AWARD NO. 21
CASE NO. 21

SPECIAL BOARD OF ADJUSTMENT NO. 1020

PARTIES TO DISPUTE	)	AMTRAK SERVICE WORKERS COUNCIL
	)	
	)	NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF CLAIM

1. Carrier violated Rules 19 (a) and (d) of the Controlling Agreement when on May 11, 1988 it withheld from service Claimant Paula Miles prior to an investigation scheduled for June 30, 1988.

2. Carrier acted in an arbitrary and unjust manner, violating Rule 19 of the Controlling Agreement, when it dismissed Claimant from service effective July 22, 1988.

3. Carrier shall now be required to compensate Claimant for all time lost from May 11, 1988 through July 22, 1988.

4. Carrier shall now be required to reinstate claimant Miles to service, compensate Claimant for all time lost beginning on July 23, 1988 and continuing until reinstated, and cleanse Claimant's service record of any reference to this discipline. (Carrier file ASWC-D-2051, ASWC file 390-B8-104-D).

OPINION OF BOARD

As discussed further below, Claimant in this matter, a train attendant in the Carrier's service since September 14, 1987, was tested under the Carrier's return-to-duty drug testing policy after having been on a leave of absence due to a back injury. Claimant was dismissed from service by letter dated July 22, 1988 for violations of Carrier Rules A, D and L for failing to rid her system of cannabinoids as instructed after her return-to-duty drug screen was positive and further after Claimant did not provide a negative sample within 30 days.

A. The Return-To-Duty Drug Testing Policy

The threshold dispute in this matter (as in the other similar cases currently pending before this Board) concerns the propriety of the Carrier's decision to require certain employees represented by the Organization, who are not subject to Hours of Service

regulation, to submit to drug screens as part of a return-to-duty physical examination. The Organization argues that by implementing the policy the Carrier violated the Agreement; there is no probable cause or reasonable suspicion that an employee has been using drugs to permit return-to-duty drug testing; the policy is aimed at penalizing off duty conduct and is unconcerned with impairment on the job; the drug tests used are unreliable, the laboratories are uncertified and the chain of custody procedures faulty; the policy is punitive and does not test medical fitness; there is no public policy imperative underlying the Carrier's policy as the jobs held by those affected employees subject to testing in these cases do not impact upon public safety; it is not insubordinate to refuse an instruction which flows from an illegal policy; and the testing violates employee privacy rights and is overly intrusive. The Carrier asserts that the promulgation of the policy involved in this case was an exercise of its right to establish reasonable medical standards.

The relevant background facts underlying this dispute are found in the District Court's opinion in *Railway Labor Executives' Association, et al. v. National Railroad Passenger Corporation*, 691 F.Supp. 1516, 1517-19 (D.D.C. 1988), which action was filed by the various organizations after the Carrier implemented its drug testing policy [citations and footnotes omitted]:

> The collective bargaining contracts between the unions and Amtrak are silent on drug testing, physical examinations, and the use of alcohol or drugs. ...
>
> For a number of years, Amtrak has required physical examinations of its employees. These examinations are conducted before an employee is hired, when an employee returns to work from a non-vacation absence of more than 30 days, and, for employees covered by the Hours of Service Act, ..., periodically. The medical standards and tests administered in these physical examinations have changed from time to time with medical developments, ...
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> Since the mid-1970's, the physical examinations have routinely included urinalysis, although a drug screen was not initially part of the urinalysis. A drug screen was performed only when, in the judgment of the examining physician, the employee may have been using drugs. In April, 1983, Amtrak began

requiring a drug screen as part of the urinalysis in pre-employment and return-to-work physical examinations. In July, 1985, Amtrak began requiring a drug screen as part of every mandatory physical examination, including periodic physicals.

Amtrak also requires urinalysis drug screening outside the context of a medical examination when there exists reasonable suspicion that an employee may be under the influence of alcohol or a drug. The record suggests the railroad began testing based on reasonable suspicion less than a year before this lawsuit was filed; previously, the railroad relied on supervisory observation to detect drug or alcohol impairment.

A rule of conduct, unilaterally implemented by the railroad, prohibits on-duty employees from working while under the influence of alcohol or drugs. That provision, asserted by Amtrak without contradiction by the unions to be long-standing, was known in prior years as Rule C and stated as follows:

> *Reporting for work under the influence of alcoholic* beverages or narcotics, or the use of alcoholic beverages while on or subject to duty or on Company property is prohibited.

In early 1985, Amtrak revised the rule, now designated as Rule G, to state as follows:

> 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.

On April 15, 1986, Amtrak issued a 12-page document detailing its policy and procedure for drug and alcohol testing of employees covered by the Hours of Service Act. On January 1, 1987, the railroad issued a similar document for employees not covered by the Hours of Service Act. ...

The main difference in the two documents concerns post-accident testing, which is authorized for employees covered by the Hours of Service Act. The documents state than an employee who tests positive for drugs or alcohol is subject to discipline and shall not be allowed to work until testing negative. An employee who tests positive three times in a row is subject to dismissal.

In a separate notice to employees covered by the Hours of Service Act, Amtrak warned that the urine test may detect off-duty drug use, without any on-the-job impairment, for up to 60 days. Unless the employee demands a blood test, a positive urinalysis "will support a presumption that you were impaired at the time the

sample was taken."

* * *

[Footnote 4] On August 15, 1987, while this lawsuit was pending, Amtrak revised its policy and advised employees that blood test results would not longer be relevant in a Rule G case because "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."

While the Court case addressed the broad spectrum of the Carrier's drug testing policy, the focus of the cases before this Board is upon the return-to-duty aspect of that policy as it applies to those employees represented by the Organization. That portion of the policy (PERS 19 (August 15, 1987 edition at 6-8)) states, in relevant part:

V. Return-To-Work and Periodic Physicals

A. Policy

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. All required periodic physicals and physicals to determine fitness for duty will also include a test for the presence of drugs. ...

B. Confirmation Testing

If the first test of a urine sample indicates the presence of drugs, a confirmation test will be conducted at Amtrak's expense 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. If the confirmation test is negative, the employee will be paid for any lost wages incurred during the time she/he was withheld from service because of the need to await the results of the confirmation test.

