UNITED TRANSPORTATION UNION)	DOCKET NO:	1018A
vs.)	UTU CASE NO:	R887-322-23
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY)	C&NWT FILE NO:	02-87-887

STATEMENT OF CLAIM

JUN 29 1990

Claim of Yardman D. L. Pilz, Eastern 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 March 30, 1987 when charged with an alleged responsibility for your violation of Rule G while you were employed as Yard Helper on Job 10 on duty 10:30 PM, February 2, 1987.

AUG 28 1990

FINDINGS

This Board upon the whole record and all the evidence, finds that the employees and the carrier involved in this dispute are respectively employees and carrier within the meaning of the Railway Laobr Act as amended and that the Board has jurisidiction over the dispute involved herein.

D. L. Pilz was employed as a helper at the Janesville, Wisconsin, yard. On February 10, 1987, while servicing the General Motors plant, cars were shoved toward the plant on Track 16. One car ran over causing it to derail. The Claimant was required to submit to a urine test which the Carrier contends resulted in a positive test for cocaine of 600 nanograms. The Carrier charged the Claimant with violating Rule G and, after a formal investigation, dismissed him from service.

The Organization protests the Carrier's April 27, 1986, revision of Rule G. It contends this unilateral action constituted a change in working conditions. Notwithstanding this assertion, this Board notes that reference to an 8th Circuit Court of Appeals case (no citation) involves litigation between the Carrier and the Brotherhood of Maintenance of Way Employees (BMWE), not this Organization. Furthermore, reference to an attorney's letter purportedly addressed to all Chairmen indicating the Carrier had withdrawn the April 27, 1986, Rule G is not dated nor is there a full copy of the text attached to this record.

In essence, the Organization argues the Carrier's February 17, 1989, General Order No. 50 repealed the April 27, 1986, revision of Rule G and that the Carrier's right to enforce the revised 1986 Rule G was prohibited by court action. First of all, it is evident the Carrier's General Order No. 50 was not handled

on the property. More importantly, General Order No. 50 specifically states that Rule G is "... superseded by the following Rule G." The word "superseded" cannot be found to encompass a retroactive repeal of the 1986 Rule G. Careful analysis of the disputed provision of the 1986 version and as ruled upon the the 8th Circuit indicates the underlying basis of the BMWE's challenge was the Carrier's attempt to regulate off duty conduct. This Board notes the 8th Circuit noted that the District Court recognized the Carrier had unilaterally regulated employees' use of intoxicants "... while on duty, subject to duty, or on company property, all under Rule G." The District Court stressed the Carrier had never before attempted to regulate off duty conduct in the manner stated in its 1986 revision of Rule G. The 8th Circuit clearly identified this distinction stating:

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments.

From the above, it is clear the Carrier's 1986 revision of Rule G was challenged on a narrow basis and limited to the sentence:

> The illegal use, illegal possession, or illegal sale of any drug by employees while on or off duty is prohibited.

Given the above analysis, this Board is unable to find a precedential or legal basis to sustain the Organization's arguments relative to Rule G. Even if this Board was capable of entertaining the Organization's arguments, we emphasize that under old Rule G, the use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances "... by employees subject to duty..." is prohibited.

Nonetheless, the Organization insists that even if subject to the pre-1986 Rule G, its application would prohibit "on duty" use or being under the influence while "on duty." Furthermore, the Organization contends the record fails to establish either on duty usage or that the Claimant was, in fact, impaired in any manner. The Organization stresses the the FRA Field Manual describes the "noticeable effects" of recent cocaine use as increased alertness, increased energy, dilated pupils, talkativeness, restlessness, sense of power, aggressiveness, sniffing, running noses, fast mood swings and frequent trips to a rest room or secluded area (FRA Field Manual at pages C-16 and C-20).

Given the above analysis, the Organization argues the record shows that none of these recognizable effects were observed by the Carrier's representatives.

With respect to the "old" Rule G arguments, the Board points out that the Organization overlooked the "subject to duty" provisions of that Rule. Secondly, supervisory observations are normally linked to reasonable suspicion factors which enable the Carrier to conduct testing. In this case, the Claimant was tested purusuant to Section 219.301(b)(3) (IV) of the Federal Railway(FRA) regulations. The record shows the Carrier has, in the exercise of its managerial rights, informed its employees that Hours of Service Employees are governed by FRA rules and regulations and explained the circumstances under which testing would be mandatory. Herein, the Board notes the Claimant assumed responsibility for the derailment. Accordingly, we find the Claimant's admission and direct involvement in a failure to stop short of a derail constitutes reasonable cause for testing under FRA regulations.

