(V2)

BEFORE AMERICAN AIRLINES - TRANSPORT WORKERS UNION
MIAMI AREA BOARD OF ADJUSTMENT

ARBITRATION IN THE MATTER	
	M-246-91 (E. Santagada)
Between	
	Issue: Discharge
AMERICAN AIRLINES, INC.	
-and-	Area Board of Adjustment
	Marvin Hill, Jr. (Neutral)
TRANSPORT WORKERS UNION OF AMERICA, Local 568, AFL-CIO	Paul Baez (Employer)
	Jack Bateman (Union)

Preliminary Statement

Hearings were held before the Miami Area Board of Adjustment on November 20, 1991, and December 6 & 7, 1991, at the Travelodge Hotel, 301 N.W. 36th Street, Miami, Florida. The parties appeared through their representatives and entered exhibits and testimony. The record was closed on that date. An executive session was held in Chicago, Illinois on January 2, 1992.

Appearances

For the Company: William O. Kelly, Esq., American Airlines, Dallas, Texas.

For the Union: Lee Seham, Esq., Seham, Klein & Zelman, New York, New York.

I. BACKGROUND AND FACTS

On April 17, 1991, Mr. Enzo Santagada was held out of service for testing positive for cocaine metabolite pursuant to a random drug test. On April 29, 1991, following a 29(f)

hearing, Mr. Santagada was issued a Final Advisory which in relevant part reads as follows:

> On April 11, 1991, you submitted to a random drug test which was conducted in accordance with the Drug and Alcohol testing policy of American Airlines. Your test was positive for cocaine (metabolite), an illegal/illicitly used drug. Your actions are a violation of Company rules and regulations which state:
>
> Rule 33: Possession, dispensing, or using a narcotic, barbiturate, mood-ameliorating, tranquilizing, or hallucinogenic drug, whether on duty to off duty, except in accordance with medical authorization, is prohibited.
>
> In view of the above you services are terminated effective April 29, 1991. (Co. Ex. 16).

On April 23, 1991, Mr. Santagada filed the following grievance:

> I, Enzo Santagada, was pulled out of service on 4-17-91 for medical reasons. The security of this UA test was not accurate. I grieve full back pay, no loss of seniority, and return to service immediately. (Jt. Ex. 2).

An attempt was made to obtain an adjustment of the dispute in the manner provided under the parties' collective bargaining agreement. Failing to reach a satisfactory adjustment, the matter is now before the Miami Area Board of Adjustment for final and binding arbitration.

II. THE ISSUE

The issue is whether Enzo Santagada was discharged for just cause and if not what shall be the remedy.

III. POSITION OF THE COMPANY

The Company submits that there is just cause for the termination of Grievant's employment. The Employer's version of the facts giving rise to Grievant's discharge, and

management's argument on the merits, is as follows:

Mr. Santagada was tested on April 11th between the hours of 5:30 and 6:00 p.m. by an outside contractor, Michael Guelbenzu, working for Life Data Labs. Mr. Santagada gave a specimen and sought to give a split sample but was unable to provide enough specimen for a split sample. He proceeded to drink water in an effort to be able to increase the volume to 60 cc's.

During that process, another employee of American Airlines, an unidentified pilot, appeared at the collection site and the collection for that individual started. According to the Company, Mr. Guelbenzu took precautions to ensure there was no confusion of the two specimens. As it turns out the pilot was unable to provide a specimen. As such, he was also in the posture of drinking water.

At this point, Mr. Santagada came back and indicated he changed his mind about providing a split sample. The sample he had previously provided clearly showed that it had been poured into the collection container and cup with the cap placed on it. That was sealed. Mr. Santagada signed the seal that was placed on top of the bottle, he signed all of the paperwork that was presented to him acknowledging and certifying that it was his specimen and that all the proper procedures had been duly followed. He did not raise any question during or immediately after the collection with the collector. Moreover, the Grievant did not ask the collector to be given the opportunity to take another test.

According to the Company, shortly thereafter, the Grievant stated that he had second thoughts about the collection process and the presence of the pilot in the collection site. Instead of returning to the collection site, he talked to his shop steward and discussed the propriety of the collection he had undergone. The next day, through his Union, Grievant raised a question about the collection and offered at that time to take another test. He was advised by the Company, based on the representations that he had been made to management, that there was no requirement that he take another test and that the test was going to be canceled.

On the 17th of April, the Harris Medical Lab which, at that time, was a NIDA certified lab, reported to the Company's medical review officer (MRO), W. L. Brawley, M.D., a confirmed positive test for the cocaine metabolite. (Co. Ex. 10). According to the Company, the MRO followed the

procedures set out for medical review officers and went about verifying the test. (Co. Ex. 11).

Several days following his initial conversation with Mr. Santagada, following conversation with the collector, and following a conversation with a Department of Transportation official, the MRO verified the test positive for the cocaine metabolite. As a result of that verification, a 29(f) hearing was held and the Grievant's employment was terminated.

Argument on the Merits

The Employer argues that this case can be resolved by looking at the credibility of the witnesses. Management asserts that the testimony of Michael Guelbenzu should be credited over that of Enzo Santagada.

With respect to what happened during the collection process, Michael Guelbenzu testified that at the time of the collection, he had been a collector for Life Data Labs for approximately two and a half months. He had completed, at that time on a daily basis, close to 500 collections. He had undergone a two week training period in which he worked with an experienced Life Data collector and observed him do collections. Guelbenzu performed collectins while being observed by his trainer. He stated that he had not had any of his collections challenged in the past.

Guelbenzu indicated that the Grievant was brought to the collection site by Supervisor of Passenger Service Debra Garner, who also notified Santagada that he was to undergo random testing. Guelbenzu's testimony was that he obtained positive identification from the Grievant and explained the process to the Grievant, gave him the collection cup, and indicated to him the amount that was required. Grievant initially indicated he didn't think he could provide it. Guelbenzu testified that Grievant did go into the stall and was able to provide just 60 milliliters.

The Company notes that Guelbenzu stated that because Snatagada was interested in providing a split sample, he needed to provide additional specimen, that the 60 milliliters was inadequate to provide a split sample. He said that he poured the specimen in a container, capped it, and put it to his left on a counter. He then gave Mr. Santagada the opportunity to drink water so that he could increase the volume. Guelebnzu admitted stepping outside for

a moment, (R. 59) although he admits that he never left the restroom while the pilot was in there. (R. 60).