C. Consequences of Positive Test Result

If a test conducted pursuant to Section V is positive, the Personnel Department will notify the employee that she/he is medically disqualified. The employee

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). ...

If an employee who has 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 expense on any sample that has initially tested positive in this retest.

When an employee who has tested positive during a return-to-work or periodic physical enters the EAP, the employee will undergo counseling/treatment as determined by the EAP counselor. When the counselor decides the employee is able to return to duty, the employee must take a new return-to-work physical before presenting himself or herself for duty. If the employee tests positive on the retest, she/he shall be subject to dismissal for failure to follow instructions and shall not be eligible to reenter the EAP.

An employee who has tested positive for drugs 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 and/or alcohol by breath or urine sample, at least once each calendar quarter for a period of two years. If the employee tests positive for the presence of drugs or alcohol during such subsequent tests, or during any future return-to-work or periodic physical, the employee shall be subject to dismissal and shall not be entitled to enter the EAP.

D. Failure to Cooperate with Testing

An employee who refuses tp provide a sample or to cooperate in the testing procedures will be treated as if she/he had a confirmed positive test result. However, an employee who intentionally interferes with the administration or integrity of a test sample shall not be entitled to enter the EAP and will be subject to dismissal for dishonesty.

The parties' arguments frame the collision of two well-established doctrines. In this case, the asserted right of the Organization to check the Carrier against unilateral promulgation of policies in conflict with the Agreement or past practices collides with the

Carrier's asserted right to make fitness and ability determinations for its employees.

From a practical standpoint, the area of return-to-duty drug testing, indeed, the entire issue of drug testing, is one that cries out for the parties to reach agreement at the bargaining table. In that fashion, mutually agreed upon policies can be developed in detail, standards and guidelines set, testing procedure checks and balances established and, from a contract administration viewpoint, employees, supervisors and Organization and Carrier officials would clearly know what is required. Therefore, the seemingly endless litigation surrounding this area (which has the potential for unduly sapping the parties' resources in large part due to lack of agreement) could be avoided.

However, as currently existing in so many relationships both within and outside of this industry, on this property the parties have not reached a consensus on the issue of drug testing. In all fairness to the parties, the inability to reach agreement on the drug testing issue is not solely one of simple intransigence, poor relationships or a product of the continual power struggle between management and labor. The issue itself transcends the collective bargaining process. Today, drug abuse is out of control and policies promulgated at the highest levels of our society have been unable to solve the problem. What may be accomplished at the bargaining table, in reality, will do little to stop the problem as a whole.

The parties' goals are similar - no one advocates a work environment that could endanger the public or other employees and steps must be taken to insure that the Carrier operates its business in the safest fashion possible.[1] At the same time, the chance that an employee may be falsely accused or wrongfully assessed as having taken drugs must be avoided at all costs. Just as lives are ruined by the drug scourge facing this society, the lives of employees falsely accused of using drugs (and the lives of those employees'

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1 As the Organization states in its submission "This dispute is not about a drug-free workplace. The Organization strongly supports that goal ...."

dependents) face similar destruction through improper Carrier action.

The Carrier's dilemma is apparent. The high degree of safety required in this industry, recent tragedies resulting in loss of life and immense destruction of property and increasing federal regulation cause the Carrier to seek a drug free work place. Thus, from the Carrier's perspective, a hard line must be advocated. On the other hand, the Carrier cannot be insensitive to the tragedy of falsely accusing employees and, for those employees who fall under the grip of the problem, the Carrier cannot ignore the fact that these employees (many of whom are long term) are in need of assistance. From the Carrier's viewpoint, however, to take other than a hard line on this question is an invitation for a future tragedy involving further loss of life and a corollary invitation for liability of massive proportions. The Carrier obviously envisions a future tragedy and a plaintiff's lawyer calmly telling a jury "Ladies and gentlemen, the defendant knew or reasonably should have known that the employees involved were using drugs and the defendant took no steps to reasonably check the problem." From the Carrier's perspective, if it did not act affirmatively, in that scenario the only real question may be how many commas are to be placed on the liability check.

The Organization articulately expresses the other side of the coin. The Organization sees the Carrier over-reacting in panic and in the process trampling over the employees in its desire to demonstrate that it is doing everything possible to accomplish a drug free work place. In the process, the Organization sees less than adequate testing procedures used, employees being falsely accused and traditional asserted rights of employees being violated.

1. The Propriety Of Return-To-Duty Drug Testing

Therefore, because the parties have been unable to reach agreement, the issue squarely falls upon this Board. Putting the reasons for the parties' inability to reach a consensus aside and, most importantly, utilizing arbitral concepts developed in this

industry and recognizing the limitations placed upon our authority which proscribe delving beyond the terms of the Agreement, we must resolve the question of the propriety of return-to-duty drug testing. Our analysis requires a weighing and balancing of Organization's asserted right prohibiting the Carrier from engaging in unilateral action against the Carrier's asserted right to make fitness and ability determinations.

It is now clear that the issue involved in this case is a minor dispute under the Railway Labor Act. Therefore, the question of the propriety of the Carrier's promulgation of the policy as an alleged contract violation is properly before us. *Consolidated Rail Corporation v. Railway Labor Executives Association, et al.*, 105 L.Ed.2d 250, 267 (1989) ("...[W]e conclude that this controversy is properly deemed a minor dispute within the exclusive jurisdiction of the Board."). As the Organization correctly argues, for the purposes of this case, *Conrail* is relatively narrow and is only jurisdictional in nature and does not address the merits of the dispute. *See* 105 L.Ed.2d at 272 ("...[I]n no way do we suggest that Conrail is or is not entitled to prevail before the Board on the merits of the dispute."). However, many of the concepts discussed by the Court in *Conrail* are relevant to our consideration of the merits.

It has long been held that carriers have the authority to conduct physical examinations, set medical standards, determine the physical fitness of their employees and establish reasonable rules relating thereto. *See Conrail, supra*, 105 L.Ed.2d at 267, n.9 (a carrier's "power to conduct physical examinations is an implied contractual term."); Third Division Award 15367 ("We will here follow the long line of Third Division Awards that through the years have held that a Carrier has the right to determine the physical fitness of its employees ...."); Second Division Award 9368 ("It is well-established that the Carrier is well within their prerogatives to establish reasonable rules and standards relating to the physical qualifications of employes. ... On the other hand, these standards should not be applied arbitrarily, capriciously, or discriminately.").

