

Org. File 1561-57-7318
Co. File TRN T-4-42

Decision No. 5743
Case 1060
Supplemental List No. 91

SPECIAL ADJUSTMENT BOARD NO. 18
(Train Service Panel)

PARTIES TO DISPUTE: United Transportation Union-
Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: Request of Brakeman Michael W. Cudd, Mountain District, San Joaquin Division, for reinstatement to service with seniority unimpaired and for replacement of wage loss resulting from his removal from service on August 5, 1984 and his dismissal from service on September 6, 1984, because of his alleged violation of Rule G of the Rules and Regulations of the Transportation Department, which occurred on August 5, 1984.

STATEMENT OF FACTS: The Claimant, along with another employe, was involved in an altercation in the Company's lodging facility at West Colton, California. Subsequent to the incident, both employes were requested and consented to provide a urinalysis. Based on the results of a test performed on their samples, which tested positive for cannabinoids, the Carrier directed them to attend an investigation. The notice read in pertinent part as follows:

"You are hereby notified to be present in the Office of Trainmaster, Bakersfield, CA at 1:30 p.m., Thursday, August 16, 1984, for formal investigation being held in connection with your alleged use of other substance which could affect alertness, coordination, reaction, response or safety, while employed as Conductor and Brakeman, respectively, at approximately 2:00 p.m. August 5, 1984.

"For this occurrence you are hereby charged with responsibility which may involve violation of:

"RULE G, third paragraph reading:

"The illegal use, possession or sale while on or off duty of a drug, narcotic or other substance which affects alertness, coordination, reaction, response or safety, is prohibited."

"of the Rules and Regulations of the Transportation Department of the Southern Pacific Transportation Company."

Subsequent to the investigation, the Claimant was dismissed.

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

DECISION: As part of their presentation to the Board, the Carrier made an extensive presentation concerning their drug testing program and procedures. Presently designed into the program's procedures are--to the Board's satisfaction--adequate safeguards as to collection, chain of custody, tests, retests and test tolerances.

However, adequate safeguards, in view of these unique facts, were not present in this case. While there was probable cause for testing, the record discloses in this case the collection/chain of custody was extremely lax. The Claimant simply set his uncapped sample on a receptionist's counter. It was not labeled or even accompanied by paperwork identifying the sample as his. After placing the sample there the Claimant left the area. It is significant as well that a Carrier officer did not observe the identification of the sample.

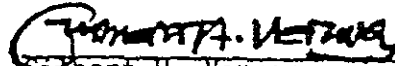
This may not have been fatal standing alone or in a singular case. However, this case is unique in that the other employee involved--who admitted at the investigation that he used marijuana within a week of the incident--had his sample handled in the same haphazard manner. An unmarked/uncapped sample with no accompanying paperwork was placed on the same counter. While the employees placed them there separately, the circumstances suggest too strongly that the samples could have been mixed up. Moreover, there is no evidence in the investigation that a confirmation test was performed.

Given these circumstances, the Board cannot conclude that the Claimant was in violation of Rule G.

In terms of remedy, the Claimant was offered reinstatement in February of 1986. However, it was without pay for time lost. The Claimant is not obligated to mitigate damages with prejudice to his claim for time lost. To toll the Carrier's liability a reinstatement offer must make clear it is without prejudice to a claim for time lost. As far as the other conditions, there was nothing in the letter which would suggest he could challenge their propriety before the Board. This too should be made clear in any offer of reinstatement.

In view of the foregoing, the claim is sustained.

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Gilbert H. Vernon
Chairman and Neutral Member



D. E. Torrey, Carrier Member


Glynn Gallagher, Employee Member

Dated this 11 day of May 1987
San Francisco, California. }