It was Mr. Guelbenzu's testimony that he (Grievant) understood the collection process. It was his testimony that had Mr. Santagada come back and provided enough for a split sample, he would have poured out the initial collection. The plan was not to allow him to void the additional specimen into what he had already given, but instead of sealing the bottle when Mr. Santagada provided it, he capped it and put it to the side on the counter.

In management's eyes, the collector in this case was only attempting to accommodate the Grievant by allowing him to have the opportunity to provide the split sample, which Grievant indicated he did want to provide. It is clear from the testimony of Guelbenzu that the collection site was under his control throughout the entire process, and that only he had a key to the collection site, that no unauthorized person entered the facility. The specimen that had been provided by Mr. Santagada was on the counter, was capped, and was away from the pilot when the pilot entered the restroom. There was no way the pilot could have tampered with Mr. Santagada's specimen since the pilot was at no point in the restroom alone with Mr. Santagada's urine specimen.

The Company argues that Mr. Santagada was only out of the restroom for approximately five minutes and that during that period no one (other than the pilot) entered the restroom and that the collector was present throughout that time. The process was completed with the execution of the custody and control form. (Co. Ex. 7). No questions were raised throughout this process by Mr. Santagada. At no point during the process did Grievant indicate to Guelbenzu that he had a problem with the process, that he thought the process was not working right, or that he was concerned about any issue. Under the Employer's version of the facts, Mr. Guelbenzu did not tamper with the specimen provided by Mr. Santagada and there is no basis to suspect that he would have a reason or basis for tampering with the specimen.

The Company has not presented Mr. Guelbenzu as an expert on the DOT regulations in this case and he was not required to be an expert. He was a collector and he had detailed instructions about how a collection was to be performed. He is not an employee of the Company and, for the past several months, he has not had any relationship whatsoever with the Company. Guelbenzu testified on his own time and has no interest whatsoever in the outcome of this

matter, unlike the Grievant who has an interest in the outcome.

Management points out that the Grievant signed a certification that the urine was his urine, although now he says he did not read those certifications. If Grievant suspected problems in the procedure after leaving, why didn't he go back and protest to the collector?

Further attacking the credibility of the Grievant, the Company submits that Santagada made several statements to the Company's MRO in the course of his investigation. He originally told the MRO that he left the specimen in the bathroom. Later he said that he may have given it to the collector. Grievant gave the MRO the impression that he made two or three attempts to complete the 60 milliliters. Now he says that's not what he meant. He told the MRO that when he finished the collection, he decided not to stay for the split sample. Now he says he was never told anything about the split sample. The Employer argues that this shows that Grievant cannot be believed.

With respect to the Union's attack on the competence of the Company's MRO, management argues that Dr. Brawley was well qualified to serve as an MRO. Under 49 CFR Part 40.33, which provides that the MRO shall be a licensed physician with knowledge of substance abuse, Brawley's knowledge in this area has not been challenged. A review of the regulations does not reveal that the MRO has to be intimately involved with each and every provision in the regulations.

With respect to the Union's argument that Dr. Brawley breached the Grievant's privacy by contacting him at work through a supervisor, the Company notes that once Brawley received the confirmed positive test and determined that things appeared to be satisfactory, he contacted the employee. The Company argues that if the FAA approved drug testing custody and control form only allows one single daytime phone number by the employee and that is the phone number that Dr. Brawley called, this Board needs to take this into account. Further, Dr. Brawley wears two hats as the MRO and as the area medical director for American. It is not unusual for him to call managers and supervisors seeking employees on issues other than drug testing. If Dr. Brawley called the supervisor, it does not automatically mean that a drug test is involved.

As a result of the version that had been presented

by the collector, as well as the issues that were raised by Mr. Santagada, Dr. Brawley proceeded to contact the DOT to review the circumstances of the collection. The DOT responded to his inquiry by saying that, based on the circumstances he described, the collection process, as stated by the collector, was valid and that, in fact, "I was obligated to remove the mechanic from safety related duties." The Company submits Dr. Brawley acted properly and that his decision to verify the drug test results was correct.

Concerning the presence of the second donor while Mr. Santagada's collection was taking place, while the Company has acknowledged the presence of a second donor (a pilot), it asserts that there has been no showing of prejudice by the Grievant. The presence of the pilot did not impact the security of the specimen and did not distract the collector to prevent him from completing Mr. Santagada's collection. It did not cause confusion in the identification of the specimens. The presence of the pilot does not offend the regulation to the extent that it should require the rejection of the test.

With regard to the contrary position taken by the Grievant and the Grievant's expert witness, Mr. George Ellis, management submits that Mr. Ellis is not a medical doctor and, accordingly, he cannot be a medical review officer under the regulations.

Management suggests that in some parts of 49 CFR Part 40, the DOT clearly and specifically states that a violation of that part or subpart requires a test to be nullified. If the DOT had intended that violations of the subsections that are at issue to require automatic nullification of the test, they could easily have written this into the regulation as they did with other parts of their regulations. The fact that the DOT put a test nullification provision in some subsections of the regulation and not in others means that they did not intend that the violation of those subsections would automatically require a nullification of the collection process.

Concerning the status of the Harris Medical Lab as an NIDA certified lab, management concedes that in July of 1991, several months following the testing of Mr. Santagada, Harris Medical Lab's certification was suspended by the National Institute on Drug Abuse. The Employer contends that as far as this Grievant is concerned, it has no impact whatsoever. At the time the Grievant was tested in April of 1991, Harris was still certified and its certification was

intact. Secondly, NIDA, at the time it suspended Harris' certification, was empowered under the regulations to direct that Harris send any positives out for retesting; they did not do that, but, most importantly, in August, following the suspension of Harris' certification, American Airlines' MRO directed that Mr. Santagada's test now be taken and be sent to Smith Kline, a NIDA certified lab. The results of that test was to confirm the presence of cocaine. Accordingly, it is management's position that the suspension of Harris' certification in July of 1991 has not impacted or undermined the validity of the positive drug test that was performed on the sample provided by Santagada.

Addressing the allegation that American was in some way obligated to cancel the test as a result of statements made by management, it is the Employer's position that this representation must be examined in light of the fact that statements were made based on one side of the story -- statements made prior to a detailed and thorough investigation of the collection.

Accordingly, for all of the reasons identified, it is the Company's position that the collection that was performed on Enzo Santagada on April the 11th, 1991, was a valid test performed in reasonable accordance of the federal regulations and, therefore, the Board should conclude that the Grievant's termination was based on just cause and that his grievance should be denied in all aspects.

