PUBLIC LAW BOARD NO. 6237

AWARD No. 8
CASE No. 8

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

DATE: April 5, 2002

DESCRIPTION OF CLAIM:

Claimant R. A. Parr was dismissed after a urine sample he submitted on December 14, 2000 tested positive for benzogolactonine, the metabolite of cocaine. At the time of his dismissal, Claimant had some 36 years of service. The Claim seeks to overturn the discipline.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was found sleeping in a Carrier vehicle at approximately 12:50 p.m. during the duty day on December14, 2000. At the time, the other members of the gang under his supervision were engaged in changing out a rail. Claimant replied negatively when asked if he was ill or taking medication. He gave no response when asked why he was tired. Given the work to be performed and the circumstances of Claimant's performance, Carrier exercised its discretion and required a drug and alcohol test. The test revealed the body's metabolite of cocaine ingestion.

The Organization challenged the discipline on several grounds. Procedurally, the Organization questioned the timeliness of the Carrier's action as well as the Carrier's basis for requiring the test.

While it is true that Claimant submitted his urine sample on December 14, 2000, the key date is the point in time when the test results became known to the Carrier. The record establishes that Carrier learned of the results on December 20th. Because the investigation was held on January 16, 2001, the 30-day time limit established by Rule 48(a) was not violated.

The Organization also questioned whether the Carrier followed its own policy in requiring the drug and alcohol test. Carrier's policy informs employees that it will also exercise its discretion to require testing on the basis of reasonable cause or reasonable suspicion in situations where such testing is not federally mandated.

On this record, Carrier's Drug and Alcohol Policy appears to be just that - a policy. It has not been shown to be a bargained set of restrictions on Carrier's freedom of discretion that must be strictly construed.

The Board sees no significant problems with the basis of the reasonable cause testing herein. Claimant was found asleep in the middle of his duty day when he should have been supervising the

members of his gang, who were engaged in safety sensitive work. When asked about his inaction, he was not meaningfully responsive.

The record also contains substantial evidence supporting the validity of the test results. No defects in the testing protocols were established.

Regarding the quantum of discipline, the record shows Claimant was previously dismissed in April of 1994 after he tested positive for alcohol and marijuana usage. He was eventually reinstated pursuant to an agreement whereby he recognized he would be dismissed for any subsequent positive drug and alcohol tests within ten years. Under the circumstances, the Board finds no proper basis for disturbing the Carrier's action.

For the foregoing reasons, the Board must deny the Claim.

AWARD:

The Claim is denied.

Gerald E. Wallin, Chairman
and Neutral Member

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 8 OF PUBLIC LAW BOARD 6237
(Referee Gerald E. Wallin)

The facts of this case are clear and were set forth in the Organization's submission. There was no violation of any safety or operating rule ever established, as well as none that could have resulted in an accident and/or personal injury to the Claimant or others. Further, there was no other narrowly-circumscribed and verifiable individualized cause approved by the General Director-Operating Practices and the Railroad Law Department. Finally, there was no personal observation by two Mangers who may have been suspicious that Claimant was under the influence of drugs and/or alcohol in any way. As such, there was no valid basis for ordering a drug and alcohol screen under any agreement rule or company policy. In fact, the drug and alcohol testing in this case was in violation of the Carrier's established drug and alcohol testing policies.

The Majority in this case indicates the Carrier's Drug and Alcohol Policy appears to be just that - a policy. Further, it has not been shown to be a bargained set of restrictions on the Carrier's freedom of discretion that must be strictly construed. This Board Member interprets this statement to mean the Carrier has the unfettered right to ***ignore*** its established policies that it distributes among its employees, management and agreement personnel alike, and, with which, it expects their absolute compliance. With this concept I can not agree.

In effect, what the majority has done here is added to the Carrier's perceived right to change its policies at will by allowing it do so ***retroactively***, as well. Potentially, by doing so, there can never be non-compliance with its policies by non-agreement personnel. Such a circumstance is completely unfair and an abuse of discretion. Instead of recognizing the necessity for compliance with the existing policy established with the upmost fairness and conciseness in mind, and in order to have the end justify the means, the Majority concludes here that it is okay to change the policy retroactively. In other words, all the fairness and conciseness the employees expected to receive from the policy can be eliminated by the Carrier at any time. Such a situation is completely at odds with fairness and the trust the Carrier is attempting (or should be attempting) to establish with its employees.

The purpose of a company setting polices is to give all employees guidance on how it expects them to conduct themselves for the orderly operation of the business. The purpose of distributing those policies with the employees is so they are aware of them and may conduct themselves accordingly. This Award renders such policies to be useless and not worth the paper they are written on because even though the policies say what they say, they can be amended and or ignored at any time by the Carrier to fit the circumstance. Like it or not, this is the message being sent to the Managers by this Award. That is, the company has rules to follow but if the Manager accomplishes a goal in contradiction with those rules, the Manager may assume it is acceptable because Management will merely change the rules to make it okay. The end result is the policies mean nothing and they give no guidance for any employee concerning the orderly operation of the business. Further, there exists an obvious double set of standards - one for the employees and one for the Managers, which, of course, destroys the confidence, fairness and trust one would hope the employees would have with a company.

In effect, what the Majority is attempting to do with this award is establish the following new policies:

Policy #1

Management sets all policies and may amend them at any time to accommodate any unforseen circumstance.

Policy #2

Employees will be expected to comply with all policies and may, as well, expect compliance therewith by all Management Personnel at all times.

Policy #3

All Employees, who fail to comply with all polices at all times, will be fired.

Policy #4

All Management Personnel who fail to comply with all policies at all times, see **Policy #1**.

This is an abuse of discretion which is completely unacceptable and should not be allowed to occur.

While this Board Member is in obvious opposition with this award, such opposition should not be construed to mean that the Organization believes the Claimant should have been let off scot-free to return to work with no restrictions whatsoever. The Organization is completely behind having a safe work environment for all employees, and the use of drugs or alcohol on the job by any employee destroys that environment, which is unacceptable. However, to make things right on a compromise basis, the claimant, who had over thirty-six (36) years of service with this company, should have been given a chance for rehabilitation and, once cleared, returned to work. But, again, it appears only the employees suffer for failing to follow company policies and Managers do not.

Because this award is in direct conflict with standards of adequacy, fairness and company policies, I dissent and conclude it is considered flawed with no precedential value whatsoever.

Respectfully submitted,

R. B. Wehrli
Employee Member PLB 6237

August 19, 2002