PUBLIC LAW BOARD NO. 6349

Case No. 14 Award No. 14

PARTIES to DISPUTE: American Train Dispatchers Department/International Brotherhood of Locomotive and CSX Transportation, Inc.

STATEMENT OF CLAIM:

Request that Train Dispatcher, James R. McCann be restored to the service with back pay, seniority and all rights restored unimpaired.

FINDINGS: On December 3, 1997, the Claimant tested positive for a prohibited substance. In lieu of having an investigation, he signed for the option of the Carrier's Rule G Bypass Agreement, which enrolled him in the Carrier's Employee Assistance Program ("EAP"). The EAP requires, among other things, short-notice toxicological tests.

This claim arose when the Carrier, subsequent to an investigation, determined that a urine sample provided by the Claimant on December 11, 2000 was "uncharacteristic of human urine, because of low specific gravity and depressed creatinine levels." The Claimant was then dismissed from the service on January 17, 2001. His appeal is now before the Board for final adjudication.

The Organization's position rests on its contentions that the proceedings leading to the Claimant's discharge were not fair and impartial. Additionally, without prejudice to that position, it asserts that the Carrier did not meet its burden of proof with respect to the merits of the charge.

The Organization's due process contentions rest mainly on the argument that a vital witness was not called to testify at the hearing, that there was a break in the chain of custody of the Claimant's urine specimen and that the specimen was not tested.

With respect to the substance of the charge, the Organization maintains that the Carrier did not meet its burden of proof requirement that the Claimant's urine specimen failed to meet accepted norms for a human being.

The record shows that Mr. Brock Lucas, the Carrier's General Director Network Operations ("Lucas"), on December 11, 2000, at about 4:00 p.m. told the Claimant that he would be required to submit a urine sample. He then escorted the Claimant to the restroom where the urine sample was to be given. The individual who was responsible for the collection of the specimen ("Collector") was there to oversee the testing. At about 4:05 p.m., because the Claimant was not able to provide a urine sample, he was told by the Collector to return to his work station and consume fluids, especially caffine. Lucas observed the Claimant "guzzling soft drinks and stuff like that." At about 4:50 p.m., the Claimant returned to the test location and was able to provide a sample. The Collector was present throughout. Lucas observed the Claimant standing in front of one of the two sinks in the restroom next to the Collector. Lucas next observed the Claimant after he came out of the stall and presented the specimen to the Collector. The faucets in the restroom were taped and the water in the toilet facilities contained blue dye.

Lucas returned to his office after the specimen was given to the Collector. He did not observe the sealing process. Before the Collector left the facility, he stopped by Lucas' office to tell him the testing had been completed and he would leave. The Collector made no comments about any irregularities, such as the sample being tampered with or that the Claimant had acted strangely or nervously.

The original of the multipaged Federal Drug Testing Custody Control Form was signed by the Claimant and the Collector after the speciment was taken. It showed a "yes" in the "Specimen Collection" box. It also contained handwritten notes that read "approximately 24 ounces of coffee and 24 ounces of water" and "voided approximately 45 milliliters of very clear fluid." On a carbon copy of the Custody Control Form, there is a note written next to the Step 6 of the form that reads "he appears to be very nervous." This note was not on the original that the Claimant had signed.

The Board has carefully reviewed the record in this case, which includes a number of arbitral decisions relied upon by both parties.

Our failure to cite these awards and other documents does not mean these were not given full consideration. The Board finds that the claim must be sustained mainly for the reasons that follow.

Turning first to the due process defense advanced by the Organization, the Collector responsible for the collection and handling of the urine sample at the work site when the Claimant was tested did not testify, although he had been requested to do so by the Organization. The Carrier, when explaining why the Collector did not appear at the investigation, claimed that his presence was "not wholly material to the primary issue of this case," that it had no control over the Collector because he was not its employee and it would attempt "to produce such outside employees when they have direct and material information related to the essence of the charges under investigation."

The Carrier is just plain wrong in relying on those reasons for not having the Collector appear. It is true that the Carrier does not have the same control over employees of other firms. However, the Carrier's decision to place a vital part of its drug/alcohol testing program in the hands of an outside firm, acting as its agent, cannot serve to alleviate its responsibility to produce witnesses that clearly are vital to the evidence gathering process. The actions of the Collector and his observations of the Claimant before, during and after the urine sample had been taken are critical to the fact-gathering process in this case.