IV. POSITION OF THE UNION

The Union's position is that there is not just cause for the termination of the Grievant's employment. The Union's version of the facts, along with its supporting arguments, is as follows:

Aside from the tainted drug test, every piece of evidence indicates that Mr. Santagada is drug free. There are no present or past indications of drug use. No supervisor has ever complained of Enzo Santagada exhibiting behavioral cues which indicate drug use. In no respect does Mr. Santagada fit the profile recognized by arbitral law and specialists as indicative of a drug user. Mr. Santagada has a record of arriving at work on time consistently. He never left work early and his sick leave requests are virtually nonexistent. His finances are steady as indicated by his purchase of a home. His four-year stint in the Marines a few

years prior to his career at American Airlines involved extensive random drug testing which he passed at all times, no complaints, only commendations from his supervisors in terms of his work performance.

The question in the Board's mind should be how to square the uncontroverted evidence about the Grievant with the single piece of evidence proffered by the Company--the test. The Union believes that the conflict is easily resolved when the following considerations are noted:

Both Mr. Guelbenzu and Dr. Brawley have confessed their ignorance of the federal law which regulates the drug testing procedure. Neither could even identify the applicable federal law despite the fact that both were required to sign certifications whereby they swore that the collection and review process had been conducted in accordance with the same federal law.

The Union notes that the FAA implementation guidelines, at Part V, state as follows: "While this document is intended to serve as a guide to the essential requirements of the FAA's anti-drug regulations and should prove helpful to those in aviation who are required to establish anti-drug programs, the controlling guidance is found in the Department of Transportation DOT/Office of the Secretary (OST) interim final rule, Procedures For Transportation Workplace Drug Testing Programs, (49 CFR Part 40; 53 FR 13 47002), which establishes procedures that employers must follow when conducting drug testing." The publication of the guidelines was prior to a final rule issued by the DOT which superseded the interim final rule. The final rule was dated December 1, 1989, and is found at 49 CFR Part 40. Similarly, the relevant FARs in Appendix B at Page 47057, Appendix I, at I states, "Each employer shall ensure that drug testing programs conducted pursuant to this regulation comply with the requirements of this appendix and the "Procedures for Transportation Workplace Drug Testing Programs" published by the Department of Transportation (DOT) (49 CFR Part 40).

The Union maintains that 49 CFR Part 40 is the law of the land in terms of transportation industry drug testing.

On Page 49869, Section 40.25(f), it requires that, "The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified." The minimum precautions under Subsection (f)(17) state: "Both the individual being tested and the collection site person shall keep the specimen in view at all

times prior to its being sealed and labeled."

The Union asserts that even under Mr. Guelbenzu's version of events, there were at least 20 minutes during which the Grievant's unsealed specimen was out of the Grievant's view and in the custody and control of Mr. Guelbenzu and an unnamed, unidentified pilot.

A second "minimum precaution" is contained under (f)25(ii) which states, "The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialed by the employee."

Once again, even under Mr. Guelbenzu's version of events (R. 59-60), the regulation was violated when he left the collection site in clear violation of (25)(ii).

A third mandatory regulatory provision is contained in Section 40.25(d) which states, "In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, the collection site person shall have only one donor under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialed, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of employee who was unable to provide a complete specimen, has entered a waiting area)."

For a third time, even under Mr. Guelbenzu's version of events, this regulation was violated.

All three of these regulations must be considered in the light of 49 CFR Part 40 Section 40.33(b)(3) at Page 48975 which, in describing the MRO's responsibilities, states in no uncertain terms that, "The MRO shall not, however, consider the results of urine samples that are not obtained or processed in accordance with this part."

The plain language of federal law establishes that the drug test in question has no evidentiary value. Consequently, even assuming arguendo the veracity of facts as presented by the Company's witnesses, the federal regulations mandate that these test results not be considered -- that the

Company's only piece of evidence should not be considered.

With respect to the Company's MRO the Union submits that Dr. Brawley admitted that he never read 49 CFR Part 40 in its entirety, even though that part is only 10 pages long. Further, not once did Dr. Brawley give testimony concerning his own opinion. Responsibility for the decision was always attributed to a DOT representative of unknown qualifications, a DOT representative whose opinion from afar is unsupported by any rationale and which was not admitted for its truth.

Union Exh. 8, an official DOT publication, states at Page 5 with regard to collection procedures: "The MRO must know precisely how these steps are carried out." Dr. Brawley did not know Step 1. Legally speaking, the Grievant's test was never verified as required under 49 CFR Part 40.

The only expert that the Company and Board heard from during the hearing was George Ellis. To impeach Mr. Ellis is to concede that Mr. Santagada's test was not verified in any way, shape or form, directly or indirectly. Unlike Dr. Brawley, George Ellis was not just a conduit for the opinion of a phantom DOT representative.

The Union maintains that both Dr. Brawley and George Ellis took the position that, if the Grievant's 60 milliliters had been provided in two separate voids, the test would be invalid under 40.25(f)(10)(i). At the outset of the hearing, however, the problem remained that Mr. Guelbenzu's affidavit stated that the 60 milliliters was provided in one void whereas Mr. Santagada's position was that there were two voids. This factual dispute was, for all intents and purposes, eliminated at the hearing. Whereas the Grievant restated his position with confidence, Mr. Guelbenzu stated (as both the Company and the Union stipulated at R. 61 & 190) that it was "possible" that the 60 milliliters was the product of two separate voids. Dr. Brawley, in his testimony, conceded the dispositive nature of this admission. When the question was put to Dr. Brawley whether he would have canceled the test if the collector had told him that it was "possible" that there had been a double void to provide the 60 milliliters, Dr. Brawley stated in one of his few forthcoming responses that he would have canceled the test. The Union submits that this issue, in and of itself, is dispositive of the case.

The Company has conceded that, if the Grievant's version of events surrounding the specimen collection were

true, then the test should have been invalidated--that given the Grievant's version of events, it is not much to the credit of the Company since the Grievant's events included testimony that the collector had propped the door open in the midst of a heavily transited hallway and turned his back on the open door and walked to an opposite end of a short hallway to put his cigarette out leaving several people to his back in front of the open door.

Consequently, another means of addressing the admissibility of the Company's only piece of evidence is whether the Company's single witness to the collection, Mr. Guelbenzu, was more credible than the Grievant. The Union submits that Mr. Guelbenzu was not at all credible and, in this respect, offers numerous references to the record indicating conflicts.

