PUBLIC LAW BOARD NO. 4418 CASE NO. 28

Parties to the Dispute: Transportation Communications Union

and

National Railroad Passenger Corporation

Statement of the Claim: Claim of the General Committee of the TCU that:

1. Carrier acted in an arbitrary and unjust manner, violating Rules 23, 24 and other related rules of the Agreement, when, on November 13, 1987, it dismissed Claimant from service. Such arbitrariness and injustice was exacerbated when Ms. L. D. Berberian, who was not present at the hearing, assessed discipline, and when, over the objection of Claimant's representative, the hearing was held in the absence of Claimant.

2. Carrier shall now be required to compensate Claimant for all time lost due to his wrongful dismissal and clear his service record of any reference to dismissal from service and make him whole for any other material injury he may incur in connection with such dismissal.

Opinion of the Board: Claimant is Stanley Collins, who entered service with the Carrier on December 3, 1975. In 1987, Claimant was a ticket clerk at San Francisco, California. In 11 years of service with the Carrier to that time, Claimant had never been charged with a disciplinary violation involving drugs or alcohol.

On May 18, 1987, Claimant began serving a 30-day suspension for failure to protect an assignment in March of 1987. The suspension was scheduled to run through June 16, 1987. In

anticipation of his return to work, Claimant was ordered by the Carrier to submit to a return-to-duty physical examination on June 15, 1987. Claimant complied. The examination included a urinalysis to screen for traces of drugs in Claimant's bodily fluids. According to the laboratory used by the Carrier to analyze Claimant's urine sample, the sample contained traces of cocaine. Claimant was therefore held out of service pending a second examination scheduled for July 15, 1987.

Claimant did not appear for the second examination. Claimant wrote the Carrier on July 17, 1987, stating that personal problems had forced him to miss the appointment and, while he believed that requiring him to submit to a drug test violated the Agreement, he would submit if another appointment were made for him. Another appointment was made for July 31, 1987, but Claimant again failed to appear.

On August 14, 1987, the Carrier ordered Claimant to appear for an investigation of whether his failure to submit to a second urine test constituted a violation of the Carrier's Rule L. Rule L prohibits insubordination by the Carrier's employees. Specifically, the charge against Claimant stated:

> Violation of Rule "L" of the Amtrak Rules of Conduct, in that you failed to submit to a second drug test by July 18, 1987, as instructed by General Supervisor, Gary L. Rose, in his letter to you dated June 18, 1987, sent Certified Mail #P525 081 792.

The investigation of that charge was eventually rescheduled for

November 4, 1987. Claimant did not appear on that date, but the investigation went forward anyway.1 Afterward, the hearing officer entered a decision concluding that the charge had been proved. On November 13, 1987, the Carrier advised Claimant that, as a result, he was discharged effective immediately.

On November 30, 1987, the Organization filed this claim with the Carrier, appealing the conclusions of the investigation and Claimant's resultant discharge. As filed, the claim also challenged the fact that the discharge was imposed on Claimant by a Carrier officer who did not attend the investigatory hearing. However, that portion of the claim has been settled and is not before the Board. The Carrier has denied the remainder of the claim.

The Carrier's requirement that Claimant submit to a return-to-duty drug urinalysis, and that he submit to a second test if the first yielded a positive result, was pursuant to the Carrier's policy identified as PERS 19.2. That policy was instituted by the Carrier as of January 1, 1987. Section I of PERS 19.2 described its purpose as follows:

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1 At the commencement of the investigation on November 4, 1987, the Organization officer representing Claimant advised the hearing officer that Claimant was ill and seeing a doctor that day. The hearing officer noted that the investigation had been re-scheduled twice, that the November 4 date had been set a month earlier, and that there was no documentation by the Organization of Claimant's incapacitation. Therefore, the hearing officer refused a further postponement.

> To provide the uniform policy and procedure concerning testing of employees in or applicants for positions not covered by the Hours of Service Act, including management positions, to determine whether such individuals have any drugs or alcohol in their systems. The purpose of such testing and related Amtrak programs and procedures is to provide, for the safety and well-being of all Amtrak passengers and employees, work and service environments which are free from the effects of employee use of drugs and alcohol.

