SPECIAL BOARD OF ADJUSTMENT NO. 957

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY "AUTHORITY"	:	
AND	:	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES "ORGANIZATION"	:	AWARD NO. 17

STATEMENT OF CLAIM

Claim of the Brotherhood (BMWE-87-10-F12) that:

The dismissal of General Track Helper C. Blackman was arbitrary and capricious and without just and sufficient cause and in violation of the collective bargaining agreement.

REMEDY:

The Claimant shall be reinstated without loss of compensation and without loss of seniority and other contractual benefits and privileges the Claimant enjoyed prior to his dismissal.

OPINION OF THE BOARD

Claimant, C. Blackman, was discharged on June 8, 1987 for being in violation of Industrial Relations Order #85-1,("85-1") which concerns use of, and testing for, intoxicants and/or controlled substances.

The basic facts are not complex. In December, 1986 the Claimant voluntarily revealed to the Authority that he had undergone treatment for a substance abuse problem (cocaine) at Eagleville Hospital. The Authority allowed the Claimant to

return to work but advised him that he would have to undergo periodic testing. The Authority tested the Claimant upon his return to work on December 3, 1986 and monthly thereafter until April, 1987. In April, the Authority informed the Claimant that he would next be tested on June 30, 1987. On June 1, Claimant reported off sick. On June 3, Claimant did return to work. The Authority instructed him to take a physical examination, pursuant to Work Rule 28. Claimant tested positive for cocaine and marijuana metabolites. Confirmation of this result was performed by Gas Chromatography/Mass Spectrometry. Claimant was then discharged pursuant to the provisions of 85-1.

Industrial Relations Order No. 85-1 was unilaterally promulgated by the Authority on September 20, 1985. The Order, which was applicable system wide, states in relevant part:

> In accordance with Public Policy and a major commitment of the Authority's Mission to ensure the safety of employes, the public, and passengers, this Order supplements the current Rule Books, Orders, or Labor Agreements governing the use of intoxicants and/or drugs.
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> Because of the unpredictable residual effects of certain intoxicants and/or controlled substances, the presence of intoxicants or controlled substances in employes off-duty but subject to duty or reporting for duty; on the Authority property or in recognizable uniform; or in possession of, while on duty; is strictly prohibited and is a dischargeable offense. Any employe suspected of being in violation of this Order may be required to take a blood/urinalysis or other toxicological test(s).
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> An employe found to be under the influence of, or, so tested, whose test(s) results show a qualitative and/or quantitative trace of such material in his/her system shall be discharged from Authority service.

The Authority maintains that the Claimant was properly discharged pursuant to 85-1. Claimant submitted to follow-up testing on several occasions without challenge and without incident. Only when confronted with the positive test results of June 3, 1987, for cocaine and marijuana, was it claimed that there were improprieties with the testing procedures. According to the Authority, no extenuating circumstances exist in this case. Moreover, the Authority contends that arguments raised by the Organization are not properly before the Board, as they were not raised throughout the grievance procedure.

The Organization raises a multitude of arguments on behalf of the Claimant. Most importantly, the Organization contends that 85-1 is an improper order, and that any discharge arising thereunder is invalid.

Initially, the Board rejects the Authority's contention that the only issue properly before it is whether Claimant was properly advised in writing of the charges against him. The Board recognizes, as noted by the Authority, that these were the only facts relied upon in the written second step grievance, and Section 401(c) of the parties' Collective Bargaining Agreement reads that the second step grievance shall state "in writing all facts which it desires to have considered in connection therewith". Nonetheless, it has not been the practice of the parties in previous cases before this Board to demand a precise statement of facts and arguments in the second step grievance. Moreover, this argument by the Authority had not been made on the

property prior to the hearing before this Board. In these circumstances, it is proper that the Board consider all arguments raised by the parties concerning the merits of the Claimant's discharge.