According to the Union, the Company tries to deal with Mr. Guelbenzu's disturbing ignorance of federal law by shifting responsibility for enforcement of federal law from the professional collector performing hundreds of tests per month to the employee, to the Grievant. The burden cannot be shifted to an employee. The Company's effort to shift the blame and the responsibilities is unjust in light of their failure to provide written instructions to the individual donor explaining the collection process as is their obligation under 40.23 (d)(2)(ii).

The one other attempt the Company makes to undermine the credibility of Mr. Santagada is that he signed a split sample document that he didn't read but the Board must remember that the collector instructed him to sign and that the penalty for failing to cooperate in a collection procedure under the Company's own regulations is termination.

The Company admits that, on the day after the collection, it made the decision to void the test and informed the Grievant that same day of its decision. The Company has made no assertion that the representative of management who took this action, Mr. Bob Zell, lacked the necessary authority. Instead, the Company takes the position that it should not be held to its solemn commitment on a matter of termination because it was misled.

The Union maintains that the Company was not misled, and that is very clear from the testimony of the Company's own witness. The Grievant never spoke to the Company prior to its decision to cancel the test. Neither Mr. Harris nor Mr. Zell had any contact with Santagada prior

to the cancellation of the test. The testimony of the Company's own witness, Mr. Harris, bears out that the Company's decision to cancel the test was based on factual information from the Union that was not only consistent with Mr. Guelbenzu's version of events, but actually omitted some of the more egregious regulatory violations that Mr. Guelbenzu has admitted to. Therefore, the Company's only reason for failing to honor this commitment is completely discredited. Grievant relied on this commitment in canceling a scheduled test at Eagle Forensic Laboratories which, unlike the Harris Lab used by the Company, retains its NIDA certification. But for the Company's promise, Mr. Santagada would have been tested at a NIDA certified lab less than 24 hours after his first test. A negative result from that laboratory would have been very strong evidence that he had no cocaine in his system 22 hours earlier.

* * *

In summary, for the test in question to be granted any evidentiary weight, the Company must show by at least clear and convincing evidence that the Board can reach each of the following conclusions; (1) that the federal regulations intend something other than their plain meaning; (2) that Dr. Brawley is more credible than Mr. Ellis; (3) that Mr. Guelbenzu is more credible than Mr. Santagada; (4) that the Company is not bound by solemn commitments made by its representatives when these commitments induce the Grievant to suffer a significant detriment such as foregoing an opportunity to have a test at a certified lab within 24 hours of his first test, and (5) that the Board would have to completely discredit Dr. Brawley in order to defeat the argument that the test is invalid because of the double void into the specimen because Dr. Brawley testified that, if a collection agent had told him that it were possible that happened, he would have nullified the test.

The Union argues that the Board cannot reach any of these conclusions, let alone all five. It is the Union's contention that every one of these five independently must be decided against the Grievant in order for the test to have any weight at all. The glaring, inescapable truth is that the test results came from a laboratory which failed to meet the minimum standards established by the federal government. The evidence indicates that they were failing to meet these standards at the time of Mr. Santagada's test. The problem cannot be completely resolved by sending it to Smith Kline Labs. No amount of retesting can compensate for a mix-up of specimens at the laboratory.

With respect to the remedy, the Union argues that Mr. Santagada has endured eight months of unemployment. He has suffered intense emotional strain, financial hardship and has almost lost his home. He has not been able to provide his wife or young child for eight months with the things he felt they needed and deserved and now he faces an impoverished Christmas. In the context of an honest Company error, all these hardships would be irrelevant. In the context of the Company's pursuit of a frivolous claim, which they themselves called a raw deal and a setup, these facts cry out for more than back wages and seniority. The Grievant and the Union will not be made whole unless the Company is given some sign that its conduct has been unconscionable and must not recur. The Union accordingly requests full backpay with interest and an award of costs and attorney's fees for the proceeding.

V. DISCUSSION

The description of the collection process that Mr. Guelbenzu gave this Board was essentially as follows:

> Q. Could you describe what happened at the start of that collection?
>
> A. He [Grievant] was brought to me by the lead agent, Debbie Grant and, at that time, we stepped inside the collection site.
>
> * * *
>
> He stepped inside. The door was closed. I went with the procedures of asking for identification, filled out some of the necessary paperwork, and I explained to him about how much I needed, that's when I had the collection container and I broke it open and handed it to him, and from what I recall, he stated he had problems where he had to use his bowels. I said it's okay to do that.
>
> * * *
>
> He went he went inside the stall, I was right--I opened the door, I kept the door open for him to go ahead and go, just, you know, and at that time, I stepped inside and he came out and he handed me the container. (R. 57-58).

He goes on to say,

I went back inside. At that time, he [Grievant] came out of the stall and he handed me the cup. I explained to him that it was enough for one sample.

Q. How much did he provide you?

A. Sixty milliliters, it was exactly enough and, at that time, I explained to him how the split sample worked. It was up to him if he wanted to provide me one, you know, I ensured--I told him it was in his best interest he did have one so he stated he wanted to provide one, that he was going to go outside and drink water. (R. 59).

During that process, another employee of American Airlines appeared at the collection site and the collection for that individual started. (R. 59). Guelbenzu took precautions to ensure there was no confusion of the two specimens, although the other individual, who was a pilot, was unable to provide a specimen. As such, he was also in the posture of drinking water:

He couldn't do, said--he stated he needed some water and, at that time, we both stepped outside. We were outside maybe a minute and--

At this point, Mr. Santagada came back and indicated he changed his mind about providing a split sample.

[S]o, at that time, we stepped inside the restroom again and I explained to him again about the split sample and how it works, it was to his best interest that he did provide one, and he stated, "No, I don't want to wait." (R. 60).

The sample he had previously provided had been poured into the collection container and cup with the cap placed on it. That was sealed. Mr. Santagada signed the seal that was placed on top of the bottle, he signed all of the paperwork that was presented to him acknowledging and certifying that it was his specimen and that all the proper procedures had been duly followed:

. . . I sealed all the seals that they initial and they put their Social Security number on them, and I sealed everything, put it in the box, sealed the box, had him sign the papers that he needed to sign and the test was over. (R. 60).

Enzo Santagada tells a different story.