On balance, we view the Carrier's action of requiring employees to submit to return-to-duty drug tests as falling under the umbrella of the Carrier's authority to set medical standards and make fitness and ability determinations. First, given the decision in *Conrail* that the kind of drug testing involved in this case is not a major dispute under the RLA and that § 6 procedures need not be followed, the Organization's asserted right against unilateral action of implementing the policy is not absolute and therefore is not determinative of this dispute.

Second, there is nothing in the Agreement that specifically regulates the Carrier's ability to test employees and hence, the Organization can point to no contractual language prohibiting the Carrier from acting as it did in promulgating the return-to-duty drug testing policy. The Carrier's promulgation of the return-to-duty drug testing policy is a response to the changes in our society of increased drug usage in the work place. The Agreement does not prohibit the Carrier from reacting to those changed circumstances. *See Conrail, supra*, 105 L.Ed.2d at 265, n.7 ("...[T]he general framework of a collective-bargaining agreement leaves some play in the joints, permitting management some range of flexibility in responding to changed conditions.").

Third, as the Organization correctly asserts, the fact that an asserted change is not legally characterized as a major dispute does not mean that the Carrier can make changes at will. Unilateral changes in existing past practices must also be considered since those practices can rise to level of written contractual language. *See Conrail, supra*, 105 L.Ed.2d at 267 ("...[C]ollective-bargaining agreements may include implied as well as express terms [and] ... the parties' 'practice, usage and custom' is of significance in interpreting their agreement."); SBA 957, Award 17 ("...[W]ell established work rules and practices, although not incorporated into the parties' written collective bargaining agreement, constitute implied-in-fact contractual terms ...."). But just as a practice of interpreting Rule G has existed, so has the practice of the Carrier's utilization of return-to-duty physical

examinations for determining employee fitness and ability. Indeed, there is a demonstrated evolution of testing procedures utilized by the Carrier, As the District Court stated in *RLEA v. National Railroad Passenger Corporation, supra*, 691 F.Supp. at 1518 "The medical standards and tests administered in these physical examinations have changed from time to time with medical developments ...."[2]

On balance, giving the Organization the benefit of the doubt, the practice asserted by the Organization is, at best, of equal weight with the practice asserted by the Carrier. Stated differently, the question of whether or not the Carrier violated the Agreement by promulgating the return-to-duty drug testing policy is a contractual question and, as such, the Organization carries the burden of establishing the violation. Given the countervailing practices, the Organization has not carried its burden and the Organization's asserted practice cannot be found as controlling.

The well-established case authority governing the Carrier's ability to make physical fitness determinations focuses the real question on the overall threshold issue before us. Specifically, the narrow question on this issue is whether or not the Carrier's action was arbitrary or capricious. *See* Second Division Award 9368, *supra* (... [t]hese [physical qualification] standards should not be applied arbitrarily, capriciously, or discriminately.").

This Board may not agree with the wisdom of resorting to the type of testing procedure implemented and applied by the Carrier in this matter. Such a unilaterally promulgated testing procedure may well in the long run prove counter-productive, especially in terms of employee morale and that factor's relationship to job performance as it is weighed against the expressed needs of the Carrier which it satisfied through unilateral action. However, whether we agree or disagree with the Carrier's choice is irrelevant. The Carrier is responding to the growing tragedy of increased drug usage in the work place. In

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2 *See also* the affidavit of Director of Field Operations J. T. Stafford given in the court proceedings which details the evolution of the Carrier's testing practices.

return-to-duty situations, the Carrier is faced with employees who have been away from the work situs for lengthy periods of time and, correspondingly, have not been in a position to be viewed by their supervisors in terms of ability to actually perform their job duties in a safe and productive manner. Given the Carrier's business of transportation of millions of passengers each year and the strict safety requirements and responsibilities that attach to its function, we cannot say that the Carrier's efforts to modify its approach and check usage of drugs by employees who have not recently been subject to the day-to-day scrutiny of their supervisors by requiring those particular employees to demonstrate that they are drug free after lengthy non-work periods is arbitrary or capricious.

Therefore, the decision to test in return-to-duty situations is a reasonable one. By testing in this fashion, the Carrier is taking preventative precautionary steps for a group of employees not subject to immediate recent scrutiny. Such a decision falls within the bounds of the Carrier's prerogatives. We have considered the specifics of the Carrier's policy with its one time 30 day requirement for submitting a negative sample and the option for EAP assistance along with the periodic retesting provisions and the consequences of a positive test during that periodic retesting and find those conditions similarly reasonable. We need not address other aspects of the policy as those other procedures were not in issue in the cases before us.[3]

Our conclusion in this matter is not one of first impression. *See e.g.*, PLB 3530, Award 83 wherein the employee was recalled to duty and underwent a return-to-duty

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3 The underlying premise of the Carrier's decision to extend drug testing to employees who have been out of service for lengthy periods of time is that the likelihood of drug usage is higher during those idle times. That premise was recognized, in part, in SBA 957, Award 17, *supra* ("Suspicion of controlled substance use is probably stronger upon the time of an employee returning to work, as during his absence the danger may well be greater that he had a relapse in his rehabilitation.") Again, whether or not that is in fact the case is not the question. We cannot say that the underlying premise in this case is irrational and does not provide a basis for the Carrier's determination that employees returning to duty after lengthy periods of time should be tested.

