctor in to testify, but the Organization declined. The absence of anyone from the laboratory to explain the test results has done no harm to the Claimant, as will become apparent later in this decision. While the Carrier refused to call the other crew members as witnesses, the Organization was free to have done so if it felt their testimony was needed.

The Organization's suspicions regarding the testing and

specimen collection procedures are not as easily dismissed.

The FRA has adopted a policy and regulations on testing railroad employees for drug and alcohol use. The parts of those regulations pertinent to this dispute provide as follows:

Sec. 219.205(a) General. Samples shall be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this section and the Field Manual.

Sec. 219.211(a)(2) FRA notifies the railroad and the tested employee of the results of the toxicological analysis . . .

Sec. 219.305(b) 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.

Sec. 219.307(b) Screening and confirmation. Each [urine] sample shall be analyzed by a method that is reliable within known tolerances. If the screening test is positive for a substance other than alcohol, a remaining portion of the same sample shall be retested by another method. The confirmation test shall utilize a scientifically-recognized method capable of providing quantitative data specific to the drug (or metabolite(s)) detected. An immunoassay (including a radio immunoassay) is not an acceptable confirmatory test for this purpose.

Sec. 219.307(c) Laboratory reports. (1) Reports of positive urine tests shall, at minimum, state (i) the type of test conducted, both for screening and confirmation, (ii) the results of each test, (iii) the sensitivity (cut-off point) of the methodology employed for confirmation, and (iv) any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test . . .

Sec. 219.309(b)(2) [Sample notice to employees] [I]f only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken. You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

As noted in Sec. 219.205(a) above, urine and blood samples must be collected and handled in accordance with requirements contained in the Field Manual. Included in the FRA Field Manual are detailed instructions to medical facilities taking specimens. Among the instructions are the following directives:

- * Each tube containing a blood sample and each bottle containing a urine sample is to be sealed twice with evidence or adhesive tape, once over the top and once circumferentially around the top.

- * Employees being tested should be asked to initial the identification labels on specimen containers.

- * Employees should observe each step in the process of obtaining, sealing and identifying specimens collected.

- * A chain of custody is to be initiated at the medical facility.

The FRA also provides a testing kit to be used by medical facilities collecting blood and urine specimens. Included are instructions for the use of the kit. In addition to information for the proper preservation and shipping of samples, the instructions state simply:

2. Packaging. Label each container. Name on each is essential. Pen provided will write directly on all surfaces. Seal each container with evidence tape. Do not use dry ice. Fill quart can with wet ice and place in center of kit.

Missing from the kit instructions is any mention that employees should observe all processes and initial labels, that tops on specimen containers should be sealed twice, or that a chain of custody is required.

From the testimony, it appears that the hospital complied with the abbreviated instructions contained in the FRA test kit. The more complete instructions contained in the FRA Field Manual were not fully complied with, however. According to unrefuted testimony, tops were sealed with only a single piece of tape. Claimant was never asked to initial any identification labels. The Claimant did not observe the entire process. There was no chain of custody.

The perhaps inadequate procedure for assuring proper identification of specimen samples likely was due to the incomplete set of instructions contained in the FRA test kit. However, Sec. 219.305 of the FRA regulations places responsibility with the Carrier for ensuring proper identification procedures.

Equally troubling to this Board is the laboratory report itself. According to the report, the urine sample was tested by immunoassay; there is no indication that a second, confirmatory test ever was performed, as required by FRA Reg. Sec. 219.,307(b).¹ The laboratory report indicates that the blood sample was tested for ethanol, yet reports a positive finding of a marijuana metabolite. There is no indication what type, if any, blood test was performed for screening for drugs other than alcohol. The laboratory report states that the marijuana metabolite "was detected in the blood at a concentration of 39

¹ There is no indication in the record that the blood test satisfies the federal requirement for a second urine test on the same sample.

ng/ml and in the urine at 96 ng/ml." No sensitivity or cut-off point was specified or any margin of accuracy given, as required by FRA Reg. Sec. 219.307(c).

The Organization also contends that the Carrier failed to provide the Claimant a copy of the test results until the day of the investigation. However, the Claimant testified that he did receive the laboratory report in the mail, although he did not bother to read it at that time. According to FRA Reg. Sec. 219.211(a)(2), it is the FRA's obligation, not the Carrier's to notify the employee, and presumably the FRA was the source of the copy the Claimant received.

According to FRA Reg. Sec. 219.309(b)(2), if an employee submits to a blood test as well as a urinalysis, there will be no presumption of impairment from a positive urine test, regardless of the outcome of the blood test. Consequently, the Carrier still must prove that the Claimant was using or under the influence of drugs while on duty. This it has not done. The identification of blood and urine samples was inadequate, and the laboratory testing and reporting was incomplete. The Claimant exhibited no suspicious behavior at the time of the derailment and, in fact, was in no way responsible for the derailment.

We are acutely aware of the serious problem of drug and alcohol use in society in general and the danger it presents in the railroad industry in particular. Nonetheless, we must concur with the Organization that there is insufficient evidence to support the charge.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence, finds:

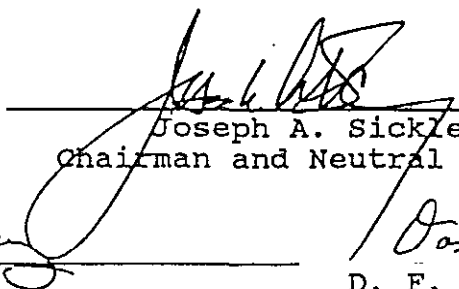
The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

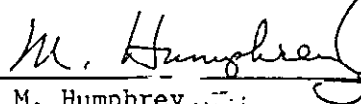
The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

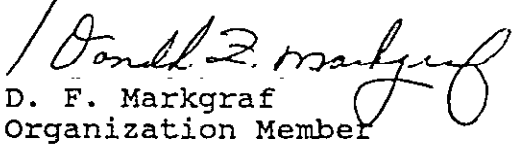
1. The claim is sustained.
2. Claimant shall be restored to duty with retention of seniority and other rights. Back pay shall be reduced by any outside earnings Claimant has received since his dismissal.
3. The Carrier shall comply with this Award within thirty (30) days of the effective date.



Joseph A. Sickles
Chairman and Neutral Member



M. Humphrey
Carrier Member



D. F. Markgraf
Organization Member

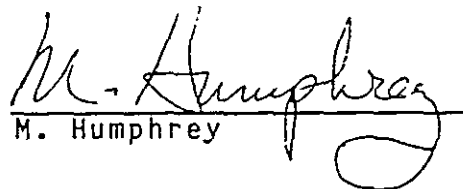
***** Concurring Opinion attached

2/15/89
Date

PLB4547-19

Concurring Opinion

- Given the Board's finding that the Company failed in several particulars to adequately prove at the hearing that it had conducted proper urine and blood tests, and had failed to provide the complete and correct test results at the hearing; and given the fact that at the hearing the Company presented no evidence whatever, other than the tainted tests, to show impairment, I concur in the award of the Board. It should be made clear however, that the Carrier would have met the burden of proof through providing substantial evidence of either (1) proper urine and blood test procedures and complete and correct positive test results or (2) by proving impairment through evidence other than such tests; and it is important this principle be understood.


M. Humphrey