

PUBLIC LAW BOARD NO. 1760

Award No. 73

Case No. 73

BMWE Docket No. DEC-84-81

N&W File NW-DEC-84-91

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company (Former Wabash)

Statement

of Claim: Appeal from discipline of dismissal assessed
Welder R. A. Frank by letter dated November 16, 1984,
as a result of investigation held November 18, 1984.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 2, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Welder, and his Helper, on August 31, 1984, were assigned to weld a plug in the mainline rail that had been discovered by a test car as having a defective spot. Claimant at 9:02 AM requested the Dispatcher for some track time because he was going to use a truck with a boom cable apparatus to move a piece of rail onto the mainline track. Said permission was denied and was not to be granted until after 2 trains had gone by after Claimant was to call the Dispatcher back.

Notwithstanding, Claimant pulled the piece of rail onto the mainline track and Train TC-4 arrived striking the piece of rail causing damage to the Company truck and locomotive.

An on the spot examination of the incident by two trainmasters and a roadmaster plus the highly questionable actions of Claimant along with his inability to explain why the incident occurred served to cause Claimant to voluntarily undergo a physical examination which included a blood and urine drug/alcohol screen.

The examination was performed at Memorial Hospital, Logansport, Indiana. The urine sample was sent to the Smith-Kline Clinical Laboratories, Creve Coeur, St. Louis, Missouri, for analysis. The test results, dated September 5 and 6, 1984, were received by the Carrier on September 12, 1984. The following drugs were detected in the urine sample: "nicotine - cannabinoids by immunoassay."

Claimant was notified under date of August 31, 1984 to attend a formal investigation on September 12, 1984 on the charge:

"To determine your responsibility in connection with your failure to secure proper protection from the Layette District Dispatcher to protect yourself and equipment against train movement at the Conrail Crossing, Logansport, Indiana, Mile Post 218.7 at approximately 10:30 a.m. August 31, 1984 which resulted in accident involving Train TC-4 hitting a rail being moved by the boom on your Hy-Rail Truck 6156 causing damage to the locomotive."

Claimant was also notified under date of September 14, 1984 to attend a formal investigation on October 9, 1984 (later changed to November 8th) on the charge:

"To determine your responsibility in connection with your violation of Rule G of Norfolk and Western Railway Company Safety Rules and Rules of General Conduct dated March 1, 1981 which reads:

'The use of alcoholic beverages, intoxicants or narcotics by employees subject to duty or their possession or use while on duty or on Company property is prohibited.'

in connection with it being determined through urine samples taken on August 31, 1984 at Logansport, Indiana showing that you had been using cannabinoids..."

Claimant was notified under date of September 28, 1984 that as the result of the first formal investigation, held on September 12, 1984,

concerning his failure to protect himself and equipment against train movements on the Conrail Crossing, Logansport, Indiana, Mile Post 218.7 which resulted in an accident involving Train TC-4 that he had been found culpable and assessed 60 actual days suspension as discipline therefor starting 3:00 PM August 31, 1984 and that he may return to work 7:00 AM October 30, 1984.

He was notified under date of September 14, 1984 that he was being removed from service pending an investigation for his violation of Rule "G" on August 31, 1984. He was also notified August 12, 1984 to attend a formal investigation. The second formal investigation scheduled for October 12, 1984 was rescheduled at the request of the General Chairman to November 8, 1984. Claimant was thereafter notified, under date of November 16, 1984, that as a result of formal investigation held on November 8, 1984:

"in connection with you being in violation of Rule G of the Norfolk and Western Railway Company Safety Rules and Rules of General Conduct, in connection with it being determined through urine samples taken on August 31, 1984 at Logansport, Indiana, showed that you had been using cannabinoids, you are hereby dismissed from all services of the Norfolk and Western Railway Company."

Thirty-nine (39) days after August 31st, i.e., on October 9th, Claimant on his own initiative submitted to another urine sample for a screen testing. That private test reflected a negative showing which was introduced at the November 8th investigation.

There appears to be no real question (Q/A 1741) as to the efficacy of the urine sample taken, or any weakness or breach in the custodial chain. The fundamental defense offered, among other things, was:

1. The Smith-Kline Clinical Laboratories did not specify the amount of cannabinoid detected.
2. A second test was not given.
3. The immunoassay test is only accurate on a small percentage of the tests given.

4. Claimant was not adversely affected by a drug.
5. Claimant's subsequent October 9, 1984 urine test showed negative.
6. There is no relevance between cannabinoids and Rule G because cannabis is not a narcotic thereunder or under law.

The Carrier concluded that among other things the following medical testimony suggested its conclusion of Claimant's guilt as to the charges placed against him.

"84. Q. Mr. Cashner, can you respond to the last question please?

A. Yes, Mr. Hammons, as I stated before in connection with your question, it depends on the dosages administered to the person, how often the doses are administered, and the physical characteristics of the individual. I have had numerous conversations with the three doctors I have mentioned. I have for exhibit in answer to your question first Page 308 from Chapter 16 the Pharmacological Basis of Therapeutics, 5th Edition, which is one of the books I previously mentioned, and I have the excerpt circle in red and I will present it as exhibit.