Obviously, we express no opinion on the propriety of random drug testing as opposed to the type of testing implemented in this case. We do note, however, that the underlying premise of the potential for increased usage during lengthy periods of non-working time would not exist in a random testing situation where employees are working and available for observation.

physical examination which included a drug screen urinalysis which test demonstrated a positive result for cannabinoids through EMIT screen and Gas Chromatography/Mass Spectrometry ("GC/MS") confirmation. Similar to the policy in this case, the employee was held out of service and was advised to submit a negative sample within 45 days or face dismissal. The employee was subsequently dismissed upon failure to provide a negative sample or enter an employee assistance program as directed. In denying the claim, the Board held:

> The Carrier has established through substantial, credible evidence on the record that Claimant violated the Carrier's lawful drug policy. Moreover, Claimant also failed to follow the instructions of the Carrier's medical director by not submitting a negative urine sample or entering the DARS program. The Carrier has a well-settled right to formulate policy and rules, especially those which deal with its obligation to provide for the safety of employes and the public. The scourge of substance abuse is particularly evident in the transportation industries, and public safety demands that rules on drug and alcohol use be established and enforced. The Carrier established lawful and reasonable rules and instructed Claimant to abide by them. The evidence is that he did not and that the Carrier enforced its rules without being arbitrary, capricious or discriminatory.

See also Awards 87 and 88 of that same Board which also involved the failure of employees to submit negative samples after return-to-duty drug tests showed positive for prohibited substances; PLB 3783, Award 65 involving this Carrier ("it was not improper for Carrier to require claimant to pass the drug screen before returning to work."); Award 72 ("In the light of its heavy responsibilities for safety, Carrier's policy in cases of this nature is not unreasonable or unduly harsh."); Award 73 ("We have had prior occasion to consider Carrier's 30 day notification policy to employees testing positive for drug use and find it in line with its heavy responsibilities for safety and efficiency in a demanding industry."); and Award 74 ("Carrier's [return-to-duty drug testing] policies and procedures ... are not realistically unreasonable, particularly in the light of its responsibilities for safe and efficient railroad service."). Finally, *see* PLB 4187, Award 6 ("[I]t must be concluded that the Carrier testing procedure is a proper and reasonable exercise of rights in an

employee-employer relationship in providing for the safe conduct of business ....").

2. The Organization's Arguments

In support of its position in this matter, the Organization has proffered extensive and detailed arguments. We find that the Organization's well-formulated arguments do not change the result.

First, as noted earlier, it is now settled that the implementation of the return-to-duty drug testing policy is not a major dispute under the RLA. *Conrail, supra.* Therefore, negotiations in accord with § 6 of the RLA are not required.[4]

Second, First Division Award 23334 is also not determinative. In that case, the carrier sought to impose *random* testing for alcohol intoxication through use of an Intoxilyzer. The issue before us does not involve random testing. Moreover, the basis for the Board's ruling in Award 23334 was narrow. According to the Board "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 50 years] for detecting intoxication ... [- a practice that] 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 ...." This case does not exhibit the lengthy past practice found in Award 23334 but, on the contrary, shows prior return-to-duty drug tests for certain employees and generally shows the Carrier making fitness and ability determinations and conducting return-to-duty physicals.[5]

Third, the Organization's analogy to the law developing under the National labor

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4 The Organization's reliance upon SBA 957, Award 17, *supra*, is not persuasive. That award did not address the issue before this Board ("... the Board does not here address the question of whether body fluids tests of employees at the time of return to work physicals is appropriate where there is no past history of controlled substance abuse ....").

5 Although not determinative of this matter, the area of misconduct focused upon by the Board in Award 23334 was alcohol intoxication with the parties' 50 year practice "that evidence of intoxication was based on visual observation; surmise; and other outward physical manifestations, such as a flushed face, slurred speech, unsteady gait, glassy eyes, etc." as opposed to drug usage which does not necessarily exhibit such outwardly identifiable manifestations.

Relations Act concerning the obligation of employers in the private sector to bargain over drug testing policies (*see Johnson-Bateman Company*, 295 NLRB No. 26, 131 LRRM 1393 (1989) and the NLRB General Counsel's Guidelines, Memorandum GC 87-5 (1987) (Org. Exh. 11)) is not appropriate. The NLRA does not distinguish between major and minor disputes as does the RLA and the statutory schemes are decidedly different. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686, n.23:

> The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are *not* coextensive with the National Labor Relations Act and the [NLRB]'s jurisdiction over unfair labor practices. See Chicago & N. W. R. Co. v Transportation Union, 402 US 570, 579, n. 11, (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes.") [Emphasis added].

Further, the Organization's analogies between the NLRA and the RLA are not appropriate here where the parties are in the arbitral forum litigating managerial rights existing under the Agreement (particularly where the issue is one of determining the propriety of assessing fitness and ability and establishing medical qualifications under the terms of the Agreement), as opposed to determining statutory bargaining obligations that do not necessarily recognize managerial discretion as that discretion has developed under existing case law relevant in this forum. In short, the Organization is arguing statutory law in the arbitral forum. As the Supreme Court has held, in the arbitral forum it is arbitral body's function to interpret the parties' Agreement and not another statute. *See e.g., Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 56-57 (1974) concerning the potential conflict between an arbitrator's award and a statutory scheme (in that case, Title VII of the 1964 Civil Rights Act):

> Arbitral procedures, while will suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of

> enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement .... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land .... [T]he resolution of statutory or constitutional issues is a primary responsibility of courts ....

Fourth, the Organization's argument that return-to-duty drug testing is improper because no probable cause exists does not carry sufficient weight to rescind the policy. Again, the overriding factor is the well-established right and obligation of the Carrier to make fitness and ability determinations and the latitude that established case law gives to the Carrier for making those assessments.[6] Indeed, the argument that some form of cause must exist for all kinds of testing has been rejected. *See Conrail, supra*, 105 L.Ed.2d at 271-72:

> As Conrail pointed out and urged at oral argument, "particularized suspicion" is not an accepted prerequisite for medical testing. ... A physician's decision to perform certain diagnostic tests is likely to turn not on the legal concept of "cause" or "individualized suspicion," but rather on factors such as the expected incidence of the medical condition in the relevant population, the cost, accuracy, and inherent medical risk of the test, and the likely benefits of detection. In designing diagnostic-testing programs, some employers establish a set of basic tests that are to be administered to *all* employees, ... regardless of whether there is cause to believe a particular employee will test positive. It is arguably within Conrail's range of discretion to alter its position on drug testing based on perceived changes in these variables. [Emphasis in original, citations omitted].

