

Org. File 1732-57-8583
Co. File TRN W-5-64

Decision No. 5749
Case 1139
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 Conductor Bruce W. Hamilton, Coast District, Western Division, for reinstatement to service with seniority unimpaired and for replacement of wage loss and productivity credits resulting from his suspension from service on September 30, 1985 and his dismissal from service on October 29, 1985 because of his alleged violation of Rule 801 of the Rules and Regulations of the Transportation Department which occurred on September 30, 1985.

STATEMENT OF FACTS: On October 1, 1985 the Carrier directed the Claimant to attend an investigation. The notice read in pertinent part as follows:

"You are hereby notified to be present at the Office of the Terminal Superintendent, 515 Bay Street, Oakland at 10:00 a.m., Friday, October 4, 1985 for formal investigation being held to develop the facts and place responsibility, if any, in connection with your alleged refusal to give a urine specimen for a toxicological test as instructed at 6:05 am, September 30, 1985 by Assistant Trainmaster M. G. Quihuiz at Watsonville. The aforementioned toxicological test was required of crew members of the 01 RVWJY-29 of which you were the conductor and brakeman respectively, which derailed at Milepost 49.5 which may be in violation of Rule 801, that portion of the first paragraph reading:

"'Employees will not be retained in the service who are . . insubordinate . . .'

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

"You are entitled to representation and witnesses in accordance with your agreement provisions.

"Any request for postponement must be submitted in writing to the undersigned, including the reason therefor."

Subsequent to the investigation, the Claimant was dismissed. On April 21, 1986 the Carrier offered the Claimant reinstatement without time lost but without prejudice to his

right to progress a claim to the Board for lost earnings. The offer was rejected.

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: This is one of many cases presently before the Board concerning the Carrier's toxicological testing policy. Basically, whenever there is an incident or accident and the preliminary inquiry fails to exclude human factor failure or omissions or acts or omissions that contribute to the severity of the incident or accident and in cases of unexplained abnormal behavior, the Carrier indicates it would use the toxicological testing procedure.

Generally speaking, this Board has no basis to conclude that this policy violates the collective bargaining agreement. In short, this sets forth an acceptable test for probable cause. Where there is probable cause the Carrier has the right to direct an employee to submit to testing.

However, we are still compelled to review applications of this policy to individual cases. The Organization still has the right to challenge whether the policy, based on the facts and circumstances of a particular incident, was properly invoked. They have the right to challenge if a refusal to be tested was based on a lack of probable cause. In other words, they have the right to contend that an initial inquiry into an incident should have reasonably excluded human error as a factor.

In this case, the real problem isn't the policy. The real problem is that the hearing officer did not grant a fair hearing, precluding the Local Chairman--over his objections--from asking questions which went to the very fundamental question of whether there was probable cause for the testing.

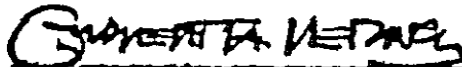
Precluding the Local Chairman from pursuing this line of questioning was fatal to the procedural rights of the Claimant, especially where there was evidence--based on the testimony of another Carrier witness--that the derailment was caused purely by mechanical failure (a broken wheel). In this respect, this line of questioning was relevant, had a foundation in fact and wasn't merely a wild goose chase or "red herring."

Decision No. 5749

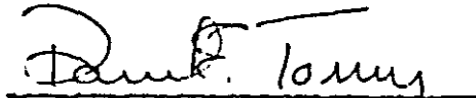
The Carrier cannot stonewall this kind of inquiry. The Claimant is not only entitled to probable cause but is entitled to know that the Carrier made an earnest contemporaneous evaluation of the causes of a derailment and reasonably concluded human error couldn't be ruled out. This kind of evidence is critical to a defense that a refusal was justified because there was no probable cause. Thus, the decision as to whether there is probable cause must be reasonably made based on the individual facts and circumstances of each incident and not made out of mere routine.

The Carrier does have the right to direct toxicological testing given probable cause. However, the employee has certain rights as well and the decision to test must be made carefully and without callous disregard for the employee's rights. If requested, the Carrier should be prepared to show that their request meets the test of their own policy and was a considered and reasonable judgment.

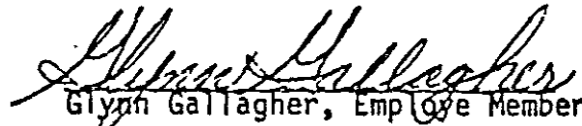
In view of the fact Claimant was not able to develop the circumstances surrounding the decision to test, we are left without a basis to determine if there was probable cause. In short, he did not have a fair hearing and the claim must be sustained. However, there will be no pay for time lost after the date of the Carrier's reinstatement offer.



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.