After arriving with Debbie Garner at the collection site, Grievant stated that he was left with the collector, Michael Guelbenzu. In an exchange with counsel, Grievant outlined the collection process as follows:

> Q. Did he [Guelbenzu] ask for your identification?
> A. No, he didn't.
>
> Q. What happened then?
> A. Then, we went into the room and he filled out the paperwork.
>
> * * *
>
> Q. Did you have any conversation with Mr. Guelbenzu prior to giving him the specimen?
> A. Yes. I told him I couldn't give him any sample at the time. I had a small bowel movement at that time. He told me to do the best I can and handed me a cup.
>
> Q. Did he ask you at that time whether you wanted a split sample or not?
> A. No.
>
> Q. Did he ask you to wash your hands prior to going into the bathroom stall?
> A. No.
>
> Q. Did you wash your hands?
> A. No, I didn't.
>
> Q. Were you able to provide a urine specimen at that time?
> A. Yes, I was.
>
> Q. How much urine were you able to provide?
> A. About 20 or 30 milliliters, I believe that was it.
>
> Q. Did you present that cup to Mr. Guelbenzu?
> A. Yes, I did.
>
> Q. What was his reaction?

A. He laughed and said that this wasn't even enough. He made a fanning motion over his face and said I really stunk the place up.

Q. I don't know if I have to be this specific. Was that in reference to your bowel movement?
A. Yes.

Q. Did he make any recommendations at this point?
A. Yes. He told me to go out to the water fountain and drink some water. Meanwhile, he was going to have himself a smoke and air out the room.

Q. He was going to air out the room; how did he air out the room?
A. He propped the door open and wedged something underneath the door.

Q. Did you go to get a drink of water?
A. Yes, I did.

Q. Where was the water fountain?
A. It was down the hall and to the left.

Q. Was there a clean line of vision between the water fountain and the door of the specimen collection area?
A. No, there wasn't.

Q. Before you left to drink water, at that point, did Mr. Guelbenzu transfer the urine from that first cup [Co. Exh. 3] into a second cup [Co. Exh. 4]?
A. No, he didn't.

Q. Were there any secure cabinets or other spaces within the bathroom where the specimen could have been stored beneath a lock and key?
A. No.

Q. You said you were down the hall and around the corner at the water fountain; did you see Mr. Guelbenzu at any time when you were at the water fountain?
A. Yes, I did.

Q. How did you come to see him if you didn't have a direct view to the bathroom door?
A. He was standing by the ashtray which was by

the pay phones smoking a cigarette.

Q. Did he look at you while you were drinking the water?
A. Yes, he did.

Q. You mentioned an ashtray; was the ashtray against a wall?
A. Yes, it was.

Q. Would that wall have been opposite the bathroom door?
A. Yes, it was.

Q. Where would have Mr. Guelbenzu's back been facing while he was putting his cigarette out at the ashtray?
A. His back would have been facing the test room.

Q. After Mr. Guelbenzu put out his cigarette, what did he do?
A. He proceeded back to the bathroom.

Q. What did you do?
A. A few seconds later, I followed him back.

Q. What was the status of the door as you came back around the corner?
A. He was in the process of closing the door at that time.

Q. You said it was kept open by some sort of wedging?
A. I believe he was putting something underneath the door; I don't know what it was. I don't recall what it was underneath the door.

Q. Did he have to remove that, whatever it was?
A. Yes, he did.

Q. So, as you followed him back around, what happened; did you go back into the bathroom at that point?
A. No. I was still waiting for the water to take effect because I just took some water, and I didn't have the urge to go at that time, so I went back to the water fountain.

Q. To drink some more water?
A. Correct.

Q. Did anything of note happen while you were having your second drink of water?
A. Yes, that's when I noticed the pilot walking down the hall.

Q. Did you see him go into the bathroom?
A. No, I didn't.

Q. What did you do then?
A. I was drinking water at the fountain. Then, I went back to the area where the bathroom was and I was waiting for the water to take effect.

Q. Was the bathroom door open or closed?
A. It was closed.

Q. Did you see the pilot anywhere?
A. No.

Q. Was Mr. Guelbenzu in sight?
A. No, he wasn't.

Q. Did you make any assumptions at that time about where the pilot was?
A. I assumed he was in the room.

Q. Okay.
So, there is a pilot and a collector behind a closed door; what did you do when you were faced with that circumstance?
A. I was just waiting outside, waiting for the water to take effect, and I went back to the water fountain.

Q. Did the pilot eventually come out of the bathroom?
A. Yes, he did.

Q. Where was Mr. Guelbenzu when the pilot left the bathroom?
A. He was outside, also.

THE CHAIRMAN: Outside of the bathroom?
THE WITNESS: Correct.

Q. (By Mr. Seham) Did you resume supplying your urine specimen at this time?
A. Yes, I went back in.

Q. What was the status of your specimen when you re-entered the room?
A. It was in the original container.

Q. It hadn't been transferred into the shipping container?
A. No.

Q. Did it have any cover on it?
A. No, not at all.

Q. Where was it; do you remember where it was located when you came in?
A. Yes, it was on top of the counter.

Q. So, tell me again where it was, where your urine was.
A. It was---

Q. In what container?
A. It was in the container that I originally urinated into and it was left on top of the counter.

Q. Okay.
You say that it was in the specimen container that you had previously used; do you know that for a certainty?
A. No.

Q. Was it marked in any way with your initials or your security number?
A. No, it wasn't.

Q. Did you assume at that time, however, that it was your specimen?
A. Yes.

Q. What happened next?
A. I went back into the stall and I gave him some more urine.

Q. Having drunk the water, were you able to provide the necessary---
A. I tried to give him as much as I could. I came out and he said that was enough.

Q. How much was it after the second attempt to fill up the original container?
A. About 50 or 60 milliliters.

Q. Did Mr. Guelbenzu discuss with you the option of having a split sample?
A. No, he didn't.

Q. From the time you gave your first, I think you said, 20 to 30 milliliters of urine to the time you provided that additional urine to bring it up to the 50 or 60 milliliters, how much time had gone by?
A. About 20 minutes.

Q. For how much of this 20 minutes was your specimen container out of view?
A. For the 20 minutes--by the time--from the time I was at the water fountain.

* * *

Q. (By Mr. Seham) Okay.
After you provided the 50 to 60 milliliters, what happened then?
A. Then, he took the sample, he poured it into another container, he put a cap over it. It had 2 seals. He put it in a box and had me sign something--some forms.

* * *

There is no dispute that under either version of the facts numerous regulations were violated in the collection process.

49 CFR Part 40 (Procedures for Transportation Workplace Drug Testing Programs), Section 40.25 (f), in relevant part states:

(f) Integrity and identity of specimen.

* * *

The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times

prior to its being sealed and labeled. [Federal Register, Vol. 54, No. 230, Friday, December 1, 1989, Rules and Regulations, at 49868.].