This case is among the first to reach this Board concerning the propriety of discharges under 85-1. It is therefore appropriate that the Board here set forth relevant guidelines concerning how it will view certain discharges under this Order.

It is stated in the first paragraph of 85-1 that "In accordance with Public Policy and a major commitment of the Authority's Mission to ensure the safety of employes, the public, and passengers, this Order supplements the current Rule Books, Orders, or Labor Agreements governing the use of intoxicants and/or drugs." In the Board's view, however, no matter how commendable the Authority's motivation or laudable its goals, 85-1 is improper insofar as it contravenes any of the Authority's contractual and legal obligations. All agree that "safety of employees, the public, and passengers" is a desired and essential ends. The question here, however, is where the Authority's means of achieving those ends, namely unilateral promulgation of 85-1, was done consistent with its obligations to the Organization and the statutorily mandated collective bargaining scheme set forth in the Railway Labor Act ("Act"), which is here applicable.

The Organization has strenuously argued that unilateral promulgation of 85-1 was improper, as it constituted a "major" dispute under the Act, and the Authority did not follow the

statutorily mandated dispute resolution procedures set forth in the Act for major disputes. On this point, the Board accepts the Organization's argument in part.

The Act reads in pertinent part as follows:

Sec. 152. General Duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Sixth. Conference of representatives; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference but shall not exceed twenty days from the receipt of such notice: And, provided further, that nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change he rates of pay, rules, or working conditions of its

> employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

If a dispute is considered "major" under the Act, the carrier cannot take the desired action except in conformity with the dispute resolution procedures called for in the Seventh section, set forth above. If, however, the dispute is considered "minor", the carrier may take action, subject to dispute resolution procedures for minor disputes. Whether a dispute is major or minor is a question of fact. It has been found by at least two courts considering the matter that "in general, if a proposed practice by a rail carrier is a clear departure from the collective bargaining agreement, a dispute over the practice is treated as a major dispute under the Railway Labor Act, and the carrier may not proceed without first negotiating with the employees' representative." Courts have also held that well established work rules and practices, although not incorporated into the parties' written collective bargaining agreement, constitute implied-in-fact contractual terms for purposes of determining what constitutes a major dispute.

This Board has concluded that it must consider the above stated principles of major/minor disputes in determining whether promulgation of 85-1 was a proper exercise of management's rights by the Authority. In this regard, the Board finds the rationale of Third Division Award No. 13491, set forth in the Organization's submission, to be applicable:

> Assuming, arguendo, that the fear expressed in this Point is well founded, this Board is not a proper forum in which to seek a remedy.
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> The Board is a statutory body of limited jurisdiction. It may only interpret and apply collective bargaining agreements negotiated and executed by the disputants. It may not insert in such agreements its predilections. Where the parties to an agreement, or one of them, find it wanting, recourse lies in the collective bargaining procedures prescribed in The Railway Labor Act.

Thus, should the parties' Collective Bargaining Agreement not give the Authority the means it believes necessary to create a safe working environment, "its recourse lies in the collective bargaining procedures prescribed in The Railway Labor Act", rather than through unilateral promulgation of Industrial Orders.

Applying these general principles concerning major/minor disputes to 85-1, the Board finds that 85-1 was a proper exercise of management rights insofar as it provides for suspicion based testing for impairment by employee use of alcohol or controlled substances. In the Board's view, a testing requirement based upon reasonable suspicion did not here create a major dispute. The parties' Contract and Work Rules make clear that impairment at work is a dischargeable offense. While neither the Contract nor the Work Rules speak to the issues of testing, it is apparent from the facts of this case and others before the Board that in certain circumstances employees have for some time undergone suspicion based testing without protest. Protest has only arisen when employees tested positive and were subsequently discharged. In these circumstances, this Board must hold that the imposition of reasonable suspicion based testing was not a deviation from

the parties' Contract and practice and therefore a proper exercise of management discretion.