Fifth, the Organization's reliance upon the District Court's decision in *RLEA v. National Railroad Passenger Corporation, supra*, (as well as other cases reaching the same conclusion) is not persuasive. The Court held that under the RLA "The imposition of drug testing gives rise to a major dispute ...." 691 F.Supp. at 1524. In light of the Supreme Court's subsequent decision to the contrary in *Conrail*, that conclusion is now in doubt.[7]

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6 Return-to-duty drug testing is not analogous, as the Organization argues, to situations where an accident occurs and "every employee in the vicinity of [the] accident" is tested, which "would be easily abused and tantamount to a random testing program". PLB 3139, Award 87.

7 The Clerk of the Court, advises us that District Court's opinion was appealed to the D.C. Circuit which, after *Conrail* and upon motion, remanded the case back to the District Court where it is now pending.

The Court did not consider, indeed, under its analysis and its authority it could not consider, whether, in fact, the action was permissible under the Agreement as an exercise of the Carrier's authority to make fitness and ability determinations. The same analysis holds for the other carriers' drug testing policies cited by the Organization which policies were found prior to *Conrail* to be major disputes. In short, the line of court cases relied upon by the Organization addresses whether or not the type of dispute involved in this case is major or minor under the RLA and the current view of the Supreme Court holds the issue to be minor. In any event, that is not the issue before us. The question of contract violation is the issue at hand.

Sixth, Third Division Award 21293 is also not on point. Award 21293 did not involve drug testing or use of drugs. In that case the Board sustained a claim involving an employee who was dismissed for conduct unbecoming after he was convicted and was incarcerated for assault against another individual resulting from an altercation off the carrier's property. The Board relied upon the concept that "a Carrier may not discipline an employe for what he does off duty" and found no evidence of damage to the carrier resulting from the employee's outside activities. However, the Board did articulate the exception that we believe is applicable to this case:

> An exception to this principle permits discipline when the off-duty conduct affects the employer-employe relationship. Critical to such an exception, however, is the guiding principle that the outside activity, in order to be subject to discipline, must definitely relate to Carrier's operations. By this it is meant that the misconduct must have arisen out of plant activities *or carry with it a serious threat of disrupting the orderly, efficient, or safe conduct of the Carrier's business*. [Emphasis added].

In this industry, drug usage carries with it precisely that serious threat.

The Organization's further reliance upon arbitration awards arising in the private sector are not persuasive.[8] However, one award cited by the Organization, *Maple Meadow*

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8 Those cases do not always show industries having a background of established case authority giving the employers the right as the Carrier has here to make fitness and ability determinations. Further,

Mining, 90 LA 873 (Phelan, 1988) while addressing a broader policy than the one involved in this matter, came to the same conclusion as we do with respect to return-to-duty drug testing. *Id.* at 880:

> In a previous decision, I had occasion to deal with the issue of whether a drug screen could properly be included as a part of a return to work physical, and I concluded that it could because it is simply one of a number of medical tests included in a physical examination conducted for the purpose of determining an Employee's physical ability to perform regular work duties in such a manner so as not to constitute a potential hazard to himself or herself or to others. In that sense, it is no different than a chest x-ray, a stress test, a hearing or eye test, a back examination, or any other medical procedure which enables the physician to make an informed judgment on the Employee's physical ability.

While we do not agree with all of the analogies made by the arbitrator, we do agree with the arbitrator's conclusion.

Seventh, the Organization's argument that the policy is aimed at penalizing off duty conduct is similarly unpersuasive. All forms of physical fitness testing, including those previously followed by the Carrier (which the Organization had no objection to) detect physical problems that could conceivably be linked to off duty conduct.[9] The focus of our review is upon the reasonableness of the Carrier's determination. Given the safety implications involved we have found that policy to be reasonable. Therefore, the employee's choice to engage in use of prohibited substances while off duty cannot serve as a shelter.

Eighth, with respect to impairment on the job, the Organization argues that mere

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the cases are factually different than the present situation, especially on the question of return-to-duty testing. For example, *The Board of Education of the District of Columbia*, AAA Case No. 1639 0030 85H (Kaplan, 1985) involved a rule even narrower in scope than the predecessor to Rule G that prohibited drug usage "while on school premises" and no evidence suggested the employees used drugs while on school premises. Further, the testing procedure involved was highly suspect in that only an unconfirmed EMIT screen was used. In *Trailways, Inc.*, 88 LA 1073 (Goodman, 1987) there was "no evidence whatsoever to show a practice or even an instance where [the relied upon rule] has been utilized for drug testing purposes ... [and] there was no written rule or policy for drug testing ...." *Id.* at 1079.

9 The logical extent of the Organization's argument would prohibit the Carrier from testing an employee who was injured in an automobile accident while on vacation as to whether the injuries incurred prohibit the employee from performing his usual duties.

presence of a prohibited substance in an employee's system does not equate with a showing that the employee is impaired. The Organization argues that evidence of smoking a marijuana cigarette 30 days in the past may appear in a drug screen but the employee may be perfectly capable of performing all duties. Questions of passive inhalation or usage of a drug whose presence in the system is not detectable for as long as other less harmful drugs (e.g., cocaine which is not detectable for as long as marijuana) come to the forefront. But again, we need not determine that presence of a prohibited substance in the system does or does not medically, in fact, affect an employee's ability to perform. In this particular safety-based industry the Carrier has made a policy decision that initially withholds employees from service based upon detected drug presence and then imposes discipline after failure to provide a negative sample. Under a *de novo* standard of review, that determination may well be questionable as it infringes upon conduct of an employee during non-working time. But under the arbitrary or capricious standard which governs us and with the great latitude given to the Carrier for making fitness and ability determinations, we cannot say such a result is not reasonably related to the safety-related goals recognized as legitimate by both parties.

