NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6659

Parties to Dispute:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS	OPINION AND AWARD
-and-	Case No. 34
PACIFIC HARBOR LINE, INC.	Claimant Karyn Haid

EMPLOYEE'S STATEMENT OF CLAIM:

"On behalf of Engineer Karyn Haid, the Brotherhood of Locomotive Engineers and Trainmen ("BLET") seeks compensation for time lost, including time lost for attending the formal hearing; restoration of her performance incentive; reimbursement of any out of pocket expenses for counselors; and the removal from her record of any mention of the concurrent 60-day suspensions assessed to her as a result of running a red signal and testing positive for alcohol while on duty on September 5, 2007."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Carrier's recitation of the relevant facts is consistent with the evidence of record and is, accordingly, adopted in part by the Board:

"1. On September 5, 2007, Claimant was assigned as the Engineer on the 1000 UP Dock Job on duty in Pier A Yard. At approximately 1640 hours, Claimant was pulling 83 cars westward out of Track 306 in preparation for doubling over to adjacent Track 307.

2. As Claimant pulled westward she received authority to pass the signal at CP Sepulveda. She continued heading west onto Main Track 3. As Claimant pulled her train onto Main Track 3 she observed an eastbound train departing Thenard from Main Track 2.

3. At about this time, Claimant was approaching the westward signal at West Thenard.

She indicated that she looked up and thought she observed a yellow signal and continued her westward movement. However, the signal was red.

4. Shortly thereafter, claimant received a call on the radio from the dispatcher at Badger Bridge. The dispatcher instructed her to stop her train as she had passed a red signal at West Thenard. Claimant's train had, in fact, passed the signal by about some 20 bays, or approximately 1000 feet. Claimant's engineer certificate was revoked at the scene in accordance with 49 CF Part 240.117(c) and (e)(1).

5. Subsequently, Claimant was taken to the Pier A Yard Office where she underwent a probable cause drug and alcohol test in accordance with Company Policy. Both initial breathalyzer test and a confirming test established the presence of alcohol in Claimant's system. Claimant was then notified that she was being removed from service pending a formal hearing.

6. Thereafter, by notice dated September 10, 2007, Claimant was directed to attend a formal hearing on September 17, 2007 to determine her responsibility, if any, for the events described above. Claimant was advised that her conduct on September 5, 2007 may have violated 49 CFF Part 240.117 (c), PHL General Code of Operating Rule (GCOR) 1.5, that part prohibiting employees from having any measurable alcohol in their breath when on duty, and PHL Timetable No. 5, Special Instructions, Signal Aspects and Indications, Rule 9.2.14, that part indicating that a train must stop before any part of the train or engine passes the signal. Claimant was also advised that she had a right to request a hearing concerning the revocation of her engineer certificate pursuant to 49 CFR Part 240.307.

7. Pursuant to 49 CFR Part 240.307(d), the revocation and disciplinary hearings were consolidated and held on September 17, 2007...

After considering the information and evidence developed at the hearing Carrier determined that Claimant had violate the rules as charged. By notice dated October 29, 2007, she was advised that pursuant to 49 CFR Part 240.117(g)(3)(I) her engineer certificate was revoked for a period of one month and that for her violations of PHL Timetable No. 5, Rule 9.2.14 and GCOR 1.5 she was being assessed suspensions of 60 days for each violation, to be served concurrently. Claimant was also advised that she would be

ineligible for performance incentive pay for a period of 90 days from the date of the incident.

The Organization argues that evidence adduced at Claimant's September 17, 2007, formal investigation reveals significant procedural error on Carrier's part. First, the railroad failed to timely notify Claimant of the charges in violation of the time limits set forth in Article 20 (A) of the Agreement. Second, Carrier was required by CFR 219.301 (b)(3)(i) to do a just cause drug and alcohol test on Claimant after she passed a red signal. Carrier's service provider, Alcohol and Drug Testing Services (ADTC), however, used OMB Form 2105-0529 for this purpose. According to CFR Title 49: Transportation Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Carrier may not use either AFT or non DOT forms for DOT alcohol tests.

Additionally, the Organization contends, as clearly stated in the DOT's governing rules as published on the FAA's website, " a railroad may not use a Federal test result below 0.02 for Federal or company action. Breathalyzers are not certified at levels below .02, so a test result below 0.02 is negative." The results generated by Claimant's 0.02 reading, therefore, failed to prove she was in violation of CFR regulations.

Lastly, as testified to by Carrier's ADTS collector, Kathleen Bykerk, mouthwash could have alcohol in it. Thus, given the imprecision of the breathalyzer--accurate to only plus or minus .005--Claimant's .023 and .007 readings do not necessarily indicate the presence of substantial alcohol in her body. The test she took merely confirmed the presence of alcohol in her system, but it says nothing reliable about the level of alcohol.