In determining whether reasonable suspicion existed, this Board will look closely to the facts of any case before it and make determinations on a case by case basis. It is appropriate to here state, however, that in situations where an employee has a verified history of controlled substance abuse that has previously required rehabilitation, the Authority may properly subject the employee to unscheduled body fluids tests with reasonable frequency for a reasonable period of time thereafter. This conclusion by the Board should come as no surprise to the parties. In this case and others, employees with verified histories of substance abuse requiring rehabilitation have undergone periodic testing without protest.

The Board has further concluded that unscheduled body fluids tests of employees with verified histories of controlled substance abuse can occur at the time of return to work physicals for a reasonable period of time after completion of the employees' rehabilitation. The Board does not accept the Organization's contention that such testing is constitutionally impermissible. While 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, the Board sees no reason why the Authority cannot test an employee upon his return to work if the Authority has the right to test an employee periodically

while working. 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.

Notwithstanding the Organization's arguments to the contrary, the Board further finds that an employee is "subject to duty or reporting for duty" upon returning to work from an absence. Thus, 85-1 testing is applicable on its face to these situations.

Moreover, the Board also rejects defenses raised by the Organization that when an employee is allowed to return to work immediately after taking a properly administered body fluids test, any subsequent decision made by the Authority to remove the Claimant was improper. The employee's return to work is clearly contingent upon the body fluids test resulting in a negative finding.

Once the Board concludes that a body fluids test was properly administered and that the results should be considered, the next step in the Board's analysis must be to determine whether the results of that test were reliable. 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. In this regard, the Board has determined that the procedures developed by SmithKline Bio-Science Laboratories, the laboratory which the Authority currently uses to do urinalysis testing, are

appropriate and provide sufficient reliability that the reported test results are accurate. It is of course possible that the procedures established by SmithKline have not been properly adhered to in any individual case, and if such a claim is raised by the Organization, the Board will look closely at the contention and carefully determine whether any deviation from established procedures occurred and, if so, what effect that deviation had on the overall reliability of the test results. Obviously, a legitimate question concerning the reliability of the test results can best be clarified by doing an appropriate retest on the body fluid specimen originally taken from the claimant.

When the Board is presented with a properly obtained and verified positive test result, coupled with independent proof establishing that an employee was under the influence of controlled substances while at work, the grievance will be denied. Sections 401(R) and 402(p) of the Collective Bargaining Agreement make clear that being under the influence at work is a dischargeable offense. The Board will not, however, consider a positive test result for a controlled substance(s), without more, to constitute proof of "being under the influence". The Board believes it well established that such a positive test result of urine samples, at most, constitutes evidence of past use of controlled substances by an individual, and is not alone proof of impairment at the time the test was administered or in the hours immediately preceding. Thus, the question becomes how the Board

will handle situations where an employee was discharged solely for having a trace of a controlled substance in his system.

In this regard, the Board believes that the Authority's unilateral implementation of 85-1 created a "major" dispute insofar as it mandates discharge of an employee found with a trace of a controlled substance in his system, without there also being proof of impairment while at work. As a major dispute, it was necessary that the dispute resolution procedures called for in the Seventh section of the Act be followed before implementation of the Order.

In essence, 85-1 has changed a well established term and condition of employment from one of discharge for being under the influence at work, to one of mandated discharge solely for a trace of a controlled substance being found within an employee's system, without there being any proof of impairment. The parties' Collective Bargaining Agreement references only discharge for impairment or possession in Section 401 and 402. In Section 401 (Grievance Handling), Section (k) it states that "an employe charged with...being under the influence of drugs or intoxicants...may be suspended or immediately barred from reporting for work". In Section 402 (Arbitration), Section (p) it is written that "in any case where the matter in dispute involves...an employe having been under the influence of intoxicating liquor or drugs...the only question which shall be determined shall be with respect to the fact of...having been under the influence...and if it is determined that in fact there