85. Q. Would you review what that excerpt does cover, Mr. Cashner?

A. This states that "Delta 9-THC is rapidly converted into an active metabolite, 11-Hydroxy-Delta 9-THC, which produces effects identical to those of the parent compound, 11-Hydroxy-Delta 9-THC is, in turn, converted into a more polar, inactive metabolite (8.11-dihydroxy-THC), which is then excreted into the urine and feces. Metabolites excreted in the bile may be reabsorbed. Very little unmetabolized Delta 9-THC is found in the urine. After reaching their peaks, plasma concentrations of Delta 9-THC and 11-Hydroxy-Delta 9-THC fall rapidly at first (half-time of minutes), reflecting to the redistribution of these lipophilic compounds to lipid-rich tissues, including the CNS. This first phase of rapid decline is followed by a much slower phase (half-time of days), reflecting the gradual metabolism and elimination of the drug from the body. Traces of Delta 9-THC and its metabolites persist in the plasma of man for several days and can be detected in the

fat and brain of animals for days after a single administration. Metabolites can be found in the urine for days or weeks. Delta 9-THC crosses the placental barrier. Consumption of repeated oral doses of Delta 9-THC by man for several days or its daily smoking for several weeks does not seem to produce clinically detectable evidence of accumulation, but this does not preclude the possibility that such would not occur over a more prolonged period or with higher doses. Chronic marijuana smokers metabolize Delta 9-THC more rapidly than do nonsmokers. Also, I have ...

87. From the Drug Enforcement Book July 1979 Edition, Page 34 and continue down Page 36: "Cannabis products are usually smoked in the form of loosely rolled cigarettes ('joints'). They may be used alone or in combination with other substances. They may also be administered orally, but are reported to be about three times more potent when smoked. The effects are felt within minutes, reach their peak in 10 to 30 minutes, and may linger for 2 or 3 hours. A condensed description of these effects is apt to be inadequate or even misleading, so much depends upon the experience and expectations of the individual as well as the activity of the drug itself. Low doses tend to induce restlessness and an increasing sense of well being, (sic) followed by a dreamy state of relaxation, and frequently hunger, especially a craving for sweets. Changes of sensory perception - a more vivid sense of sight, smell, touch, taste, and hearing - may be accompanied by subtle alterations in thought formation and expression. Stronger doses intensify these reactions. The individual may experience shifting sensory imagery, rapidly fluctuating emotions, and a flight of fragmentary thoughts with disturbed associations; an altered sense of self identity; ...

was present in the user's body. This, of course, assumes that no additional usage has occurred during the period from the test to the time of the last usage. There are no studies which relate urine concentration

and physiologic effects in a specific way. The variety of responses physiologically to this drug and the variability among user makes these comparisons and correlations difficult to establish. I think the importance point to be derived from this technique description is that the presence of cannabinoids in the urine indicates, with little doubt, that the person has been a user of tetrahydrocannabinol containing substance some time in the recent past. It could be as recently as one hour previously or as long as one plus months. However, the presence of the substance in his urine leave little doubt that he has been a user and that he had the substance in his body at the time of the testing. I hope this brief review has been useful to you, and if I can be of further assistance, please do not hesitate to contact me. Cordially, Jack Mellinger, MD"

Mr. Patterson: May this two page letter submitted by Mr. Cashner over the letterhead of Decatur Urgent Care Center, signed by Dr. Mellinger, be made a permanent part of the transcript labeled as Exhibit D and will be made available to any of those present to examine if they so desire.

106. Q. Would you please state your name, address and occupation?

A. John A. Meyer, MD, surgeon, general traumatic surgery. I am also Administrative Medical Chief of Surgery and Medicine for several corporations, including the C&IM Railroad, Pillsbury Mills, Commonwealth Edison's interest in Central Illinois, and some other companies.

Mr. Patterson: Dr. Meyer, if I may ask you to speak up just one little bit so we can be assured of getting a correct recording of your statement, and as a matter of information, Dr. Meyer, this proceeding is to determine the responsibilities, if any, in connection with Mr. Frank being in violation of Operating and Safety Rule G of the Norfolk and Western Railway Company in connection with a urine specimen

taken at the Memorial Hospital, Logansport, Indiana, on August 31, 1984, and subsequent report by the Smith-Kline Clinical Laboratories which indicate that the test revealed that the employee had in his system cannabinoids on that date. All of your statements will be tape recorded and transcribed for a permanent transcription at a later date. Dr. Meyer, I would like for you to review several exhibits that have been made a part of this procedure. Exhibit A is the results submitted by Smith-Kline Clinical Laboratories of the urine specimen taken from Richard Frank on August 31st. Would you view such please.

107. Q. Would you please read for me the findings of the Smith-Kline Chemical Laboratories?

A. The findings of the Smith-Kline Chemical Laboratories showed cannabinoids by immunoassay and nicotine.

108. Q. Dr. Meyer, could you define cannabinoids for me at this time please?

A. The suffix "-oids" refers to similar like the main body of the word, cannabis referring to marijuana, and like means similar to cannabis. So the study then shows that there are cannabis like chemical products as done by the assay method that they use in their examination of the material.