With respect to the roll of the Collector, his testimony would have been directly on point to the key elements being investigated. For example: Did the Claimant tamper with the taped facets? Was there any way he could have substituted the specimen without the Collector's knowledge? Did he see or hear the Claimant pass urine into the specimen bottle? Did the Claimant sign the tape sealing the specimen bottle? Why was no comment made on the original form signed by the Claimant which was later made in a notation next to item 6 (as noted earlier) of the Custody Form about apparent nervousness? Why did the Collector say nothing to the Claimant or Lucas about nervousness when he left

the facility? Did he have any suspicion that the Claimant had adulterated his urine? If he did, why didn't he say something at the time or take another urine sample?

In summary, with respect to the roll of the Collector, his testimony was crucial to the Claimant's defense of the charges. The investigation process is under the control of the local Carrier officials. When it chooses to place the key elements of its drug testing program in the hands of an agent-contractor and does not have a requirement that the contractor appear at a hearing when required, it has done so at its own peril, especially when the roll of that contractor becomes critical to an employee's right to defend himself.

Turning next to the test of the Claimant's urine specimen, there has been no evidence presented that there was anything other then urine in the Claimant's specimen bottle. Indeed, the evidence shows every safeguard had been taken throughout the entire time that the Claimant was involved. The Claimant had no advance notice of the test. He was taken to the testing cite. The Collector was present at the site. He took no exception to what had been done before, during or after the test. He found the temperature of the Claimant's specimen to be within an acceptable range. Therefore, at that point, all safeguards and regulations had been followed and there was no indication that the specimen had been altered. Indeed, there must be a reasonable inference that it had not been altered.

Turning then to the findings of the Laboratory used by the Carrier, the MRO reported that the urine toxicological test of the Claimant's urine specimen was not performed because the specific gravity was less than or equal to 1.001 and the urine creatinine was less than or equal to 5mg/dl. Thus, it was not normal human urine. The Board finds that this does not satisfy the Carrier's burden of proof, given that there was no evidence of improper action on the part of the Claimant, that the temperature of his urine specimen was acceptable and that there is no evidence that sample had been tampered with after it had been sealed. Therefore, what remains standing alone is the

laboratory report noted earlier. However, there is no expert testimony, for example, that urine could not have the "low specific gravity and depressed creatinine levels" as reported by the laboratory to support the Carrier's conclusions. In summary, the Carrier did not meet its burden of proof.

AWARD

The claim is sustained.

S.R. Friedman - Dissent
Steven R. Friedman
Carrier Member

Eckehard Muessig
Neutral Member

David W. Volz
David Volz
Organization Member

Dated: July 25, 2002

PUBLIC LAW BOARD NO. 6349

Case No. 14 Award No. 14

INTERPRETATION

PARTIES to DISPUTE: American Train Dispatchers Department/International Brotherhood of Locomotive Engineers and CSX Transportation, Inc.

BACKGROUND

Award No. 14 of this Board held that the Carrier did not meet its burden of proof and, thus, the claim was sustained. However, the Carrier has questioned certain findings and conclusions of the Board. Specifically, the Carrier contends that a Board of Arbitration does not have the authority to disturb the mandatory nine-month suspension required by the Department of Transportation ("DOT") and Federal Railroad Administration ("FRA") regulations and, consequently, the Claimant cannot be awarded back pay for those nine-months.

Following an Executive Session of the Board held on July 25, 2002 at the Carrier's Headquarters in Jacksonville, Florida, the parties were still at odds with respect to the position of the Carrier. Therefore, the matter was returned to the Neutral for an Interpretation of Award No. 14.

INTERPRETATION

The Organization, as a threshold issue, argues that because the Carrier did not raise the question of a damages remedy on the property, it cannot now be considered by the Board. Its position, in this respect, rests on a basic tenet of the Railway Labor Act that Public Law Boards are prohibited from considering argument or evidence not joined on the property.

However, after a careful review of the Organization's position on this issue, I conclude that the Carrier's position must prevail. The parties are not immune to existing law. To require either party to specifically raise the issue of law having an impact on an arbitral Award that has yet to be issued is an unreasonable and untenalbe legal position.

Turning to the question at issue, I have carefully reviewed the record before me, as contained in the respective submissions of the parties. I also have considered the decisional authorities each party has relied upon. The absence of a detailed recitation of each and every argument or contentions advanced by the parties to this Arbitration does not mean that these were not fully considered.