was ...such influence...then the action of SEPTA based thereon shall be sustained". Nowhere in these Rules, or anywhere else in the Contract, does it speak to discharge or discipline for having a trace of a controlled substance in the system. While it is true, of course, that the Contract does not list all causes of discipline or discharge, it appears that in the area of use of controlled substances, the parties expressly spelled out their intentions. Those intentions were that discharge result for an employee being under the influence at work, not solely for having a trace of a controlled substance in his system. In effect, by promulgating 85-1, the Authority attempted to place having a trace of a controlled substance in the system in the same category as other offenses, including being under the influence, that are listed in 402(p). While having a trace of a controlled substance in the system may or may not deserve to be treated in this fashion, the essential point here is that in light of the parties' Collective Bargaining Agreement, the Authority could not make that determination unilaterally.

Examination of the parties' Work Rules further leads to the conclusion that 85-1 creates a major dispute insofar as it mandates discharge for having a trace of a controlled substance in the system. Work Rule 20, applicable to employees represented by the Organization, states:

> 20. Under the Influence
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> Employees must not indulge in the use of, nor be under the influence of intoxicating liquor, malt beverages, harmful drugs, or patent medicines containing harmful drugs.

a. While on duty
b. When reporting for duty
c. While off duty, but on any Authority property.

Possession of or carrying any of the above while on duty or on Authority property is strictly prohibited. "Under the influence" shall include odor on the breath of any of the above which would be apparent to an average person and make such person suspect their use.

Employees having consumed any patent or prescription medications prior to reporting for work must immediately report same to their immediate supervisor upon the employee's arrival on Authority property.

Any employee violating this rule shall be subject to discharge.

This Rule speaks only to possession and impairment, stating that employees found to be in violation of the Rule are subject to discharge. There is no indication within the Work Rule, expressed or implied, that an employee found to have a trace of a controlled substance within his system, without more, will be automatically discharged.

Finally, examination of the parties past practice, insofar as it has been presented to the Board, solidifies the conclusion that 85-1 constituted a unilateral change of a term and condition of employment and that a major dispute here exists. There is no evidence that prior to promulgation of 85-1 any Organization represented employee was discharged or disciplined solely for having a trace of a controlled substance in his system. Moreover, it appears that since the inception of 85-1, the Organization has vigorously protested each and every discharge of an employee based solely upon a finding that the employee had a

trace of a controlled substance in his system.

The Authority has argued forcefully that this Board should not find any aspect of 85-1 to be a major dispute, as no other arbitration panel or railroad board considering 85-1 has made such a finding. The Board nonetheless rejects the Authority's position in this regard for several reasons. First, none of the prior cases involved this Organization. Accordingly, the question of the propriety of 85-1 is a matter of first impression insofar as it concerns this Collective Bargaining Agreement. It would be inappropriate strictly to bind the Organization by virtue of other decisions to which it was not a party. Second, most of the prior decisions cited to this Board involve unions not subjected to the provisions of the Railway Labor Act. In those cases, considerations concerning major disputes have no applicability. Third, careful examination of the previous determinations that did involve organizations covered by the Railway Labor Act reveals that the question of whether 85-1 causes a major dispute has not been previously raised and/or was not advocated as thoroughly and as extensively as done by the Organization in this case. In these circumstances, it would be inappropriate for the Organization to be bound by determinations in these other cases.

Accordingly, the Board will hold that the Authority's unilateral promulgation of 85-1 was improper, insofar as it results in discharge based strictly and solely upon a finding of a trace of a controlled substance in the system of an employee

represented by the Organization. The Collective Bargaining Agreement terms, which do not provide for discharge or discipline based solely on a finding of a trace of a controlled substance in an employee's system, must be preserved until the Authority complies with the dispute resolution procedures called for in the Seventh Section of the Railway Labor Act. It does not automatically follow, however, that where a body fluids test is administered properly, and a trace of a controlled substance is found in an employee's system but there is no evidence of impairment, that the positive test results will be without consequence.