Even under the Company's and Mr. Guelbenzu's version of events, there were many minutes during which the Grievant's unsealed specimen was out of the Grievant's view and in the custody and control of Mr. Guelbenzu and an unnamed, unidentified pilot.

A second "minimum precaution" is contained under 40.25 (f)(25)(ii) which states:

> The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialed by the employee. <u>If it becomes necessary for the collection site person to leave the site during this interval, the collection site shall be nullified</u> and (at the election of the employer) a new collection begun. (Id. at 49870; emphasis supplied).

Again, even under Mr. Guelbenzu's version of events (R. 59-60), he left the collection site in violation of 40(f)(25)(ii). The Board further points out that the DOT Drug Regulation Seminar 1990 handbook (Union Exh. 8), in relevant part, declares:

> If it becomes necessary for the collector to leave the collection site between the time that the specimen is received and securement of the sample with an identifying label bearing the appropriate specimen identification number and seal initiated by the donor, <u>then the collection is nullified</u>. (Union Exh. 8 at 25; emphasis supplied).

A third regulatory provision is contained in Section 40.25 (d) which states:

> (d) Access to authorized personnel only.
>
> * * *
>
> In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, the collection site person shall have only one donor

under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialed, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of employee who was unable to provide a complete specimen, has entered a waiting area). (Id. at 49869).

Of particular relevance in this case is 40.25(f)(10)(i) which, in relevant part, provides:

> Upon receiving the specimen from the individual, the collection site person shall determine if it contains at least 60 milliliters of urine. If the individual is unable to provide a 60 milliliters of urine, the collection site person shall direct the individual to drink fluids and, after a reasonable time, again attempt to provide a complete sample using a fresh specimen bottle (and fresh collection container, if employer). The original specimen shall be discarded. * * * [Id.].

This last provision is particularly important because the parties stipulated that the following question was put to Mr. Guelbenzu, "Is it possible that Mr. Santagada provided some urine for the specimen less than 60 milliliters, went out to drink water and, then, provided the rest of the 60 milliliters?" The response was, "Yes, it is possible." (R. 190). Mr. Santagada testified that this is exactly what happened. Dr. Brawley conceded that if Santagada's version of the facts were correct, the test should have been nullified. In an exchange with Mr. Seham, Dr. Brawley went on to elaborate that the test should be disregarded even if there was a possibility that the specimen was the result of more than one void:

> Q. [By Mr. Seham]: Why?
> A. The statement that he made about giving the urine and leaving the cup in the stall and coming back and putting additional urine two or three times to get the 60 cc's would have been inappropriate. (R. 221).
>
> * * *
>
> Q. So your decision to verify this drug test necessarily involved a credibility determination in which you decided to credit Mr. Guelbenzu over Mr. Santagada, is that correct?

A. Correct.

Q. On what basis did you make that credibility determination?

A. There were some inconsistencies in the information that Mr. Santagada gave me from one story to the next and the information from the collector was very exact and precise and met the standards as I understood them.

Q. Was he exact and precise, as you put it, about whether or not there had been repeated efforts to void into the same container?

A. Correct. (R. 222).

* * *

Q. What if, instead of being exact and precise, the collector had stated to you over and over the phone, "It's possible that Mr. Santagada returned to void in the same container"?

A. If he had indicated that there was more than one void into the same container, then that would have given reason to invalidate the test.

Q. But what if he said it's possible, that he wasn't certain one way or the other?

A. I--would indicate, you know, lack of his control over the collection process, and I think it would have been an area of concern to me.

Q. Would you have nullified the test under these circumstances?

A. Yes. (R. 223-224).

Dr. Brawley went on to testify that "I felt that the collector did maintain full custody of the specimen at all times." (R. 251). When asked about technical violations that he would overlook if the donor wasn't able to keep the specimen in his view at all times prior to the sealing of the specimen, Dr. Brawley explained: "As long as the collector maintained his full control of the specimen at all times, either by sight or lock, meets the DOT criteria as they've been explained to me." (R. 251-252). In a final exchange with Mr. Seham, Dr. Brawley re-affirmed his view regarding voiding into the same specimen container:

Q. On the other hand, if urine was put on urine in the same specimen container, that would be more than a

technical violation?

A. I've been told by the DOT both in our training programs and additional guidelines that that would invalidate a test, that would be what they call a fatal flaw. (R. 252).

In summary, Dr. Brawley testified that if Guelbenzu told him that it was possible that the 60 cc's were obtained as a result of two voids in the same container, the test would be invalidated. Mr. Guelbenzu told the Board that it was indeed possible that the specimen was obtained as the Grievant stated -- that the sample was the result of more than one attempt. Given the testimony of Dr. Brawley and Mr. Guelbenzu, the Board has no choice but to invalidate the test.

There is an additional reason to nullify this test and it involves a credibility determination.

Dr. Brawley testified that he had one phone conversation with Guelbenzu. He was not familiar with his training, he had no knowledge concerning his general background (including criminal convictions or problems with substance abuse), and he did not know whether Guelbenzu was terminated from Life Data due to incompetence. (R. 224-225). Dr. Brawley did not interview Grievant face-to-face, nor did he investigate whether Santagada's behavior or work performance carried any indicators of drug abuse. He had no knowledge about Santagada's general health or record of tardiness or absenteeism. (R. 225-226). Is there reason to credit Guelbenzu's testimony over that of the Grievant?

At oral argument the Union outlined numerous facts that give rise to question the overall credibility of Guelbenzu. Many of the Union's points are well taken.

Mr. Guelbenzu signed a certification whereby he swore that the specimen, "has been collected, labeled and sealed in accordance with applicable federal requirements." (Co. Exh. 7). Mr. Guelbenzu signed such a certification despite admitting ignorance of the regulations. Not only did he deny any familiarity with the regulations (R. 73), but the Company objected to questioning Guelbenzu concerning the regulations because his ignorance had been so firmly established. (R. 81; 100).

Mr. Guelbenzu also swore to an affidavit which the Company submitted as evidence. In terms of the affidavit's preparation, Mr. Guelbenzu testified at R. 104-05 as follows:

Q. Before, you said someone instructed you what to write in the affidavit; who was that?
A. No one--well, they just told me to write what happened during the test; no one told me what to write.