The Carrier's institution of this policy followed promulgation by the Federal Railroad Administration of a regulation, effective in February, 1986, concerning drug and alcohol testing of employees subject to the Hours of Service Act. That Act does not cover clerks such as Claimant. The FRA rule requires carriers to test covered employees following their involvement in certain kinds of accidents, and authorizes such testing when a carrier has reasonable suspicion that a covered employee is a substance abuser or has committed certain rule infractions.

Section II of the Carrier's PERS 19.2 policy defines its coverage. That section provides that the policy does not apply "where there is a specific conflict with an applicable labor agreement." Section V of PERS 19.2 sets forth requirements for return-to-work physical examinations, and reiterates that the policy does not supersede contrary provisions of a labor agreement, stating in subsection A:

> Except as specifically provided in an applicable labor agreement, all employees returning to work after an absence, for any reason other than vacation, of 30 days or more will be tested by urine sample for drug presence

as a part of a return-to-work physical. (emphasis added)

Section V of the policy goes on to provide as follows, in the case of return-to-duty testing:

> B. Confirmation Testing. If the first test of a urine sample indicates the presence of alcohol or drugs, the employee being tested is entitled . . . to have a confirmation test conducted on the same sample at a medical facility selected by Amtrak using another method that is specific for the substance detected in the first test. The employee is entitled to receive a copy of the laboratory report. . . .
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> C. Consequences of Positive Test Result. If a test conducted pursuant to this Section V is positive, the Personnel & Administration Department will notify the employee and the employee's supervisor of the result, and the employee will be subject to the medical disqualification provisions of Subsection III.C.

Subsection III. C. of PERS 19.2, referred to in the above excerpt from Section V, provides as follows:

> C. Medical Disqualification
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> 1. An employee who tests positive for drugs or alcohol, and who does not have a negative confirmation test result, shall immediately be removed or withheld from service. Such employee shall be disqualified for service until he/she achieves a negative test result.
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> 2. An employee who tests positive for drugs or alcohol must, within 30 days, either be retested by an Amtrak nurse or a medical facility designated by Amtrak, or, if eligible, enter the Employee Assistance Program (EAP). Any employee entering the EAP shall be governed by the provisions of Section PERS 39 of the Procedures Manual.
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> 3. If an employee who has previously had a positive test does not enter the EAP and elects to be retested and the retest result is positive, the employee shall be subject to dismissal and shall not be entitled to enter the EAP. A confirmation

> test shall be conducted at Amtrak's expense on the sample that has initially tested positive in this retest.
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> 4. An employee who has tested positive for drugs or alcohol and is returned to service after achieving a negative test result shall, as a condition of being returned to service, be subject to testing for drugs or alcohol by breath or urine sample, each calendar quarter, for a period of two years.
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> 5. The requirements of Subsection III.C. shall be in addition to, and shall have no effect upon, any disciplinary action that may be taken or pending in connection with the use of drugs or alcohol by an employee.

These excerpts reveal, among other things, that the Carrier's PERS 19.2 goes beyond the FRA regulation, not only in its application to employees who are exempt from the FRA rule, but also in its requirement that employees on leave for more than 30 days submit to drug tests before they may resume working. The FRA rule contains no such requirement.

The record indicates that sometime before the FRA rule took effect, the Carrier began requiring that maintenance of way employees and members of other crafts routinely submit to physical examinations, including drug screening, upon their returns from extended absences. The record contains no evidence whether the Carrier's agreements with those crafts addressed the permissibility of such requirements. In any event, not until 1986 did the Carrier begin routinely requiring return-to-work physical examinations of <u>all</u> its employees. As to employees not covered by the Hours of

Service Act, the drug testing portions of those examinations were conducted pursuant to the policies set forth in PERS 19.2. Claimant was dismissed because, when taking his back-to-work examination, he incurred an initial positive test result within the meaning of Section V.C. of PERS 19.2, and then failed to submit to a re-test as required under Section III.C.2.