109. Q. Dr. Meyer, there has been some testimony by Mr. Cashner, which you were not present, were you not?

A. No.

110. Q. During his testimony he referred to the definition of the cannabinoids and linked this as being connected with cannabis. He also brought forth some other terminology that I would like for you to comment on and define. This would be with the cannabinoids being found in the employee's system, the test, according to Mr. Cashner, cannot determine the level of cannabinoids. Would you comment on that please?

A. Yes. The test only shows that there is a level present. That level has been at various standards.

The nanogram, which is a billionth of a gram, is used as a standard. Apparently, at one time they used 50 nanograms, now they are using 100 to be sure that there will be no false positives, and that 100 nanograms then means there was at least that much present and could be more, but that much present it does not quantify how much was there.

111. Q. When you refer to "they", is this the Smith-Kline Chemical Laboratories?

A. That's correct, the laboratories that would be examining the tissue.

112. Q. Mr. Cashner in his testimony has referred to the terminology, and I hope you will bear with me if I am not pronouncing it correctly, I will spell it for that purpose, tetrahydrocannabinol. Are you familiar with that term?

A. Yes, sir, that is tetrahydrocannabinol. That is a break down product that occurs in the course of the use of cannabis.

113. Q. Mr. Cashner referred to this product only being derived from marijuana. Is that a correct statement?

A. That is correct.

114. Q. And as a matter of simplifying this terminology, he then referred to it in further testimony as THC.

A. It is referred to as THC and also Delta THC. They are two forms of it, and both of them have the active principles of cannabis.

115. Q. Dr. Meyer, due to the fact that the testing procedure only qualifies that cannabinoids were found in the employee's system and no certain level, Mr. Cashner then referred to the fact that, in answer to a question how long had the employee had this in his system or when had the employee consumed any marijuana or how that could be identified, Mr. Cashner was unable to identify, saying that there are no conclusive tests that can precisely identify the exact time that the employee was to have consumed this product. Would that be a correct statement?

(underscoring added)

A. That's correct. They are rules of thumb. To put a stop watch on it, though, would be next to impossible. The rule of thumb is one cigarette lasts three to five hours, two to three hours mostly, and may have an effect up to five hours, and those who use them frequently and chronically, it can last somewhat longer. Also, if you take it orally, without a cigarette, it has a different time span. (underscoring added)

116. Q. If I may then, when you refer to cigarette, are you referring to marijuana?

A. Marijuana cigarette, that is right.

117. Q. And if it was taken by the form of a cigarette, how soon would the immediate effect take place?

A. Immediate effect is rather quick. It happens within 30 minutes, 15 to 20 minutes, however, there are ways of using a cigarette to make it effective more often. It depends on how it is smoked and if it is smoked as a straight cigarette, it takes maybe a little longer. There are also ways of increasing that effect, or trying to, by putting the cigarette in a funnel of rolled up paper and putting the cigarette in the end of it, and then taking a big breath into it to get a maximum burn on the cigarette and then a maximum inhalation, and this is done in a way by rolling up toilet paper or ordinary paper, anything you have at hand, sticking a cigarette in the end of it, and taking a big breath and holding the end of it and finally getting a final blast of built up burn in the intake. So it depends on how it is done, and that's one of the ways that you can get the most out of the least amount of cannabis so that you get a maximum effect sooner depending on how it is smoked and if it's smoked in the ordinary cigarette way, it will last a little longer.

118. Q. Cashner also referred to the fact that the product or detection of the product could remain in an individual's system for extended periods up to approximately one month. Could you expound upon that further?

A. That is correct. I know of one case where in a pre-employment case where it was two weeks later that exams were done elsewhere that two weeks is the

standard where the tests are used in pre-employment standards, and if they are present, it is felt they have used them within at least two weeks on the standard pre-employment use of drug screening. On tests it has run up to a month.

119. Q. The effects of these cannabinoids, is there any measuring rule stick to establish what effects this substance would have on Mr. Frank that could have been derived from the finding of the Smith-Kline Chemical Laboratories? (underscoring added)

A. If the cannabis and its derivatives were present and active, the known effects of the drug are to reduce the sense of perception, of surroundings, and by that to have altered response to the normal stimuli with which one measures their life style. For instance, time seems to pass much more slowly, and therefore one apparently thinks they have more time to accomplish things. You also have a noted awareness of the frequency of response because your time is out, your memory is impaired, the mood of the person depends on whether you are by yourself or in a crowd. If you are by yourself, it appears to be depressed and... (underscoring added)

120. Q. Dr. Meyer?

A. You have a mood change, a sense of relaxation, you may have a sense of sleepiness. If you are in a crowd, it is much more sense of euphoria and laughter. If a person using it chronically and heavily, they can also then have a certain amount of permanent brain damage which then would leave them such that even with a level of 100 nanograms or so would have some permanent effects that might not be known because they don't know what the long term smoking habits are. But there are two things that occur. One is a temporary change, as I mentioned, and also the second is a long term change of organic brain damage. (underscoring added)

121. Q. Mr. Cashner has brought forth that the test submitted by the Smith-Kline Clinical Laboratories could not precisely identify what reaction these cannabinoids would have had on Mr. Frank on the date in question. Would you agree with that?