Q. But who is that individual?
A. Dr. Brawley, he's the one that requested an affidavit from what I recall.

Q. You said there was a supervisor?
A. My supervisor, yes.

Q. Was he the one who drew the diagram?
A. Yes.

Q. Did he assist you with the affidavit?
A. No.

Q. No, he didn't read it?
A. He read it after I wrote it, yes.

Q. Did he make comments?
A. I don't--not that I recall, no." He said, "This is fine." I mean, this is what happened.

Yet, at R. 94-95, Mr. Guelbenzu testified,

Q. Company 8, you say, is a copy of an affidavit that you drafted at Dr. Brawley's request?
A. Yes.

Q. Did he ask you to make this diagram?
A. I think so. It was basically my supervisor who instructed me exactly what to write and what to do.

Q. This was Mr. Hinojosa?
A. Mr. Hinojosa."

The Union notes that although at that point he was not forthcoming about the diagram, the topic had come up and he did note he initialed it, did not admit at this point to the fact that he did not draft the diagram. At R. 96 he finally admitted that the supervisor completed the diagram for him -- a diagram which (in the Union's eyes) contains a very significant distortion of the actual layout of the premises, a diagram which indicates a direct line of view between the collection site portal and the water fountain where Mr.

Santagada had gone to get a drink, a diagram that, again, Mr. Brawley had relied upon.

Again, regarding the affidavit, Mr. Guelbenzu testified that there were no prior drafts. However, Mr. Lawrence Davis testified that a very different version had been completed and filed with Life Data Labs; that he saw it; that, instead of being three pages with a diagram, it was three-quarters of a page, and that the style of writing was very different, lending considerable support to Mr. Guelbenzu's first admission that he was told exactly what to write.

Still addressing the credibility of Guelbenzu, an omission in the affidavit which Mr. Guelbenzu stated under oath at the hearing concerned Santagada's bowel movement. The comment was not solicited by any party, it was instinctive, impulsive. Mr. Guelbenzu probably thought it was a significant thing, yet it was not in his affidavit, but unprompted that came up in the hearing. It is not a minor point but goes a long way to explaining why the door would happen to be propped open. Grievant had a bowel movement and testified that there was a very unpleasant odor from that bowel movement and that was the reason for the collector responding, "Well, I'm going to air this room out." Given the room, how small it was, how a bowel movement might have affected the atmosphere in such a small area, and there was no circulation in that area, it's very credible that's precisely what happened. Why was the reference omitted in his affidavit? Perhaps, as argued by the Union he was told exactly what to write by his supervisor.

Other contradictions in Mr. Guelbenzu's testimony include R. 88 where he stated that, in accordance with applicable rules, he offered the Grievant the split sample option at the beginning of the collection procedure whereas, at R. 58-59, he indicates that the split sample was offered after the Grievant had already provided 60 milliliters. Which story can be credited?

Furthermore, and more puzzling, Mr. Guelbenzu's version of events do not fit the time format the Company's own exhibits set out. The Company's exhibits indicate that Mr. Santagada was picked up at 5:30 p.m. The testimony reflects that it would have taken two minutes or so to arrive at the collection site and the exhibits of the Company reflect that the process would have been completed or finished around 6:05 p.m. There are over 30 minutes to account for, yet at R. 93 Guelbenzu says it took 10 minutes for Grievant to give the 60 milliliters and at R. 94 Guelbenzu indicates that the process

was completed within five to 10 minutes after that. Mr. Guelbenzu's version of events accounts for a little more than half of the time which the Company's exhibits indicate transpired during this process. Mr. Santagada's version of the events, which involved several trips to the water fountain and more than one attempt to fill the same specimen container, is much more plausible given the uncontroverted time span that was involved.

Mr. Guelbenzu also was very confused about the responsibilities regarding his job:

> Q. Was it your responsibility to make sure samples were collected in conformance with federal regulations?
> A. Yes, it was.
>
> Q. You couldn't delegate that to anybody, that was your sole responsibility?
> A. Yes.

Later, and in response to the question whether there had been tampering or any violation that occurred with regard to chain of custody, provisions in the federal regulations, what he was supposed to do with the specimen, the witness indicated that he would keep it until the supervisor came:

> Q. Then, what would happen?
> A. It's not up to me to decide.
>
> Q. It is not up to you to decide what happens to the specimen?
> A. Not that I know.
>
> Q. You said you had the sole responsibility for enforcing these federal regulations; you could not delegate that to anybody; you let the supervisor tell you what to do?
> A. I guess I don't have full authorization with what happens to the specimen; I guess I was wrong.
>
> Q. So you would have the supervisor interpret the regulations?
> A. I would tell them if I saw something that went wrong. I would explain what went wrong; it was up to the supervisor.
>
> Q. If he told you ship the sample out, you would do that?

A. Yes.

Q. Even if you--
A. I'm not sure. I guess it would depend on the violation.

Q. Some violations are okay and some violations are not okay?
A. I really don't know. I mean, basically my job was to supervise, to make sure that they did not tamper with the urine. If that did happen, I would contact their supervisor.

It is clear that Mr. Guelbenzu was only aware of half of the regulations that protects the Company; there is no evidence that he was aware of the regulations which protects the donor:

Q. I understand the function in terms of tampering, but don't you have another purpose there in terms of making sure the chain of custody is protected or don't you know?
A. From what I know is that I must supervise the test to go accordingly.

Q. Who do these regulations protect; do they protect the employer or do they protect the employee?
A. I'm not sure. I don't fully understand what you're asking.

Besides allowing another individual to enter the site during a collection, leaving the site for no good reason, and leaving the door open to air out the room, the record reflects a picture of Mr. Guelbenzu following instructions, writing in the affidavit what he was supposed to write, and rejecting or not rejecting a specimen according to what a supervisor may have been telling him. Contrary to the conclusion of Dr. Brawley, this Board cannot find that Mr. Guelbenzu was "very precise and very professional" and that his story should be credited over Grievant's. [1]

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1. The Board notes that the DOT Drug Regulation Seminar 1990 handbook addresses when an MRO may negate the statements of an employee vis-a-vis the collector:

The record also indicates that Grievant, contrary to DOT regulations, was removed from service prior to Dr. Brawley completing the verification process:

> Q. [By Mr. Seham]: Is it not true that Mr. Santagada was removed from service prior to the completion of the verification process?
> A. Correct. (R. 233).

It is also of note that Grievant was never provided written instructions during his collection process. (Cf. Union Exh. 6). While both considerations are not dispositive of this grievance, not adhering to the regulations does not help the Company's case.

Finally there is the matter of Mr. Zell's representations that the Grievant's test was going to be thrown out. The Company asserts that it was mislead by the Grievant and this was the basis for making the statement to Grievant's Union representatives. The Union asserts that the Company was not mislead and that this is clear from the testimony of the Company's own witness.