The Organization contends that, by imposing upon its members the requirements for routine back-to-work physical examinations and drug screens under PERS 19.2, the Carrier violated Rule 23(a) of the parties' Agreement.2 Rule 23(a), governing "Physical Examinations and Disqualification," provides as follows:

> Employees, after completing sixty (60) calendar days of service, will not be required to submit to physical examination unless it is apparent their physical condition is such that an examination should be made.

It is the Organization's position that the Carrier violated Rule 23(a) when, without any apparent grounds, it required Claimant to

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2 The Organization also argues that the Carrier violated Rule 24, which provides that an employee may not be disciplined or dismissed without a fair investigation, and that an employee may not be held out of service pending investigation unless his retention in service during that interval could be detrimental to himself, another person or the Carrier. The Board agrees with the Organization that holding Claimant out of service pending a negative drug test violated Rule 24 in the absence of any evidence that Claimant had been under the influence of drugs while on or subject to duty. However, because of our disposition of the other aspects of the claim, we need not go into further detail on that issue.

submit to a physical examination before returning him to work. If Rule 23(a) forbids the Carrier to impose such an examination in Claimant's case, it follows that PERS 19.2 was improperly invoked, because PERS 19.2 is inapplicable by its very terms where it conflicts with an existing labor agreement.

The Carrier argues that Rule 23(a) is inapplicable to this situation. According to the Carrier, Rule 23 is intended to apply only to employees in active service, and not to employees like Claimant who are on leave at the time a physical examination is demanded. There is some support for such an inference in paragraph (b) of Rule 23, which seems to contemplate the removal of employees from active duty for medical reasons. However, paragraph (a) of Rule 23 is definite and absolute, and expresses no such limitation.3 In short, Rule 23(a) is unequivocal, and would seem to preclude the Carrier from routinely requiring physical examinations, including drug tests, of employees returning from leaves.

However, the Carrier relies on past practice to suggest that Rule 23(a) was not violated in this case. According to the Carrier, the fact that it has long required return-to-duty physical examinations including drug tests of its employees proves that the

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3 Likewise, Rule 21(d) of the Agreement authorizes employees to return early from leaves upon 48 hours' notice, and does not authorize the Carrier to delay an employee's return pending a physical examination.

Agreement does not forbid such a requirement. The same argument was presented to this Board in Case No. 16, Award No. _____, decided at the same time as this claim. After independently reviewing the evidence specific to the Carrier and the Organization, the Board concluded that no established practice had existed involving the Organization and employees at issue here. As we explained in that award, the Carrier simply has not shown that it had a consistent policy of routinely requiring physical examinations and drug urinalysis of all clerical employees returning from leaves.4 In fact, the very language of PERS 19.2 indicates that such a policy was first promulgated, as to employees not covered by the Hours of Service Act, in or about 1987.

Thus, the Board must conclude that the Carrier's application of PERS 19.2 to Claimant was specifically contrary to Rule 23(a) of the parties' Agreement. Therefore, requiring Claimant to comply with PERS 19.2 not only violated the Agreement, but was also erroneous under the terms of PERS 19.2 itself, since those terms

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4 In Case No. 16, the Board discussed the recent court decisions in the cases of Consolidated Rail Corporation vs. Railway Labor Executives' Association, 57 U.S.L.W. 4742, 131 LRRM 2601 (June 19, 1989); and Railway Labor Executives' Association vs. National Railroad Passenger Corporation, 691 F. Supp. 1516, 129 LRRM 3131 (D.D.C. 1988), both of which considered whether past practice can establish that drug testing requirements are permitted under railroad labor agreements. In the latter case, the court similarly held that Amtrak had not established a past practice of routinely imposing drug urinalysis on its employees.

make PERS 19.2 inapplicable where they conflict with a labor agreement.