Ninth, with respect to the Organization's argument that the Carrier's change in policy has improper disciplinary consequences, the Court's reasoning in *Conrail* is sufficient for this matter (105 L.Ed.2d at 272):

> It is clear that Conrail is not claiming a right, under its medical policy, to discharge an employee because of a single positive drug test, a right many railroads assert under Rule G. See Skinner, [103 L.Ed.2d 639, 109 S.Ct. 1402]. Furthermore, an employee has the option of requesting a period of rehabilitative treatment. Thus, it is surely at least arguable that Conrail's use of drug testing in physical examinations has a medical rather than a disciplinary goal.
>
> The fact that for drug problems, unlike other medical conditions, Conrail's standards include a fixed time period in which the employee's condition must improve, does serve to distinguish Conrail's drug policy from its response to other medical problems. Conrail has argued that it needs, for medical purposes, to require

> employees who deny that they are drug-dependent to demonstrate that they are capable of producing a drug-free sample at will. ... In our view, that argument has sufficient merit to satisfy Conrail's burden of demonstrating that its claim of contractual entitlement to set a time limit for successful recovery from drug problems is not frivolous.

While *Conrail* discussed the discipline question in the context of whether or not the argument was frivolous in terms of determining whether the dispute was major or minor, we believe that the above-quoted logic carries over into the merits of the dispute in this case. The Carrier's policy gives the employee a reasonable period of time to demonstrate a lack of drug dependence before discipline is imposed. It is not unreasonable for the Carrier to conclude under the policy that, after testing positive, failure of the employee to provide a negative sample at a future date as directed is sufficient demonstration of a drug dependent individual who is unfit for duty and incapable of following the Carrier's instructions. By the same token, when the Carrier makes the determination that an employee has tested positive for drugs, the initial withholding of the employee from service until a negative sample is given is not disciplinary entitling the employee to certain hearing rights under the Agreement's disciplinary procedures (here, Rule 19). The action of the Carrier in withholding the employee from service is appropriate for a medical disqualification.

The Organization counters arguing that even assuming that the unilateral promulgation of the return-to-duty drug testing policy is found to be permissible as a reasonable exercise of the Carrier's authority, the imposition of *discipline* for failing to provide a negative retest within the prescribed periods as required by the terms of that unilaterally promulgated policy is objectionable and constitutes a prohibited change in practice since employees were never before disciplined for being placed in a medically disqualified status.[10] That fine-line distinguishing argument is not persuasive.

We have found the return-to-duty drug testing policy to be a reasonable exercise of

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10 Here, the Organization asserts that the affected employees should simply be held in a medically disqualified status until they can demonstrate their lack of drug dependence.

the Carrier's authority. We have further found that there is nothing to demonstrate that the time constraints contained in that policy are an unreasonable exercise of the Carrier's authority. In short, the Carrier has promulgated a reasonable policy that carries with it the traditional sanction that failure to comply with a policy or rule results in discipline. To give weight to an argument that a practice existed wherein the Carrier did not take certain action would effectively foreclose the Carrier from any first-time exercise of a legitimate management prerogative. Under the Organization's argument, in each case that the Carrier sought to exercise authority not prohibited by the Agreement's explicit or implicit terms, the Organization could effectively block that otherwise valid action because a past practice existed of non-exercise of that authority. Under that rationale, the Carrier could never act in a manner not previously exercised. Without more, we cannot give weight to the Organization's argument to change the result. In the context of this particular case, the Carrier has decided that violations of its return-to-duty drug testing policy result in discipline rather than continued medical disqualification if the employee fails to present a negative sample within the prescribed periods. That managerial decision must also be tested under a reasonableness standard and we cannot say that such a decision is an unreasonable exercise of the Carrier's authority.[11]

Tenth, the Organization argues that the tests utilized by the Carrier are unreliable and that the laboratories used by the Carrier for testing the samples are prone to give erroneous test results. Specifically, the Organization keys upon the unreliability of the EMIT test and the high level of false positives as well as the asserted possibility that confirmatory GC/MS tests nevertheless can yield false results. With respect to the laboratories, the Organization focuses upon instances where chain of custody problems

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11 Again, we do not read First Division Award 23334, *supra*, as broadly as the Organization. That award clearly addresses the change from detection of alcohol impairment by physical observation to detection through *random* usage of the Intoxilyzer ("[T]he Intoxilyzer program is administered randomly and indiscriminately, ..."). Such a change in practice is not present in this case. Nor does that award stand for the proposition that the Carrier cannot impose discipline as part of the *valid* exercise of a managerial right to formulate a rule or policy.

have been demonstrated and further focuses upon cited examples of poor performance by certain labs.

We are unwilling to make the general finding that the testing procedures are flawed in all cases. We view those issues as questions of fact to be explored on a case-by-case basis. In this regard, we are bound to use the well-accepted standard that evidence supporting the Carrier's decisions will be reviewed under the substantial evidence standard. *See* Third Division Award 26207 and awards cited therein ("We do not substitute our judgment for the Carrier's nor do we decide what we might or might not have done on a *de novo* basis. Our function is to determine whether or not there is substantial evidence in the record to support the Carrier's decision."). While the substantial evidence standard is not the same as *de novo* examination of the evidence that exists in other arbitral forums, we are mindful that given the authority of the Carrier to conduct the kinds of drug tests that we are approving in this manner, we will carefully scrutinize the Carrier's actions in making its determinations when timely brought into question by the Organization. The authority exercised by the Carrier and the consequences flowing from that exercise of authority through implementation of the drug testing program are immense. Avoidance of wrongfully accusing and erroneously acting against an employee is the corollary responsibility that the Carrier assumes. The employee's only real recourse is to forums such as this Board and it is not our intention to permit the tragedy of sustaining an action against the wrongfully accused employee. *See* SBA 957, Award 17 *supra* ("The Board will closely examine how the test was administered, how the chain of custody was maintained, and how and what tests were performed by the laboratory to which the specimen was sent."). But again, so as to permit proper development of the record, in order for us to examine these questions and to allow the Carrier the ability to offer evidence concerning the testing procedures and chain of custody, the Organization must timely raise the issue at the investigation.

Eleventh, the Organization's argument that the drug testing policy is punitive analogizes the Carrier informing an employee who injured his back that he must be cured within 30 days or face dismissal for failing to improve. The analogy is not appropriate. The injured employee obviously may not have the ability to cure himself within the given time period. The employee testing positive for drugs *has* that ability to provide the negative sample - i.e., by simply refraining from the use of prohibited substances or, under the policy, by delaying the retest and seeking assistance through the EAP.