A. Repeat that again?

122. Q. Mr. Cashner was unable to precisely identify what effects would have been present in Mr. Richard Frank's system on the date in question. Would that be correct? (underscoring added)

A. That would be correct, but there is a period going into and coming out of the effect of this where one could have outwardly normal appearance but could have some early or minimal changes of mood, perception, response to stimuli, and so on and so forth, that would not be measurable but could be present. So it would be hard to say specifically in one case like that. (underscoring added)

123. Q. If, for instance, an individual, Mr. Frank for this matter, had not consumed the marijuana substance or cannabinoid substance recently. Let's say that he had consumed, we will take the month figure as that has been brought into this proceeding, if he had consumed the product a month prior to August 31, would there still be any effects that are identifiable to his mannerisms or judgements, motoring activities.

A. I think a man on the street it would be difficult to do. It would take psychometric testing at that point to determine what the long term effects have been established in a person before you measure the drug. If you have measured just on one dose, one cigarette, and the effect lasts for a month, no, but if it's a chronic heavy user who has had cerebral deterioration and so on, it is very miniscule, that would be something else to consider. That would have to be measured by psychometric testing and it is measured the way they have determined organic brain damage, for instance. That is not done by anybody in my capacity or ordinary off the street capacity. It is done by specialists in the field.

124. Q. Would the evidence of the cannabinoids in the employee's system offer then serious question as to the effects on him?

A. Yes. If you have, again, the test only measures a minimum level of 100 nanograms. It will measure anything that is in the system above that, but it only comes out as a positive/negative. There is no

quantity testing of the material, therefore, one doesn't know what range one is dealing with at the time it is measured. (underscoring added)

125. Q. You then referred to previously in regard to the nanograms that the Smith-Kline Chemical Laboratories at one time used the criteria of 50 nanograms to create a positive finding, is that correct?

A. That's correct.

126. Q. And you state in regard to the test on August 31 and subsequent analysis that the Smith-Kline Laboratories now uses the minimum requirement of 100 nanograms?

A. That is my understanding.

127. Q. I would assume this is an increase in the minimum quantities to be detected to create a positive finding?

A. That is correct.

128. Q. Dr. Meyer, we very briefly brought to your attention the reason we are here today. Mr. Frank is charged with, because of the findings of cannabinoids in his system on August 31, to be in violation of Operating and Safety Rule G, of which he is subject to. I would like, for your benefit, to read the definition of Rule G. This is taken from the Book of Safety Rules and Rules of General Conduct and is identically stated in the Book of Operating Rules. Rule G states: "The use of alcoholic beverage, intoxicants, or narcotics by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited." We certainly are not dealing with an alcoholic beverage, are we not?

A. No.

129. Q. Are we dealing with an intoxicant?

A. No.

130. Q. There would be no intoxicating possibilities that would exist with the evidence of cannabinoids in his system? (underscoring added)

A. Well, if you are talking about the cannabinoids, yes. The cannabinoids are in there. I was thinking the alcohol. (underscoring added)

131. Q. No, I am referring now to how would you relate the word intoxicants to the finding of the cannabinoids in his system? (underscoring added)

A. I would say that they were there and it is a level which has not as yet been quantified as to what happens at certain levels. But that it is present in the system and does show use and it is a measure that show that its present in whoever has it. (underscoring added)

132. Q. How would you then compare narcotics with the finding of cannabinoids in Mr. Frank's system? (underscoring added)

A. Well, cannabis is a mood elevator. Narcotics, in a sense, are mood elevators. The cannabis is put into a generic group of things that are considered nonspecifically narcotics, but then the mood, mind changing, brain adulterating drugs, and they would be considered as a narcotic in that sense, I would assume. (underscoring added)

155. Q. But who is Dr. Mellinger?

A. Dr. Jack Mellinger of Decatur Urgent Care Center, Decatur, Illinois. It says in his letter that the 100 nanograms per millimeter, which is the minimum detectable level established by the Smith-Kline Toxology Screen.

156. Q. But is Mr. Mellinger verify that through Smith-Kline Chemical Laboratory?

A. That I don't know, that is just the advice that I have, that it was so done, I...

157. Q. Well, it is my understanding that this wasn't changed until some time in October, that it would go to the 100?

A. It would be 50, 50 shows the present, it was 50, which is there standard before it was...

158. Q. True, but I understand that it didn't go to 100 until sometime in October?

A. I don't know when their changes were done, I have no idea when their lab.

159. Q. Now there is several components within cannabis weed?

A. That is correct.

160. Do you know how many components was in?

A. Well I have reference from the standard text book of Godman and Gilman and the components are numerous but they all get, no matter how many components you have, it is the two of them can leave a burning account and there may be all the rest of them in there, but those two are the most important ones, I don't know how many other ones there are. Cannabis breaks down by paralysis into these 2 THC compounds. The rest of the components I don't know about those.