Cases involving 85-1 now before the Board, including this one, involve Claimants who had a verified history of substance abuse, and had undergone rehabilitation, prior to testing positive for controlled substances and being discharged. In these situations, the Board concludes that if it was proper for the Authority to administer the test, a verified positive result that is not caused by passive inhalation may serve as a legitimate basis for removing the employee from service. In such circumstances, the employee involved is not being withheld from service as a disciplinary action, but rather to ensure the safety of the work place. There is substantial risk that the employee using controlled substances, who once needed treatment, is unfit to continue working due to his relapse. Here, the Authority's right and obligation to ensure safety of other employees and the public overrides the Organization's argument that disciplinary

action resulting from the finding of a trace of controlled substance in an employee's system improperly places the Authority in the position of controlling the lives of employees away from the work place.

Moreover, it does not appear that removing such an employee from service would constitute a deviation from prior undisputed practices. It is clear from cases now before the Board, including this one, that it has been implicitly understood that when an employee had an acknowledged history of substance abuse, which required treatment, and later was found to have a trace of controlled substance in his system, the Authority could take appropriate action. As previously noted, employees with acknowledged problems with substance abuse had been required by the Authority, upon their return to work from rehabilitation, to undergo periodic body fluids tests. These body fluids tests were not protested, so long as the employees involved therein did not test positive. If the Authority could not take any action if these employees tested positive, the periodic tests would serve no practical purpose. The Board is unwilling to conclude that these body fluids tests for employees with acknowledged histories of substance abuse were merely exercises in futility or formality.

The Board has further concluded, however, that an employee who has previously undergone rehabilitation, and is properly removed from service solely due to a finding of a trace of a controlled substance in his system, is entitled to reinstatement

upon meeting three conditions. One, he must self refer to an appropriate program of rehabilitation. It is apparent that renewed rehabilitation is necessary, as a finding of a controlled substance in the employee's system establishes that he has not yet been successfully rehabilitated. Two, the employee must successfully complete the rehabilitation program he undergoes. Success will be determined as defined by the programs own standards. Three, the employee must test negative upon undergoing a return to work body fluids test. If the Claimant meets all these conditions, the Authority shall be obligated to reinstate him. Thereafter, of course, the Authority will have the right for a reasonable period of time to require the employee to undergo periodic body fluids tests to ensure that his rehabilitation has remained successful.

Applying these guidelines to the facts of this case, it follows that the claim must be sustained in part.

Prior to Claimant's discharge now at issue, he had a verified history of controlled substance abuse and had undergone rehabilitation as recently as December, 1986. Thereafter, Claimant underwent a series of body fluids tests without protest. The Authority's decision to administer Claimant a body fluids test upon his return to work on June 3 was, therefore, proper and the test results could properly be considered by the Authority. The Board is satisfied that the testing procedures used were adequate, that the results accurately showed that Claimant had a trace of controlled substance within his system,

and the trace was a result of use by the Claimant rather than passive inhalation. There is no evidence, however, that Claimant was under the influence of controlled substances while at work or reporting for work.

In these circumstances, the Board finds that the Authority could not properly discharge Claimant. The Authority could, however, properly remove Claimant from work until such time as he underwent additional rehabilitation and tested negative.

Accordingly, within 60 days of receipt of this decision, Claimant shall notify the Authority whether he will self refer to a proper rehabilitation program. If Claimant re-enters rehabilitation and successfully completes the program, the Authority shall reinstate him contingent upon his testing negative for a body fluids test administered at the time of his return to work physical.

AWARD

Claim sustained in part consistent with this Opinion.

10/7/88 R. B. Birnbrauer

R. B. BIRNBRAUER
Authority Member

W. E. La Rue

W. E. LA RUE
Organization Member

S. E. Buchheit 10-7-88

S. E. BUCHHEIT
Neutral Member