Twelfth, the Organization's argument that no public policy underpinnings exist for the testing of the employees who are non-operating personnel and that the testing procedures violate privacy rights as overly intrusive are not questions for us to resolve. Our function is limited to the interpretation of the Agreement and the existence or lack thereof of the Carrier's authority to act. Questions of public policy, like questions of statutory interpretation and constitutional considerations, are for the courts and not for this Board. *See Alexander v. Gardner-Denver, supra*, 415 U.S. at 57 ("[T]he resolution of ... constitutional issues is a primary responsibility of courts ...."). Again, the question is whether or not the Carrier's decision to test employees returning to duty was arbitrary or capricious. The Carrier asserts that it desires all employees, whether operating or non-operating, to be in a position to act in the most efficient and safe manner possible at all times, including potential emergency situations and its policy is designed to meet that goal. In our opinion, that reason is not irrational and absent justification.

Thirteenth, in light of our finding that the return-to-duty drug testing policy is not a violation of the Agreement, the Organization's argument that it is not insubordination to refuse an instruction which flows from an illegal policy is moot.

Fourteenth, the Organization's argument that by endorsing the Carrier's policy this Board is sanctioning conduct that could result in the Carrier testing employees returning from one day's absence is not well taken. We are limiting our finding to the drug test given

as part of the return-to-duty physical examination for employees who have been away from the work situs for lengthy periods of time "for any reason other than vacation, of 30 days or more". Our decision goes no further.

3. Conclusion On The Carrier's Policy

In sum, in our limited function of interpreting the Agreement and under the doctrines further limiting our authority, we find the Carrier's requirement that employees returning to duty must submit to a drug screen as part of the return-to-duty physical examination to be a policy not prohibited by the Agreement or a violation of established past practice. Questions concerning the accuracy of the particular tests used or test safeguards employed to insure the integrity of the samples are factual questions that must be resolved on a case-by-case basis and will be addressed when timely raised by the Organization.

B. The Merits Of Claimant's Case

With respect to the merits of this particular case, the record shows that Claimant suffered an injury to her back while working on March 22, 1988 and was released by her doctor to return to work on May 10, 1988. On May 11, 1988 the Carrier's Industrial Nurse K. L. Miller administered an EMIT screen consistent with the return-to-duty drug testing policy. The test showed positive for the presence of cannabinoids. A report form American Medical Laboratories ("AML") from a test on May 12, 1988 indicates a GC/MS confirmation for the presence of cannabinoids.

By letter dated May 13, 1988 pursuant to the Carrier's policy, Miller, on behalf of the Carrier's Medical Director, Dr. J. R. Young, informed Claimant by certified mail as follows:

> A urinalysis conducted as part of your recent physical examination was positive for Cannabinoids. Accordingly, Amtrak's medical policy forbids your return to service at this time.
>
> In accordance with Company policy, you are instructed to rid your system of Cannabinoids or any other prohibited drugs.

> You must also provide a negative urine sample ... within 30 days of the date of this letter, or, [i]f eligible, enter the Employee Assistance Program (EAP). You will be permitted only one retest within this 30 day period. If your retest is positive, you will not be permitted to enter the EAP. If you fail to comply with these instructions, you will be subject to dismissal.
>
> If you feel that you have a physical or psychological dependency on Cannabinoids or other drugs, I urge you to seek help from one of our EAP counselors. If you enter the EAP, you will not have to provide a negative sample until the EAP counselor determines that you are ready to return to work. At that time, you will be scheduled for a drug test before you can return to work. A brochure describing the EAP and giving a list of the names and telephone numbers of our EAP counsellors is enclosed.

On June 13, 1988 Claimant appeared for a retest in accord with the policy. According to Nurse Miller (Tr. 22), "I got the impression that Ms. Miles was sure that she would be negative and would be returned to work." Miller conducted two EMIT tests on Claimant on that date. The first test was conducted at 9:15 a.m. and the second was conducted at 9:55 a.m. Once again, the EMIT screens showed a positive presence for cannabinoids. A report from AML from a test on June 15, 1988 again confirmed the presence of cannabinoids through GC/MS testing. As a result, under the Carrier's policy Claimant was dismissed from service on July 22, 1988.

Claimant denies using drugs. According to Claimant (Tr. 44):

> [A.] ... I do not use drugs, I have five children at home ranging from two years old to seventeen year[s] old and I don't use drugs and I don't use alcohol because that's not showing much of a role model to my children and I don't approve of it.

After learning of of her positive retest through the EMIT screen conducted by Miller on June 13, 1988 Claimant contacted her physician and had an independent test conducted at Southern Maryland Hospital. That test was conducted approximately four hours later and yielded a negative result.

At the investigation, the Organization attacked the validity of the results reported by AML and particularly focused upon the chain of custody. Aside from the lab reports from AML and a chain of custody form that ended with Nurse Miller giving Claimant's sample

to a courier for transportation to AML, no specific evidence was offered concerning the tests administered by AML, the safeguards used or chain of custody followed at AML. With respect to what happened after the sample was sent to AML, Miller testified (Tr. 34, 81):

> [Q.] Do you know if AML, on that end of it, when the courier brings it do you know what they do in terms of checking the specimens, do they check the temperature that they were carried, maintained that, that sort of thing?
>
> [A.] I have no idea, once they leave my hands, I have no idea of the procedure.
>
> * * *
>
> [Q.] Do you have any idea who accepted the test at the AML Laboratory?
>
> [A.] I have no idea.
>
> [Q.] Do you have any idea who ran the test?
>
> [A.] I have no idea.
>
> [Q.] Do you have any idea whether they questioned the courier as to the temperature that the specimen had been kept at during transport?
>
> [A.] I have no idea.
>
> [Q.] Whether that specimen or was the only one carried over at that time?
>
> [A.] I have no idea.

In upholding the Carrier's right to conduct return-to-duty drug tests, we stressed the corollary responsibility that the Carrier assumes to avoid the possibility that an employee will be falsely accused of using drugs and that, when timely raised by the Organization, a case-by-case examination must occur utilizing the substantial evidence standard. Here, at the investigation, the Organization attacked the validity of the tests and the chain of custody. Here, substantial evidence does not support the Carrier's determination that Claimant validly tested positive for cannabinoids on her June retest.