As pointed out by the Union, the Grievant never spoke to the Company prior to its decision to cancel the test. Specifically, neither Lee Harris nor Bob Zell had any contact with Enzo Santagada prior to the cancellation of the test. As Mr. Lee Harris testified, it was Mr. Brennen who spoke to Harris who, in turn, spoke to Zell. Mr. Harris testified that this information was the basis for Mr. Zell's decision:

(continued)

> The MRO must know precisely how these steps are carried out. Deviance from accepted procedures may lead the MRO to negate apparently positive results, while knowledge that prescribed procedures were carefully followed permits the MRO to discount statements from a covered employee that a collection site person or laboratory adulterated the employee's sample. (Union Exh. 8 at 5).

Aside from Dr. Brawley's lack of knowledge of the regulations, it is difficult, if not impossible, to credit the collector's story in view of Guelbenzu's admitted violations of the regulations.

Q. [By Mr. Kelly]: Did you have any direct contact with Enzo on that day?"
A. [By Mr. Harris]: No.

Q. Did Mr. Brennen give you any specifics about the problems or concerns that Mr. Santagada had with the test?
A. That Enzo had trouble providing a sample is what Mike had told me. He left the room to get water and Enzo felt that somebody had gone into the room and contaminated his sample.

Q. Did he provide any more detail than that?
A. No, that's as best I can remember, that's it.

Q. Based on that conversation, what did you do?
A. I called employee relations looking for some guidance.

Q. Who in particular did you call?
A. Bob Zell.

* * *

Q. What did you do when you contacted Mr. Zell?
A. I told Bob the same story Mike told me. We talked for a few minutes. Bob felt a little uneasy about what I was telling him, and he said he was going to contact headquarters and ask their opinion.

* * *

Q. Did Mr. Zell get back with you?
A. Yes, Mr. Zell got back with me, and he informed me that I could tell Mike Brennen who could tell Enzo that the test would be null and void, and his name would be put back in for random drug testing. (R. 113-114).

In summary, Harris stated that Mr. Santagada had trouble providing a sample. Neither the Company nor the Union, contest this. Second, Harris was told that Enzo left the room to get water. Third, Harris was told that Grievant felt that someone had tampered with his specimen. Astatement concerning the Grievant's feelings could not be considered a misrepresentation of fact. Moreover, the Company could not and did not rely on this "feeling." The fact that they did not is brought home by the testimony of Mr. Harris:

Q. [By Mr. Seham]: During your conversation with Mike Brennen, he told you that Enzo Santagada felt that someone had contaminated his sample, is that correct?

A. [Harris]: The best I can remember from the conversation we had, yes, the first time I talked to Mike Brennen.

Q. "Did he tell you the reasons why Enzo felt that way?

A. The reasons why--be more specific.

Q. Did he report to you that Enzo had seen someone directly contaminating his specimen?

A. No.

Q. So, it was more in the nature of a suspicion that Enzo had?

A. That's what Mike led me to believe. (R. 116).

The testimony of the Company's own witness, Mr. Harris, bears out that the Company's decision to cancel the test was based on factual information from the Union that was not only consistent with Guelbenzu's version of events, but actually omitted some of the more egregious regulatory violations that Mr. Guelbenzu has admitted to. The Board concludes that the Company's only reason for failing to honor this commitment has nothing to do with misrepresentations made by the Union or the Grievant.

What resulted was that the Grievant relied on this commitment in cancelling a scheduled test at Eagle Forensic Laboratories which, unlike the Harris Lab used by the Company, retains its NIDA certification. Dr. Brawley testified that the cocaine metabolite stays in the body for three to five days. But for the Company's promise, Mr. Santagada would have been tested at a NIDA certified lab less than 24 hours after his first test. A negative result from that laboratory would have been very strong evidence that he had no cocaine in his system hours earlier. Is is not, as pointed out by the Company, dispositive of the matter, but it would have helped the Grievant's case who, after all, should be entitled to a test consistent with the regulations.

Conclusion

If this Board were convinced in any way that the urine of Enzo Santagada tested positive for cocaine, consistent with

prior Board precedent his termination would be sustained in a New York minute. The problem in this case is that the Board cannot conclude whose urine tested positive in view of the many infirmities in the collectin process and the questions regarding the certification of the lab.[2] Furthermore, tracking the testimony of Dr. Brawley, as well as the DOT regulations, this grievance must be sustained in view of the Board's conclusion that the urine sample clearly was the result of two separate voids. The Board finds the Grievant's story credible and consistent with the Company's time frame regarding the collection procedure. Mr. Guelbenzu's testimony was full of inconsistencies and, more important, it cannot be squared with the time frame involved in this case. Clear and simple, Mr. Guelbenzu, who (to the Company's credit) is not an employee of American Airlines (he was, after all, a subcontractor of a subcontractor), did not maintain full control over the collection process from start to finish.

For the record, the Board is not deciding that every violation of a DOT regulation must result in the test being thrown out. Further, the Board sees no utility in addressing every argument by both management and the Grievant regarding this case. Credibility is not an all or nothing proposition and while the Board is ruling for the Grievant, it agrees with the Company that there are some facets of this case that raise real concern, especially from an employee in a safety-sensitive position.[3] Given the overall evidence record, however, the Board is left with little choice but to order the Grievant reinstated with backpay at his straight-time

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2. While the lab was certified at the time of the chemical analysis, one unanswered question is what the lab did during a six-month window to lose its certification. The Board was only told that the loss of certification involved "security" issues, but there is little evidence along these lines. Did the security problems involve access to samples? Did it involve mixup of samples? The loss of certification is just one additional aspect in this case that does not help the Company's case.

3. A major concern, noted by both parties during a January 2, 1992 Executive Session, is a urine sample, identified by the lab as Grievant's, did test positive. Accordingly, as part of this award both parties agreed that the Company, in addition to random testing, may test the Grievant at its discretion for one year.

rate, less interim earnings by the Grievant. The Board is denying the Union's claim for other costs and expenses including the Grievant's claim for interest. No prior system board opinion supports such an award and this Board is not prepared to exercise its writ like a circuit rider--dispensing industrial justice pursuant to its own whim.

VI. AWARD

The grievance is sustained. The Grievant is ordered reinstated to his former position with backpay at his straight-time rate, less interim earnings. All other claims for monetary relief are denied.

Paul Baez
Company Board Member
(concur)

Jack Bateman
Union Board Member
(concur)

Marvin Hill, Jr.
Chairman, American Airlines -- TWU
Miami Area Board of Adjustment

Dated this 14th day of ~~January~~ February 1992.