The Carrier's position, simply stated, is that the urine sample provided by the Claimant on December 11, 2000 revealed creatine and specific gravity levels below that found in human urine. Therefore, pursuant to DOT and FRA regulations, the Claimant's urine specimen must be considered to have been substituted and, accordingly, is considered as a refusal by the Claimant to take the test in the first place. Moreover, the Carrier maintains that no evidence was presented to challenge the laboratory's determination as to the validity of its test of the Claimant's urine. Thus, because the Carrier's actions were based upon the verified test results, the nine-month suspension is mandatory as prescribed by FRA regulations and cannot be overturned by a Board of Arbitration.

The DOT and FRA regulations relied upon by the Carrier are very clear with respect to the triggering question before me. Once a Department of Health and Human Services ("DHHS") certified laboratory notifies a Medical Review Officer ("MRO") that a urine test could not be performed on a sample because the specimen was adulterated or substituted, the Claimant must be considered as refusing to take the test. Therefore, under FRA regulations, the individual is subject to a mandatory nine-month suspension from covered service. The regulation states:

> 49CFR §219.107 Consequences of unlawful refusal.
>
> (a) An employee who refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part shall be deemed disqualified for a period of nine (9) months.

The Carrier argues that it is not a required to present evidence of how the employee performed the substitution. Nor, it maintains is it required to present evidence of substitution beyond the scientific results. It further submits that the DOT anticipated such a situation when in the DOT's revised regulations, it addressed the role of the Arbitrator and the Carrier as follows (quoted verbatim):

> §40.149; §40.209
>
> What is an employer to do if an arbitrator's decision claims to overturn the result of a DOT drug or alcohol test on grounds contrary to DOT regulations?
>
> ANSWER:
>
> - There could be instances in which an arbitrator makes a decision that purports to cancel a DOT test for reasons that the DOT regulation does not recognize as valid.
> - For example, the arbitrator might make a decision based on disagreement with an MRO's judgment about a legitimate medical explanation (see §49.149) or on basis of a procedural error that is not sufficient to cancel a test (see §40.209).
> - Such a test result remains valid under DOT regulations, notwithstanding the arbitrator's decision. Consequently, as a matter of Federal Safety regulation, the employer must not return the employee to the performance of safety-sensitive functions until the employee has completed the return to duty process.
> - The employer may still be bound to implement the personnel policy outcome of the arbitrator's decision in such a case. This can result in hardship for the employer (e.g., being required to pay an individual at the same time as the Department's rules prevent the individual from performing the duties of his job).

The Carrier's conclusions are valid, as far as they go. However, that determination is subject to challenge pursuant to the parties' Collective Bargaining Agreement and as provided by Section 3 of the Railway Labor Act, as was done in this case. Therefore, it goes without saying that the Carrier's decision to terminate the Claimant was not a final decision, because it was appealed. After the Organization appealed

the Carrier's decision, Public Law Board No. 6349 held that the Claimant's due process rights were violated and that the Carrier did not meet its burden of proof. Or, again simply stated, the Board found that the Claimant had not adulterated the specimen that he gave on December 11, 2000.

Nonetheless, a more detailed review of the events of December 11, 2000 are instructive to place my final conclusion in its proper context. The Claimant had no advance knowledge that he was to be required to submit a urine sample on December 11, 2000. Mr. Brock Lucas, the Carrier's General Director of Network Operations ("Lucas") told the Claimant at about 4:00 p.m. of the test. Lucas then escorted the Claimant to the restroom where the urine sample was to be given. The individual who was responsible for the collection of the specimen ("Collector") met them and was there to oversee the testing. At about 4:05 p.m., because the Claimant was not able to provide a urine sample, the Collector told him to return to his work station and consume fluids, especially caffine. Lucas observed the Claimant "guzzling soft drinks and stuff like that." While the evidence is unclear as to the exact amount of liquid consumed by the Claimant, the language used by Lucas and the timeframe involved (about 45 minutes) while the Claimant was "guzzling soft drinks and stuff like that," suggest that a large amount of liquid was consumed.