The Organization further contends that PERS 19.2 was in fact imposed by the Carrier as an impermissible means of extending the Carrier's Rule G. Rule G, the substance of which is prevalent throughout the industry, states:

> Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances, including medication whose use may cause drowsiness or impair the employee's responsiveness.

The Organization does not dispute the Carrier's right to require drug tests pursuant to Rule G when the Carrier has reasonable grounds to suspect that an employee is impaired by drugs while on or subject to duty. However, the Organization argues that the established practice between the parties is to permit such examinations under Rule G only when the Carrier has such reasonable suspicion. Thus PERS 19.2, according to the Organization, is a radical departure from the established practice.

The Organization points to the Carrier's Division Notice No. 4-25 as evidencing that the new drug policy reflected in PERS 19.2 was intended by the Carrier to bolster Rule G. That Notice announced to employees that, effective August 15, 1987, the Carrier's drug testing policy was revised in various ways. One of the revisions involved merging the policy covering Hours of Service

Act employees with PERS 19.2, covering others, thereby yielding a unified drug testing policy for all employees. Another change was described as follows in the Notice:

> Amtrak will no longer offer blood testing as a follow-up to urine testing. The FRA considers blood testing as a better method (vs. urine) for determining impairment, ... However, Amtrak considers the mere presence of a drug in an employee's system as a violation of Amtrak Rule G. Hence, the objective of Amtrak's Drug/Alcohol Testing Program is not to determine influence, but to determine whether or not a prohibited substance is present in an employee's system.

This reveals that the Carrier's approach under the PERS policy extends Rule G substantially beyond its previous limits. The Carrier does not dispute that, prior to 1986 or 1987, its traditional approach to enforcing Rule G had been to rely on supervisors' observations of employees while on or subject to duty, to detect those who appeared to be using or under the influence of drugs or alcohol. A suspected employee could then be required to submit to a toxicological examination or face discipline for refusing. A positive test result would tend to corroborate the supervisors' observation that the employee had been under the influence or using drugs on duty. Under the PERS policy, however, the Carrier demands that employees submit to toxicological examinations without any grounds for suspecting them. Further, if the employee complies with the demand, a positive test result does not tend to corroborate pre-existing evidence of impairment on duty, as it did under the traditional approach, since under the

PERS policy there has not been a supervisory observation or suspicion to corroborate.

Although Rule G is not a part of the parties' Agreement, the way in which the Rule always has been administered between the parties takes on the status of an established term of the Agreement. For example, in First Division Award No. 23334 (O'Brien 1982), the First Division of the Adjustment Board held that a carrier was not free, under its agreement with the locomotive engineers, to change unilaterally the means it had long used to enforce its rule against intoxication. In that case, as here, the carrier had long relied on observation of the on-duty behavior of engineers to identify any who appeared to be in violation of Rule G. Suddenly, however, the carrier announced that it would begin randomly subjecting engineers to breath tests using a device called an "Intoxilyzer". The Board said:

> In sum, the evidence convinces this Board that there is scant similarity between the former method of detecting use of alcohol by employees under Rule G, and the use of Intoxilyzer testing to make this determination. The Carrier obviously departed from the prior well-established practice, which practice was mutually accepted by the parties over a period in excess of 50 years, when it unilaterally implemented the Intoxilyzer program in September 1980. . . .
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> All we have decided in this dispute is that the Intoxilyzer program unilaterally implemented by the Company in September 1980 was contrary to the prior long-standing practice that existed on this property for detecting intoxication. Since that practice constituted a binding condition of employment which was just as much a part of the collective bargaining agreement between the parties as the written terms thereof, the Carrier had

> no right to unilaterally abrogate this prior practice. Clearly, any rights reserved to the Carrier under the contract to operate its business were restricted by this condition of employment.

Similarly, in S.B.A 957, Award No. 17 (Buchheit, 1988), it was held that a carrier could not unilaterally adopt a policy calling for the discharge of any employee in whose bodily fluids is found even a trace of a controlled substance, when the established practice between the parties had been to impose discharge only upon evidence that the employee was impaired by such a substance while on or subject to duty.

