PUBLIC LAW BOARD 4651

UNITED TRANSPORTATION UNION	DOCKET NO:	1026
vs.	UTU CASE NO:	R1593-646-83
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY	C&NWT FILE NO:	402-87-1593

STATEMENT OF CLAIM

Claim of S. E. Thomas, Central Division, for reinstatement to the services of the Chicago and North Western Transportation Company, with vacation and seniority rights unimparied, in addition to the payment of any and all health and welfare benefits until reinstated, and that he be compensated for any and all lost time, including time spent attending an investigation held on September 22, 1987, at Council Bluffs, Iowa.

FINDINGS

This Board upon the whole record and all the evidence, finds that the employees and the carrier involved in this dispute are respectively employees and carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On September 5, 1987, the Claimant was working as a brakeman on Train BPRX, the Extra 7002 south at Sioux City, Iowa. The train was clocked by radar at 31 m.p.h. in a 20 m.p.h. territory. Three of the four members of the crew were tested for alcohol and drugs. The Claimant's urinalysis tested positive for marijuana. Subsequently, he was charged with a Rule G violation and, after an investigation, dismissed.

The Organization protests the Carrier's April 27, 1986, revision of Rule G. It contends this unilateral action consituted a change in working conditions. Notwithstanding this assertion, this Board notes that reference to an 8th Circuit Court of Appeals case (no citation) involves litigation between the Carrier and the Brotherhood of Maintenance of Way Employees (BMWE), not this Organizition. Furthermore, reference to an attorney's letter purportedly addressed to all Chairmen indicating the Carrier had withdrawn the April 27, 1986, Rule G is not dated nor is there a full copy of the text attached to this record.

Reliance herein on the Rule G in effect prior to the Carrier's 1986 Amendment requires this Board to make one of the following two conclusions: (1) that the Carrier's February 17, 1989, General Order No. 50 retroactively repealed the April 27, 1986, revision of Rule G and/or (2) that the Carrier's right to enforce the 1986 version of Rule G versus the Organization herein involved was prohibited by Court action. Clearly, contemplation of the 1989 revision of Rule G was not a subject of on-the-property handling. Nevertheless, General Order No. 50 specifically states that Rule G is "... superseded by the following Rule G." The word "superseded" cannot be found to encompass a retroactive repeal of the 1986 Rule G. Careful analysis of the disputed provision of the 1986 version and as ruled upon

by the 8th Circuit indicates the underlying basis of the BMWE's challenge was the Carrier's attempt to regulate off duty conduct. This Board notes the 8th Circuit noted that the District Court recognized the Carrier had unilaterally regulated employees' use of intoxicants "... while on duty, subject to duty, or on company property, all under Rule G." (Emphasis added) The District Court stressed the Carrier had never before attempted to regulate off duty conduct in the manner stated in its 1986 revision of Rule G. The 8th Circuit clearly identified this distinction stating:

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments.

From the above, it is clear the Carrier's 1986 revision of Rule G was challenged on a narrow basis and limited to the sentence:

> The illegal use, illegal possession, or illegal sale of any drug by employees while on or off duty is prohibited.

The Board notes that applicability of the provisions of Part 219 of the Federal Railway Administration (FRA) regulations are not optional and failure to comply subjects a violator to civil penalty. In essence, the Carrier's Alcohol and Drug Policy states the employees subject to the Hours of Service Act will be governed by the mandatory testing provisions of Part 219. We conclude there if no factual basis or evidence to find the challenge to the Carrier's right to unilaterally revise Rule G extended beyond the narrow off-duty issue framed by the Courts involved.

The Organization challenges the procedures the Carrier utilized to obtain a sample for urinalysis. It points to possible access to the sampling kits prior to use, the common knowledge being that samples are mishandled.

Division Traveling Engineer Kritenbrink testified the Claimant was the last of the three crew members to give a urine sample. Kritenbrink stated the sample was taken in a small jar, and the jar was sealed in the Claimant's presence. Kritenbrink indicated the seal was signed by the nurse and the Claimant, and then the sample was placed in a box for shipping along with the filled out chain of custody. The record shows the nurse signed her name, and the box was sealed. The seal bore the Claimant's signature. This sealed box was then placed inside a Federal Express envelope and shipped to CompuChem Laboratories in North Carolina. Given the specifics of the record

on the collection and shipping of the Claimant's urine sample, the Board is forced to conclude the burden of disputing the accuracy of the chain of evidence must be supported by probative evidence as opposed to speculation and/or unsubstantiated possibilities.

The Organization stresses the CompuChem report indicates a positive showing of but 23 nanograms of marijuana. At best, the Organization claims, the Carrier has shown the Claimant may have used a drug within the previous sixty (60) days or was in the vicinity of someone else who was using marijuana; although the record is void of any probative evidence to support a finding that a 23 nanogram level could be explained by passive inhalation. The Board emphasizes the Claimant was offered the opportunity to submit to a blood test which would more accurately pinpoint how recent usage was. The Claimant's refusal deprived him of a possible defense and raised a presumption of impairment under Section 219.309 of the FRA regulations. There is no basisto rule that the Carrier, in testing this Claimant or considering the presumption of impairment, excersied its managerial discretion in an arbitrary manner. Accordingly, we will uphold the discipline issued.

AWARD

Claim denied.

Robert W. McAllister, Chairman and
Neutral Member

Carrier Member

Donald F. Markgraf
Organization Member

August 9-1990
Date