161. Q. You don't know, just the 2 is what you actually test for?

A. I don't know what they test for, I think it is Tetra, the cannabinoids are referred to primarily as THC.

162. Q. Well to run one of these tests, are you familiar with how these tests are run?

A. I don't specifically know the test, no. It is in my immunoassay, an immunoassay is done taking the effect of the chemical that they are looking for and matching it with something that connects on to it and hinders an antibody reaction and when those two connect and those are measured by whatever method is used to measure them by the technique of the measure. I am not acquainted with the actual mechanics of how it is done.

163. Q. You do not have a degree in chemistry?

A. I majored in chemistry, but not in this chemistry when I was in college.

164. Q. But do you have...

A. I am not in this particular chemistry, this particular material.

165. Q. Well to analyze one of these tests, what degree would you have to have?

A. Well probably the present time, inorganic chemistry. Which is, what this is, this is an inorganic compound and however if you analyze one, there are also technicians who do it and process is set up by PHDs and other people who have specifically worked in the process of finding the chemical, identifying it, getting the energy for it, making the energy meet the antibody and the two of them be measurable.

166. Q. Yes sir, but what degree in medicine or medical degree would you have to have to be able to have to analyze this?

A. Any degree of medicine, if you are interested in the field, specifically in the technical capacity of analyzing it, any degree of medicine would allow you to do it.

167. It would?

A. Yes sir.

168. Q. Could you analyze it?

A. If I spent time learning how it was done, yes sir.

169. Q. Yes sir, but what degree does it call for to be able to make this test and make it a properly sir?

A. It doesn't call for, to make a test and make it properly, it calls for somebody with the knowledge to operate the machinery, to identify the compound and to produce the compound identity in readable form so that it can be used in cases like this for court purposes. Now if you want to go the face level of knowledge needed for that, it is somebody who goes to a technician's school, who learns to operate the material on direction of someone else. However, the person who would be responsible for that could be

anybody from a, who had taken a course in the subject of chemistry, either graduating in inorganic chemistry with a Bachelors Degree or someone who graduated in a medical degree, someone who just takes someone with the knowledge of the procedure to do it. And it doesn't take any specific person other than that. A pathologist in the hospital have a medical degree and they run the tests of this type, however, the machinery is such that it is done in central locations so that the tests are accurate and are constantly run, but the degree doesn't really count.

175. Q. Dr. also, when cannabinoids is found in the person's system, there is a certain amount that is ingested into the system by a certain way, is that correct?

A. And how are you referring ingest?

176. Q. Well you can either take it internally or you can smoke it, is that correct?

A. That is right, you can eat it orally, chew it, or smoke it, that is right.

177. Q. Now as that goes into the system, how is it excreted through the body?

A. How is it what?

178. Q. How is it left out, got out of the body, in other words?

A. Comes out in the urine.

179. Q. And in what other way?

A. As far as I know the blood stream also carries it, but it has to either come out through the urine or the people pass it, that is the only way it can get out, unless you have a blood letting.

180. Q. Not all people will get rid of it in the same manner, at the same, the same amount, would you agree with that?

A. The process is the same, the timing would be different.

181. Q. But somebody will hold it longer than others?

A. Yes, that is possible.

182. Q. Well why would it be impossible? In what way would it be impossible?

A. Well you have got an unknown factor of what a persons storage rate is going to be, the unknown factor of, there is no way of measuring a number of unknowns and that is it, how it was put in the first place, secondly how fast is it absorbed and thirdly where was it absorbed and finally when was it gotten out, this is all a peculiarity of the human body.

183. Q. What is it absorbed, where is it absorbed at?

A. Well it is picked up in the bloodstream and then travels through the obviously to the brain to get the impaired sensations that occurs.

184. Q. Well not only to the brain, but is it stored in the body...

A. Fatty tissue, fatty tissues, other place it can be, yea.

185. Q. And it is skirted from that body by your metabolism?

A. That is a breakdown of material.

186. Q. Some people may take lengthier time than others?

A. That is possible.

187. Q. Now, there has been a question come up here of how long it would stay into a person's system, in your opinion, how long will it stay in this man's system?