These and other cases stand for the proposition that the established procedures for detecting violations of long-standing rules against intoxication in the industry become tacitly incorporated in the parties' agreements. Once they are so incorporated, a party is thereafter precluded from unilaterally inaugurating substantially more onerous or intrusive procedures. The same reasoning applies in this claim. It follows that this case is distinguishable from PLB 4187, Award No. 6 (Peterson, 1987), cited by the Carrier. There, the Board held that a back-to-work drug testing procedure for signalmen had been long and consistently applied by the carrier, and was completely independent of Rule G.

Rule G and past practice notwithstanding, the Carrier argues that its statutory responsibility to provide safe service

authorizes it to institute the PERS policy and implement that policy as it has in this case. The Board must disagree. It is true that the Rail Passenger Service Act, creating the Carrier, charges the Carrier to assure the safety of its employees and the travelling public. Nevertheless, with respect to ticket clerks, the Carrier simply does not have as crucial an interest in possible off-duty drug use, which does not result in visible impairment on duty, as it may have in the case of employees involved with the actual movement of trains.

Both the Federal Railroad Administration and the Supreme Court have recognized the distinction, in this context, between clerks and operating employees in the railroad industry. In the case of Skinner vs. Railway Labor Executives' Association, 109 S.Ct. 1402, 57 U.S.L.W. 4324 (March 21, 1989), the Court affirmed the constitutionality of the FRA regulations requiring drug testing of operating employees under some circumstances. As discussed earlier and in Award No. 16, those regulations apply only to employees who are subject to the Hours of Service Act, and not to clerks and ticket agents.

In the Skinner case, the Supreme Court rejected the unions' contention that the regulations infringed the employees' constitutional right to be free from unreasonable searches. It did so, however, because (1) the FRA rules affect employees on sensitive jobs whose momentary lapses can have disastrous

consequences for the safety of others; (2) the rules will aid the railroad industry in the important task of investigating and determining the causes of serious accidents; and (3) the rules will help deter drug usage, a societal evil. The first two of these reasons have no application to return-to-duty examinations of ticket agents.

This is significant because the Supreme Court in Skinner repeatedly emphasized the heavy safety implications underlying the FRA rules. The Court stated:

> We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern. As the dissenting judge below noted, "[t]he reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. . . . Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others.

57 U.S.L.W., at 4331 (citations omitted). This reasoning simply does not apply in the case of ticket agents, whose momentary negligence at work cannot result in great human loss, and who

generally are subject to closer observation by their supervisors than are operating employees.

Thus, the application of PERS 19.2 to Claimant not only violated the Agreement in this case (and, therefore, the terms of PERS 19.2 itself), it also represented an impermissible unilateral expansion of Rule G. The Carrier lacked reasonable grounds to test Claimant initially and, even if drug traces were in fact present in Claimant's body fluids as suggested by the initial test results,5 it does not follow that Claimant used, possessed, or was under the influence of drugs while on or subject to duty. Furthermore, the application of PERS 19.2 to Claimant cannot be justified by the serious safety concerns which have served to validate the FRA regulation. The only remaining question is whether the Carrier can avoid these otherwise fatal defects by charging Claimant with a violation of Rule L (insubordination). In other words, even if the Carrier's demands of Claimant were illegitimate, was Claimant legitimately subject to discharge for failing to comply with them?

The well-reasoned decision in P.L.B. 3139, Award No. 86 (LaRocco, 1987) illustrates why Claimant cannot be deemed guilty

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5 The Organization contends that the test results are unreliable because it has not been proved that testing and chain-of-custody procedures were adequate in Claimant's case.

of insubordination in this situation. In that case, the carrier discharged an employee who refused to submit to a drug urinalysis after she was implicated in a minor accident on the carrier's property. The carrier's officers had no basis, other than the employee's involvement in the accident, to suspect her of being under the influence of drugs in violation of Rule G at the time, and the Board ruled that that was an insufficient basis. Nevertheless, as in this case, the carrier argued that the claimant's refusal of her superiors' instructions to submit to the test constituted dischargeable insubordination. The Board held otherwise, explaining:

> When given a direct order, an employee must usually "obey now, and grieve later." The purpose of the "obey now, grieve later" principle is to prevent workers from constantly challenging their supervisors' orders, causing anarchy in the shops and the disruption of railroad operations. . . . However, in this case the "work now, grieve later" principle is inapplicable for two reasons. First, the Carrier's urine sample request must be premised on probable cause, reasonable cause or a reasonable suspicion. Probable cause gives validity to an order requiring a urine specimen. If the employee were obligated to obey an order (demanding a urine sample) issued without probable cause, the Carrier would be relieved of satisfying its threshold burden of demonstrating a necessity for the urinalysis. Compelling the Carrier to first show probable cause of suspected drug usage establishes the relationship between the workplace and the alleged off duty misconduct. The second reason for not applying the "work now, grieve later" principle to this case is the lack of a feasible remedy should a later grievance be sustained. If the employee obeys the order by submitting a urine specimen and it is later found that the Carrier did not have probable cause for requiring a urinalysis, it would be impossible to redress the effects of the Carrier's improper order. A grievance could hardly undo the

> personal humiliation and the unreasonable invasion of privacy associated with the administration of an invalid mandatory drug screening test. Thus, this Board rules that before the Carrier may impose discipline on an employee who defies the Carrier's demand for a urine sample, the Carrier must show probable cause for issuing the order.

However, the Board then went on to include this admonition:

> Nonetheless, we warn employees that a refusal to provide a urine specimen (when asked) exposes them to possible discipline. Employees declining to supply a urine sample are guilty of insubordination provided the Carrier's order was premised on probable cause.

The same logic applies in this case. Past practice and Rule 23(a) of the Agreement precluded the Carrier from requiring that Claimant submit to an examination unless it had reasonable cause to suspect Claimant. The Carrier has not shown or even asserted that it had such cause.6 Under these circumstances, to hold Claimant guilty of insubordination for failing to comply with the testing order even though it was wrongfully applied to him would allow the Carrier to flout its obligations under the Agreement, at the same time as it violates the rights the Agreement confers

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6 It might be argued that, once Claimant's initial test yielded a positive result, the Carrier obtained reasonable cause to demand that he submit to a re-test. However, such reasoning would unfairly penalize Claimant for complying with the Carrier's initial demand. It would compound the harm of that demand. A ticket clerk who is improperly ordered to submit to a drug test may comply out of ignorance of his rights or the hope that a negative test result will quickly end the matter. If the initial result appears positive, the employee should not be barred from then invoking his rights under the Agreement unless the Carrier has independent grounds to suspect a Rule G violation. The positive test result is not evidence that the employee was impaired in violation of Rule G.

on Claimant and the Organization. Such a result cannot be countenanced. See, also, Utah Power & Light Co., 94 LA 233 (Winograd, 1990).7

We again make clear that the Board does not condone any employee's abuse of drugs. On the contrary, the Board fully supports the Carrier's determination to see that none of its employees is impaired as a result of such abuse. However, the Board cannot approve measures to achieve that objective if those measures violate the Agreement which the Board is charged to uphold. We find such a violation in this particular case, and therefore must sustain the claim as stated above. The Board orders, however, as a condition of reinstatement, that the Claimant participates in Carrier's EAP program. If EAP so determines that Claimant is in need of assistance, Claimant must successfully complete the program.

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7 The Board has carefully reconsidered its conclusions in Cases Nos. 16, 26 and 28, including in executive session after proposed awards were circulated. The Carrier has criticized the Board's proposed findings in elaborate supplemental submissions in each case. Having meticulously considered every contention, the Board finds that the supplemental submissions do not warrant either a reversal or a substantial alteration of the conclusions.

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AWARD

Claim sustained as per opinion.

Lamont E. Stallworth, Neutral Member

Employe Member

Carrier Member

Dissent - written dissent will follow.

Dated this 27th day of July, 1990.