Lastly, the Organization protests the lack of credible evidence necessary to establish the Carrier's testing adhered to all applicable rules and regulations and insured that the test results were those of the Claimant's. The Organization stresses that FRA rules for testing at Section 219.307(c) state:

> 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 (or, in the case of alcohol, for the single test procedure). However, in the case of a negative test (either for screening or confirmation), the report shall specify only that the test was negative for the particular substance.

The Organization correctly points out the lab report received by the Carrier from Compu-Chem does not state the type of screeing and confirmation tests conducted or their respective results. Furthermore, the report does not state the sensitivity (cut-off point) for either the screening or confirmation test. The Board notes the Carrier was put on notice that the Organization questioned and objected to the procedures used in obtaining the Claimant's urine sample, as well as the authenticity of the

results. Nonetheless, the Carrier proceeded with the investigation and, after completion, submitted a letter from its Medical Director, Dr. Thomas G. Cook, which the Carrier avers authenticates and identifies the tests conducted, their results as positive, the cut-off point, and accuracy of those tests.

Analysis of Cook's letter does not demonstrate personal knowledge of the specific test results involving the Claimant. Rather, Cook's comments are general in nature and can only attest to procedures normally employed by Compu-Chem. As such, Dr. Cook's letter is self-serving and does not satisfy the rather clear mandate of Section 219.307(c). The Board further observes the Carrier was put on notice of the Organization's general challenge to the testing report. Once so challenged, the Carrier had the opportunity to satisfy the barest evidentiary standards, but chose not to.

Likewise, the Carrier was clearly put on notice that the Organization had raised serious concerns over the chain of custody of the Claimant's urine sample. The Carrier has attempted to rectify this serious challenge by including Exhibit L in its submission, which is identified as a chain of custody document. The Board, however, finds no evidence this document was part of the on-the-property handling of the dispute. On the contrary, the hearing transcript at Page 5 indicates otherwise.

The record establishes the Claimant and Carrier representatives Dlugosinski and Sullivan arrived at Mercy Hospital in Jansville between 5:45 A.M. and 6:00 A.M. Neither Carrier representative observed the test. Sullivan testified he laid the testing kit down at the Admitting Clerk's location. Neither he nor Dlugosinski knew who picked it up nor could either attest to how the sample left the hospital.

This Board concurs with the serious questions raised by the Organization relative to the Carrier and Compu-Chem's failure to follow FRA procedures, as well as the reliability of the chain of custody. Without such serious concerns, this Board would have no hesitation in acting so as to uphold the Carrier's actions. Once, however, the testing procedures and chain of custody are challenged, the burden shifts to the Carrier which, in turn, must support the challenged procedures with substantial and probative evidence. Instead, the Carrier chose to rely upon a piece of paper produced by Compu-Chem which did not meet FRA regulations. Dr. Cook's letter of explanation falls far

short of meeting the standard of probative evidence because it is rank hearsay and is based solely upon Dr. Cook's beliefs as opposed to actual fact. Nonetheless, this Board stresses that once Compu-Chem's Drug Analysis Report was challenged at the investigation, the Carrier had ample opportunity to obtain corrobative evidence from Compu-Chem. It did not, Likewise, the chain of custody was also challenged at the investigation. The Carrier was clearlyput on notice the Organization contended no evidence existed showing who collected and purportedly sealed the urine sample and how it next was transported to Compu-Chem. As indicated, there is no evidence Exhibit L was exchanged on the property. These failures can be overcome, but the Carrier's reliance on Dr. Cook's letter and a document not relied upon in the on-the-property handling of this case is misplaced. Accordingly, the Board concludes the Carrier failed to meet its burden of proof once Compu-Chem's Drug Analysis Report was challenged and probative testimonial evidence failed to establish a reliable chain of custody.

AWARD

Claim sustained. The Claimant is to be reinstated to service and compensated for all time lost since his removal less interim earnings. This reinstatement is conditioned upon the Claimant's being capable of passing a drug/alcohol test within fourteen (14) days of his reinstatement. This condition is not intended to affect the back pay element of this award.

Robert W. McAllister, Chairman
and Neutral Member

Carrier Member

Dissents & Follows.

Donald F. Markgraf
Organization Member

August 14-1990
Date