195. Q. Dr. would it be realistic you say that you could check someone today and 30 days from now, if he had it in his system, that it would still be there?
(underscoring added)

A. If it was a level of 100 nanograms or more. It may be in his system, less than 100 nanograms, and since the tests has been changed from 50 to 100, there is a possibility of getting some people between 50 and 100, but a low 50 is not considered, you could check it but it could still be in your system. (underscoring added)

196. Q. The test would come up negative? (underscoring added)

A. The test would come up negative, but the materials would still be there. It is called a false negative. (underscoring added)

197. Q. Is there anyway you can tell by these tests if a person is under the influence or not? (underscoring added)

A. To clarify, you can't clarify the test as measured here, only shows a level of 100 nanograms or more. It will not test anything except the physical presence of the drug, the condition of the patient or the person involved, is not indicated by this test. (underscoring added)

198. Q. It will not show whether the man is under the influence or not then? (underscoring added)

A. That is right. (underscoring added)

199. Q. All it does is show that there is a certain amount into his system?

A. That is correct.

200. Q. And above a certain...

A. That level or above.

201. Q. This particular type of test, it was a urine specimen, is that correct?

A. I understand that is correct, yes.

202. Q. How accurate are these tests? (underscoring added)

A. Well, I have never had occasion to find one in a pre-employment exam, I work with a different company than this, in Chicago, but the other two companies use it, but I have never found one test that the test was positive, that anybody would ever deny it and prove that they denied it, I assume that the test

is positive enough that it is acceptable standard
in the field of medicine. (underscoring added)

203. Q. But is it a 100 degrees, 100% effective?

A. I am not aware of the technique of the test again, as I have testified earlier, and so I can't tell you what the specific results of their testing is.

204. Q. You have no knowledge of what the percentage is?

A. Not investigating the company or its techniques.

205. Q. To make a test is this, how does it make a positive test Dr?

A. How do you make a positive test?

206. Q. Yes sir?

A. What are you referring to?

207. Q. Well to make one of these tests you run a certain amount of chemical through your urine?

A. As I told you, I don't understand, and all I am aware of the use of this material, a specimen of urine is taken, sent to the laboratory, the laboratory does the work, the laboratory gives the result back. I send the urine, I get a piece of paper back. What is done in between times, I am not aware of enough to testify as an authority on how it is tested.

208. Q. But have you ever have them run a second test to make sure that the first test was positive.

A. I have.

209. Q. Why did you do that?

A. To be sure, the patient questioned it.

210. Q. Can you tell by this test here, if it a positive test or not?

A. It is reported as positive.

211. Q. And I can see nothing on the Smith-Kline Clinic that this is a positive test?

A. It says the following drugs were detected in the urine, and the urine specimen was sent in, and then the urine specimen sent in and I assume that the company is reputable and keeps track of the urine so that what urine goes in and the urine is tested and it is effective in the drugs detected, nicotine from cigarette smoking, and cannabinoids by immunoassay and cannabinoids are in there, then that is a positive test.

Mr. Hammons: I have no further questions.

Mr. Patterson

212. Q. Dr. Meyer in reviewing Exhibit D, which is Dr. Mellinger's letter which you reviewed, I note that the last paragraph of the first page states:

"So the finding of cannabinoids in any urine sample would indicate that these metabolites are present in an amount greater than 100 nanograms per ml which is the minimum detectable level established by the Smith-Kline Toxicology screen. This level, which represents a substantial amount of the metabolite, makes it highly unlikely a false positive test will occur. In fact, there have been no reported false positive tests found by the Smith-Kline Laboratories according to Dr. Wright the Toxicologist there."

Do you have any comment on that? (underscoring added)

A. Well my comment would be then that the company is very careful, conservative in their standards and apparently have not as yet had anyone have a report that was not accurate. (underscoring added)

213. Q. I would have to assume at this point that the employee voluntarily submitted to the test at the closest hospital on August 31 and that would have been the Memorial Hospital in Logansport, I would have to assume that the hospital chose the laboratory in which would be analyzing the urine specimen?

A. That is generally standard done.

216. Q. This is the common practice?

A. Common practice each hospital has its referring laboratory and I am on the staff of several of them and they each use whatever they find applicable for their purposes.

217. Q. Also there has been numerous approaches to effects, effects of cannabinoid products would have on a given employee or given individual and I, from what I have heard, it is established that there is no accurate gauging of a precise effect on a particular individual, is that correct?

A. That is correct?

218. Q. Would it be correct to state that if cannabinoid substance was found in an employee's system, whether it be the criteria for detecting level 50 nanograms or 100 nanograms, and that we cannot determine how long it has been in the employees, or individuals' system, the test in question did establish that, without doubt, there were cannabinoids found in his system, is that correct?

A. That would be my interpretation.

219. Q. Would there be some effects, can we say that there are some effects, or can we say that there are no effects? (underscoring added)

A. You can't make a positive statement either way, as I mentioned earlier, if the patient is just going into the effects of the drug, he would pass that minimum 100 nanogram at a time, and the time level ratio again, as I said, is hard to say, but it is possible, that he could be going, observing drug at the time and be picked up to a point where he would have effects right there after or he would be coming out of the use of it, and coming down past the 100 nanogram level and he could be clearing himself of the effects. What I am saying is that you don't know when the material was ingested, but crossing a level, rather than staying at a level, then he would obviously either, just like an airplane taking dive, or zooming up, your crossing level either way, the

metabolic effects the physiological effects, I mean, the physiological effects are going to vary in rapid quick time, depending on if he has used them within a half an hour to an hour prior to the test, two hours of so, and coming back down, in a period after that, so you can't say anything occurs at, that is measurable that level that has its positive, it is an ongoing dynamic process. (underscoring added)

220. Q. Alright, in some of Mr. Hammons' questioning that you, for the first time that I can recall in these proceedings, he referred to the word influence and I would like at this point not to discuss influence?