That fact, the Organization argues, is especially significant in light of the medications Claimant was taking at the time for both Lupus and rheumatoid arthritis and Carrier's refusal to recognize her special circumstances. As her physician, Daniel J. Wallace, MD, confirmed, Claimant was at the time of these events taking seven prescribed medications for her condition. According to Dr. Wallace, "[i]t is possible that any or a combination of these medications can interfere with a breathalyzer test." Claimant repeatedly asked to have a blood test administered to demonstrate the absence of alcohol in her system, but Carrier rebuffed those efforts. That decision deprived Claimant of the one realistic opportunity she might have had to demonstrate that the ADTS breathalyzer test, which

detects the methyl groups of alcohol, was actually picking up the Methotrexate in her system, since that drug falls with the methyl group. The refusal of Carrier's Hearing Officer to admit documentary evidence in support of that contention was overly restrictive and unfair.

Carrier takes the position that its claim handling was fair, impartial and free of any substantive procedural irregularities, and that its finding of guilt on all charges was supported by ample credible evidence. In view of Claimant's brief, 14-month period of service, it asserts that the 60-day suspensions for these serious rule violations was lenient.

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With respect to the Organization's initial procedural argument, it is clear that notwithstanding the typographical error in the September 10, 2006, date that appeared in the notice of formal hearing, Claimant herself admits that she received that notice on Friday, September 12, 2007, well within ten-days of the September 5 incident.

Regarding the Organization's second procedural objection, suggesting that Carrier's breath alcohol examination was administered on a DOT form and subject to DOT restrictions explicitly precluding company action for positive readings such as hers, that argument rests on a faulty premise. Claimant was required to submit to a test under Company policy; she was not charged with violation of the CFR and thus her test was not pursuant to federal authority. The form employed here, while similar to the DOT form, was not a federal form, and Carrier was not bound to disregard the minimal positive reading Claimant produced. The governing rule is Carrier's Rule 1.5 "Drugs and Alcohol." It reads in part:

> "...Employees must not have <u>any</u> measurable alcohol in their breath or in their bodily fluids when reporting for duty, when on duty, or while on company property." (Emphasis supplied.)

With respect to the signal violation, the record is equally clear. Claimant does not deny that in passing a red signal at West Thenard she violated CFR Title 49, part 240.117 (e) by failing to control her train in accordance with a signal indication. Running a red signal in the absence of a "proceed" signal may well have had catastrophic consequences under the

circumstances presented—there was a train occupying the track ahead of Claimant's train. That violation is established.

Reliable record evidence supports Carrier's charge that Claimant had a prohibited substance in her system while working on September 5, 2007, in violation of Rule 1.5. Whether that violation was the result of alcohol consumption or was attributable to other factors, however, is a closer question. The evidence on the point is in sharp conflict.

The Organization's case may be summed up as follows: (i) combining alcohol with the other chemicals Claimant was required to ingest would have posed health concerns; (ii) she made an early request for a potentially more conclusive blood alcohol test, rejected by Carrier but highly indicative of innocence; and, (iii) the recently added Methotrexate, or, as her physician urges, it in combination with Claimant's other six prescriptions, triggered a wrong conclusion from the breathalyzer positives.

Blood and alcohol test results are normally entitled to a presumption of validity. In this instance, neither of the first two arguments above overrides the breathalyzer science. Potential danger and a demand for another test in the face of two positive breathalyzer tests do not prove non-consumption.

With respect to the Organization's last contention, the evidence is in a mild state of irresolution. The legal standards governing this Board, however, do not require that the Rule G infraction be proved beyond a shadow of a doubt. By letter dated September 12, 2007, Carrier's Certified Medical Review Officer, Paul Teynor, MD, took issue with the theory of Claimant's personal physician that her drugs may have caused a false reading on the breathalyzer:

> "...none of the seven medications listed would individually, or in combination, interfere with the breath alcohol test. The breath alcohol instruments measure low molecular weight alcohols, such as ethanol and methanol. None of thee medications will produce these low molecular weight alcohols."

Accordingly, upon careful consideration, we find that Carrier has met its burden of proof and demonstrated that the Rule 1.5 violation is supported by substantial credible record evidence.

In the final analysis, however, we share the Organization's misgivings about the overall role Claimant's on-going health issues played in these events, as well as its concern about additional factors, related and unrelated. Accordingly, notwithstanding the Board's above findings, Claimant's suspension shall be reduced to thirty (30) days and she shall be made whole for losses in pay and benefits for the additional thirty (30) days of the sixty (60) day suspension.

AWARD

Claimant is partially sustained in accordance with the Findings.

James E. Conway
Chairman and Neutral Member

Stephen Speagle
Employee Member

Andrew Fox
Carrier Member

Dated: February 13, 2009
Great Falls, VA