PUBLIC LAW BOARD NO. 4651 Case/Award No. 10

UNITED TRANSPORTATION UNION)	DOCKET NO.	1027A
vs.)	UTU CASE NO:	R1613-329-83
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY)	C&NWT FILE NO:	02-87-1613

STATEMENT OF CLAIM

Claim of Trainman J. K. Moorman, 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 benefit until reinstated, and that he be compensated for any and all lost time, including time spent attending an investigation held on September 21, 1987 at Boone, Iowa when charged with an alleged responsibility for his violation of Rule G at approximately 7:30 PM, August 24, 1987, while he was employed as Switch Foreman on Boone Yard Switch Job 02, on Duty 2:30 PM that date at Boone, Iowa.

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 Labor Act as amended and that the Board has jurisdicition over the dispute involved herein.

The Claimant, M. K. Moorman, was a Yard Foreman at Boone, Iowa, on August 24, 1987. As a result of cars placed on Track 6 rolling out and striking a car on Track 5, the Claimant was required to submit to a urine test. The Carrier concluded the urine test was positive for marijuana and charged the Claimant with violation of Rule G. An investigation was held following which the Claimant was dismissed 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 Furthermore, reference to an attorney's letter purportedly addressed to all Chairmen indicating the Carrier had withdrawn the April 27, 1986, Rule G is not dated nor is there a full copy of the text attached to this record.

In essence, the Organization argues the Carrier's February 17, 1989, General Order No. 50 repealed the April 27, 1986, revision of Rule G and that the Carrier's right to enforce the revised 1986 Rule G was prohibited by Court action.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 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 employee's use of intoxicants "... while on duty, subject to duty, or on company property, all under Rule G." (Emphasis added) 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 that 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 grequent trips to a rest room or secluded area (FRA Field Manual at pages C-16 and C-20).

Given the above, 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 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 pursuant 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 finds the record establishes the Claimant was directly involved in a failure to secure a hand brake(s) which, under FRA rules, constitutes reasonable cause for testing.

Notwithstanding the above, the Organization argues the Carrier failed to have the Claimant initial his specimen and failed to establish a chain of custody. Furthermore, the Organization insists the record shows the Carrier produced no witnesses or probative documentation identifying the type of screening and confirmation tests conducted nor the sensitivity (cut-off point). Given these failures, the Organization insists it is questionable as to whose specimen was tested or if, in fact, conducted properly.

The Carrier claims the above objections are new arguments. The Board disagrees. Careful scrutiny of the investigation transcript clearly demonstrates the Organization questioned the type of screening and confirmation tests conducted by Compu-Chem, the cut-off point, and external chain of custody.

The record shows the Carrier, upon investigating the incident, decided to test the whole crew. The Claimant testified that a nurse handed him a metal urinal and a plastic cup instructing him to use the metal urinal to collect his sample and then transfer it to the plastic container. This break in normal procedures was questioned at the investigation. The Carrier's Division Administrative Trainmaster, J. W. Weedman was asked if a contaminated sample might be obtained from a re-usable container. He imagined it was possible, but not likely. The Board agrees with Weedman's opinion, but stresses that likelihood versus unchallenged integrity of the chain of custody must be distinguished. The sanctity of the chain of custody is not an administrative chore intended to tie up the Carrier's Management in bureaucratic restrictions. Rather, the principle behind the chain of custody requirements protects the due process rights of individuals by objectively assuring the specimen can be identified without assumptions, likelihoods, or offers of

probability. The Carrier must be deemed to have understood the implication raised by the unchallenged assertion of the Claimant that his specimen was collected in a re-useable metal urinal. Nonetheless, it concluded the investigation without assuring the integrity and non-contamination of the urinal. This must be viewed as a fatal omission.

In addition to the above failure of the Carrier to respond positively to chain of custody deficiencies, the Organization argues the Carrier also failed to establish the testing facility it chose adhered to promulgated FRA rules. This Board agrees with this contention. FRA rules for testing are set out at Section 219.307(c) and 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.

As indicated above, the Organization challenged Compu-Chem's Drug Urinalysis Report because it failed to comply with Section 219.307(c) quoted hereinabove. The Carrier submitted into evidence a letter authored by Dr. Thomas G. Cook, its Medical Director which attempts to authenticate Compu-Chem's report by attesting to the identification of the tests conducted, their results as being positive, the cut-off point, and accuracy thereof. Dr. Cook's letter cannot be considered as best evidence because it does not indicate personal knowledge of the case at hand and is, at best, hearsay. Dr. Cook's letter is self-serving and falls far short of the requirements imposed upon those entities who issue laboratory reports. In other words, its conclusionary remarks cannot substitute for what the FRA mandates must be contained in a laboratory report. Lastly, it is evident from the investigation transcript that the Carrier was fully aware of the Organization's doubts concerning Compu-Chem's report. Given this information, its decision to proceed without clarifying Compu-Chem's report by submitting probative evidence cannot be ignored.

Likewise, the Board cannot ignore the questions and challenges raised over the chain of custody and method employed to collect the urine sample. Again, we stress the Carrier had the notice and opportunity to obtain whatever evidence it deemed necessary to dispose of those questions and challenges dealing with the chain of custody via a postponement. Its failure to do so requires this Board to sustain the Organization's claim.

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

Donald F. Markgraf
Organization Member

Dissent & Concur.

August 14-1990
Date