A. Not what?

221. Q. Not discuss influence.

A. Alright.

222. Q. I would not like to associate influence with the drug, what I would like to associate with is the narcotic...

223. Q. What I would like to associate or ask questions in regard, would it be, the Rule G that we have brought forth in this proceeding, the Rule G mentions nothing about influence of a drug, under the influence or anyway connected with the influence, it does, however, mention that in regard to a drug, or a narcotic, that there cannot be any intoxicants or not narcotic either possessed by the employee, or possessed by the employee or on company property or in his system, did the findings of the Smith-Kline Clinical Laboratory establish the findings of cannabinoids in his system? (underscoring added)

A. It did. (underscoring added)

224. Q. And is this connected with intoxicants or narcotics? (underscoring added)

A. It is. (underscoring added)

225. Q. Mr. Hammons do you have any further questions of Dr. Meyer?

A. Yes sir.

Mr. Hammons

226. Q. Dr. Meyer you said it is related to or has connection with narcotics, is that correct?

A. The general feel of narcotics, as under, recognized by the State of Illinois and other people for mind altering drug.

227. Q. It is known as a drug, but is it known as a narcotic in the State of Illinois?

A.

228. Q. Is is classified in the narcotics in the State of Illinois?

A. I am not sure of the exact classification. It is a restricted drug.

229. Q. Now how do you define the word intoxicant? For this investigation?

A. Anything which does or have a capacity to do, alter the normal body process, whether it does or does not at the time, it is present and the drug as such can cause trouble, therefore, it would be prescribed as I understand it in this sense. (underscoring added)

230. Q. Would you consider aspirin as an intoxicant?

A. If you get enough of it, but not within the general sense of the use of drug.

231. Q. In other words, if you only had a small amount of cannabinoids weed, would you consider it at all times intoxicant? (underscoring added)

A. I would consider cannibinis basically as a detriment with no known value to the body, and therefore, no matter what it does, it is negative use of the body and therefore in a minute form, or whatever you want to say, it has absolutely no positive to it, and therefore, it is in a miniscule way, it is an intoxicant, even if it is an intoxicant to 5 cells, it intoxicates those cells, if you wanted to say it that way. Again, an intoxicant is something which

alters anything in the body, it doesn't have to alter the mind, it can alter anything. It is a restricted drug and comes under the category of restricted drugs and it has no known value. It is harmful to the body anyway you take it. (underscoring added)

232. Q. Well we are not questioning whether it is harmful to the body, which I think most people would agree to it, that a certain amount of degrees that it is, but the problem is how you interpret intoxicant of, you said an aspirin could, if you used a certain amount of it?

A. That is right.

233. Q. Now if a person used marijuana in a minor degree would it be intoxic to the body?

A. What do you classify minor degree?

234. Q. Say I took a puff off one drag, are you or anybody else?

A. I don't know, I know the value of the use of one cigarette, now again, you take one puff off a cigarette, and as I mentioned you can accentuate that effect and have a temporary high or you wouldn't have it in the first place or you wouldn't be using it and to get a high, you, the way of smoking it, you take one good puff and get a high on it, so in that case, to some people it can be an intoxicant.

235. Q. To some people it would, to other people it wouldn't?

A. It is possible that a very small measure of it would not be, but I doubt if the amount that would not be intoxicant would then create a level in the bloodstream that would be measurable, what I am saying is you almost have to an intoxicating level before there is going to be a level in the bloodstream that is going to be measured, to the extent that we have in this test.

Mr. Patterson: Can I clarify one, or attempt to clarify one point here, Mr. Hammons?

Mr. Hammons: Well you may.

Mr. Patterson

236. Q. In regard to the question by Mr. Hammons of one puff of a marijuana cigarette, whether the criteria is the testing criteria, minimum criteria is 50 nanograms or 100 nanograms, would one puff be able to score in this scale? (underscoring added)

A. It is my impression that it would not. (underscoring added)

Mr. Patterson: Thank-you, Mr. Hammons.

Mr. Hammons

237. Q. We are not questioning whether it would be effected anything in here, we was disputing that one puff would indicate that he had any excessive amount of testicle debris. The questions I asked him what his interpretation of the intoxicant is.

Mr. Patterson: I understand your question and do you have any further questions of Dr. Meyer.

238. Q. One other question I would like for you to clarify, you mentioned in your testimony that it produces brain damage?

A. That is correct.

239. Q. How did you come to that conclusion?

A. Research.

240. Q. That is introduce brain damage?

A. It does, it has been noted in the military, smoke heavy doses in Viet Nam. And chronic heavy smokers have been found to have it, it is in the literature, the medical literature.

241. Q. Would you mind to elaborate what medical brochure or whatever you found that out of that would...

Dr. Meyer

Would you please ask your question again?