The record shows that the June retest administered by Nurse Miller showed positive for cannabinoids. However, that test was an EMIT immunoassay screen.[12] Miller did not conduct the confirmatory GC/MS test but sent Claimant's specimen to AML for that purpose. At this point in the science of drug testing, due to the potentially high chance for false positives in the EMIT screen, it is fairly well-accepted that an EMIT screen alone will not suffice to demonstrate the presence of prohibited substances.[13] The high potential for false positives in that test is the reason employers such as the Carrier resort to GC/MS confirmation.[14]

But although brought into question at the investigation, the record demonstrates *practically nothing concerning the confirmatory GC/MS test conducted by AML.* With respect to safeguards, procedures and chain of custody at AML, Miller testified (Tr. 34) that "I have no idea, once they leave my hands, I have no idea of the procedure." Indeed,

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12 Miller testified (Tr. 21):

> [Q.] What's the name of test we're talking about?
> [A.] The Ceva [sic] emit.

13 Evidence entered in *National Treasury Employees Union v. Von Raab*, 649 F.Supp. 380, 389 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *vacated in part and remanded*, 103 L.Ed.2d 685 (1989), illustrates the point. Quoting a toxicologist:

> The EMIT screen suffers from limitations in its reliability. This test will give a positive result for the tested drug when other prescription and over the counter drugs have been ingested, and may react to food and other substances, including enzymes produced by the body itself. This is because of a phenomenon known as "cross-reactivity". The legitimate drugs that have triggered a positive result for marijuana, for example, include the anti-inflamatory drugs ibuprofen, fenoprofen, and naproxen, some of the most widely used drugs in this country. They are sold under the brand names Advil, Motrin, Nuprin, Rufen, Anaprox, Aponaproxen, Naprosyn, Navaonaprox and Nalfon. A number of drugs that are closely related in chemical structure to amphetamines will also test positive, mainly diet and cold preparations containing ephedrine and phenyipropanoiamine. These include Nyquil, Contac and other brand names. In addition, the immunoassay tests cannot distinguish between codeine, a legal drug, and heroin. Both are classified opiates.

14 *See Von Raab, supra*, 649 F.Supp. at 390, quoting the same expert:

> If conducted properly, the combination of gas chromatography with mass spectrometry can provide a more reliable test for determining the presence of drugs in a urine sample because it identifies the specific metabolites in urine samples.

See also, Von Raab, supra, 816 F.2d at 181 ("While the initial screening test, EMIT, may have too high a rate of false positive results for the presence of drugs, the union does not dispute the evidence that the follow-up test, GC/MS, is almost always accurate, assuming proper storage, handling and measurement techniques.").

with respect to the chain of custody at AML, Miller further testified (Tr. 33-34):

> [A.] ... [A]s far as this company is concerned, no one touched this specimen except Ms. Miles, myself and the courier and then it left the company and then from that I have no record of ... I have requested from authorities of AML to give us at least a copy of the chain of custody of the entire chain of custody which they have agreed to do but it has not arrived as yet.

Therefore, even though timely raised at the investigation, there is simply no evidence in this record concerning what happened in the administration of the confirmation test by AML.

We are thus faced with a record concerning the June retest which shows an employee who denies usage of drugs; a positive EMIT screen whose results and procedures were meticulously documented at the investigation, but a test that by its very nature is prone to high incidents of false positives and, when properly used, is only the first step in the drug testing process; and although questioned, *no* evidence concerning the circumstances surrounding the GC/MS confirmation. Since the GC/MS test results were brought into question at the investigation and no evidence concerning the details of that test's administration could be offered by the Carrier's witness, it was the Carrier's obligation to do more than only rely upon the written results from AML. The Carrier was on notice that it had to do more than rely upon a piece of paper that could not be cross-examined. To accept the validity of the GC/MS test results in this case would be tantamount to accepting the results of a written piece of paper on mere blind faith and would further foreclose the Organization from efforts to question the validity of the GC/MS results. Given the ramifications of blindly accepting those results, under the circumstances of this case we are unwilling to do so when the results have been so seriously questioned.

Another factor in this particular case weighting towards a sustaining award is the negative independent test taken by Claimant a few hours after she was advised by Miller that her EMIT screen was again positive. While ordinarily the Carrier is not required to accept the results of a subsequent test conducted outside of its control (*see* PLB 3783,

Award 65, *supra* ("Carrier did not have to accept another test taken by claimant at a different laboratory through her own physician.")), given the serious failings in the evidence concerning the GC/MS confirmation relied upon by the Carrier in this case, the independent test conducted at Southern Maryland Hospital becomes significantly more probative. Therefore, under the circumstances of this particular case, we are unable to accept the final results of the Carrier's June 1988 retest as a demonstration that Claimant failed to comply with the Carrier's instructions under its return-to-duty drug testing policy to provide a negative urine sample.

We therefore find substantial evidence does not support the Carrier's action in this case. Claimant shall be returned to service without loss of seniority or other rights and benefits and shall be compensated for time lost from June 13, 1988 (the date of the retest). Claimant's reinstatement is conditioned upon a return-to-duty physical examination including a drug screen, which shall be taken within 30 days from the date of this award.[15]

AWARD

The Carrier did not violate the Agreement by implementing the return-to-duty drug testing policy. In light of the lack of evidence concerning the circumstances surrounding the confirmation test conducted by AML and given the other factors set forth in the Opinion, substantial evidence does not support the Carrier's determination that Claimant had prohibited substances in her system when she retested under the Carrier's policy. Claimant shall be returned to service without loss of seniority and other rights or benefits and shall be compensated for time lost from June 13, 1988. Claimant's reinstatement is conditioned upon a return-to-duty physical examination including a drug screen, which

15 In light of our decision, the Organization's arguments concerning the mixing of samples due to lack of sufficient volume are moot.

shall be taken within 30 days from the date of this award.

Edwin H. Benn
Neutral Member

L. D. Miller
Carrier Member

J. C. Campbell
Organization Member

Chicago, Illinois
August 7, 1990