At about 4:50 p.m., the Claimant and Lucas returned to the testing location and were met by the Collector. The Claimant was able to provide the specimen. There was nothing in the record to show that all the mandated safeguards were not taken. Specifically, the Collector controlled and observed the collection process. The toilet water was dyed blue. The facets were taped. The temperature of the speciment was within an acceptable range. The Collector took no exceptions to the sample. He said nothing to the Claimant or to Lucas that he had a reason to question that the Claimant had not given a proper specimen. Indeed, I believe it is reasonable to conclude that, had the Collector or Lucas suspected misdoing by the Claimant, one of them would have said something at this point in time. Thus,

there is nothing in the record up to this point to establish that the sample was not properly given or that it had been adulterated. Instead, all the evidence indicates that the sample was acceptable and it provides a reasonable inference that the Claimant passed urine into the sample container.

What is left is the laboratory test result standing on its own. Normally, given the degree of control, inspections, etc., one must presume the accuracy of the DOT authorized laboratory results. However, one must also recognize that, while the findings of these laboratories are extremely reliable, they are not infallible.

There is nothing in the record to show that the Claimant placed a substance other then his own urine in the container. There is a possibility that the laboratory report was either not accurate or that there may be situations when the specific gravity and creatinine levels did not meet laboratory criteria, but the specimen still could have been human urine. This latter element could have been, but was not, addressed by expert testimony.

The Carrier has the burden to prove its charge by substantial evidence. It did not present expert testimony that human urine could not have "low specific gravity and depressed creatinine levels" as reported by the laboratory in this case.

The Awards cited by the Organization are on point to this case. First Division Award No. 23951, dated October 27, 1989, (Referee LaRocco) held in part as follows:

> The Carrier wishes us to imply that Claimant must have filled the urine container with water because the specimen measured an extraordinarily low level of specific gravity. Although there is not any evidence that anyone tampered with the sample once it was sealed, the low specific gravity level alone is insufficient proof that Claimant placed water in lieu of urine in the bottle. The Carrier shoulders the burden of coming forward with substantial evidence. Substantial means more than mere speculation and conjecture. Moreover, the Carrier did not present expert testimony that it would be impossible for urine to have such a low specific gravity content. Absent such evidence, the Carrier did not meet its burden of proof.

First Division Award No. 24789, dated June 27, 1997, (Referee Malin) held as follows:

> Thus, to credit the inference from the lab report that Claimant provided a sample that was not urine, one must conclude that, with no advance notice, Claimant procured a substance to use in place of his own urine and concealed that substance when he was in the presence of the collector, that the substance looked like urine and had the temperature of urine, and that Claimant placed the substance in the collection cup in a manner that conveyed to the collector who was listening on the other side of the partition the sounds of urination. Carrier has not suggested any theory as to how this could have occurred. The likelihood that this occurred is so minuscule, that to find that Carrier proved the Claimant's guilt by substantial evidence based solely on a single lab report concerning a single metabolite would go way beyond recognition that the lab reports are generally highly accurate and reliable. There is nothing to corroborate the lab's suggestion that the sample was not urine and everything to contradict it. To find that Carrier's reliance solely on the lab report in this case proved Claimant's guilt would be tantamount to finding that the lab report was infallible.

The Carrier, with respect to the question at issue mainly relied upon Award No. 11, Public Law Board No. 6050 (Fischbach). As I read that Award, it is not applicable to the case at hand for a number of reasons. Moreover, that Award, in pertinent part also held: "In vacating her dismissal from service, which shall be expunged from her personal record, the Claimant's discipline will amount to a suspension of nine-months." (Emphasis added.) Thus, the Neutral concluded that the Claimant was not totally innocent of the charge levied against her because he upheld a nine-month disciplinary suspension. This is quite contrary to Award 14 of this Board which held the Claimant was innocent of the charge, i.e., that the Carrier did not meet its burden of proof.

Finally, I agree that I do not have the authority to set aside or make void the nine-month suspension imposed by the DOT and FRA regulations. However, because the Board held that the Claimant was innocent of the charge, he is entitled to back pay, less outside earnings, for the nine-months that he was held out of service. To

find otherwise, nullifies the arbitration process, which I find is not contemplated by the DOT. In this respect particularly, I note the fourth paragraph of the previously cited "Questions and Answers" which reads:

> . The employer may still be bound to implement the personnel policy outcome of the arbitrator's decision in such a case. This can result in hardship for the employer (e.g., being required to pay an individual at the same time as the Department's rules prevent the individual from performing the duties of his job)."

Eckehard Muessig
Arbitrator

Dated: October 1, 2002