Mr. Hammons

242. Q. I said, what reference did you refer to when you made that statement?

A. Goodman and Gilman Physiology, the 5th and 6th Edition, on page 562 of Chapter 23, some, it, summary states Army enlisted men using high doses of hashish which is also marijuana and cannabis, for another name, on a chronic basis exhibited apathy, dullness and impairment of judgment, concentration and memory associated with a loss of interest in personal appearance, hygiene and diet. After discontinuation, memory, alertness, concentration, calculating ability, returned to normal within 2-4 weeks but several men seemed to exhibit continued intermittent residual symptoms, memory loss, confusion, inability to calculate and concentrate similar to those seen in organic brain disease. Such chronic high dosage use is not common in the United States, but some chronicians have described subtle changes in personality and decreased interest in achievement and pursuit of conventional goals in young marijuana users who regularly smoke a few cigarettes a day. At present there is no evidence to suggest that any such personality changes are due to irreversable organic brain damage. The possibility of an adverse affect in frequent and chronic low levels of intoxication on developing personalities cannot be dismissed.

243. Q. You're talking about concerning chronic smokers from that degree.

A. Young marijuana users who regularly smoke a few.

Mr. Patterson

Dr. Meyer, at this point may I ask that we make a part of the transcript that exerpt from that publication, and would you write the name of that publication on that page that you just read from please.

Dr. Meyer

All right, Goodman and Gilman. I don't know, let's see, the exact title. Is my other copy here?

Dr. Meyer

This came out of the 6th Edition and...

Mr. Patterson

Just forget that, it's not necessary. We have the publication here.

Dr. Meyer

It's Goodman and Gilman's Pharmacology Book, I know what it is, but it's a standard, and whatever title it comes under, it's a pharmacology book.

Mr. Patterson

May the transcript note that we will make this excerpt from the Goodman and Gilman publication a part of the transcript labelled as Exhibit "F" and make this available to any of those present who wish to examine.

244. Q. You have any further questions, Mr. Hammons, at this point?

Mr. Hammons

A. Not at the present.

Mr. Frank

245. Q. May I ask one?

Mr. Hammons

A. You ask it through me.

Mr. Patterson

May the transcript note that Mr. Frank wishes to confer with Mr. Hammons. Mr. Frank has requested a recess so he may confer with his Local Chairman. At this point we will have a brief recess for this purpose. The time is 12:40 PM.

246. Q. May the transcript note the time is 12:42 PM. We have returned from the requested recess by Mr. Frank and Mr. Hammons. Mr. Hammons, are you ready to proceed at this point?

A. Yes sir, I have no further questions.

May the transcript also note that all those who were present at the time of the recess are again present now.

Mr. Patterson

247. Q. Dr. Meyer, Exhibit "A", which is the findings of the laboratory in question. Have you received through your practice similar type reports?

A. Yes.

Mr. Patterson -

Mr. Frank, let me enter this. Your second request for submittal will be recognized. It is over the letterhead of the Smith-Kline Clinical Laboratories and Co., dated October 12, 1984, would be made a permanent part of the transcript and labeled as Exhibit H, I beg your pardon, made Exhibit I, we'll make this Exhibit I. It's addressed to Mr. Richard Frank N&W Railroad, 1900 N. River Road, West Lafayette, Indiana, reading as follows: "Dear Mr. Frank, Enclosed is the information you requested concerning cannabinoids assay of urine. At SKCL, which I assume would be the abbreviation of the Smith Kline Clinical Laboratories, we use the Syva Co. immunoassay (EMIT) as the primary screening method. We confirm all positive samples by a radioimmunoassay, and in parenthesis (Abuscreen). The concentration we use as the cutoff between positive and negative is 100 ng/ml. At this level we perhaps report a few false negatives but very rarely a false positive. If we can be of further service please let me know." (underscoring added)

The testimony, quoted above, including Claimant's August 31st behavioral pattern does provide a valid basis for the Carrier's conclusion. It also answers the six (6) points raised by the Employees. Further, Claimant's

urine test taken 39 days after August 31st is deemed self serving. He could have taken same any time after the September 14th notification of Rule ^{"G"} violation if any affirmative weight was to be assigned thereto.

As to the discipline imposed, we find that there are circumstances that serve to mitigate the discipline of discharge. Among them are that there was no effort made to make a second test of Claimant's urine sample taken August 31, 1984. Also, Smith-Kline Laboratories changed the cut off level between positive and negative, from 50 nanograms to 100 to assure almost no instances of false negatives, after having tested Claimant's urine. Thus, he is entitled to a benefit of any doubt thereon.

The Carrier has subsequently adopted an enlightened drug/alcohol policy and an employee assistance program in connection therewith. Consequently, Claimant will be reinstated to service with all rights unimpaired, without pay for time out of service subject to passing the necessary return to service examinations and entering into said new program. He will therefore assume a probationary status until completion thereof. Such status does not affect his rights under the discipline rule.

AWARD: Claim disposed of as per findings.

ORDER: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

M. A. Christie
M. A. Christie, Employee Member

S. C. Lyons
S. C. Lyons, Carrier Member

*Carrier
dissents to
Reinstatement*

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued August 18, 1986.