SPECIAL BOARD OF ADJUSTMENT 910

UNITED TRANSPORTATION UNION

vs

CONSOLIDATED RAIL CORPORATION

AWARD NO. 312
CASE NO. 312
DOCKET NO. CRT-4749D

STATEMENT OF CLAIM:

Trainman G. E. Collins is appealing his dismissal from Conrail Service as notified by Conrail Form G-32 Notice of Discipline dated August 6, 1988. (Attached as Organization's Exhibit "A")

The claim, as appealed, is for the Claimant's restoration to service, compensation for all lost time, continuity of seniority and a make whole provision for all lost arbitraries and fringe benefits.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act as amended; that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter; and that the parties were given due notice of this hearing.

FINDINGS

Claimant has been in service as a Brakeman since 1971. On May 26, 1987 a drug screen test was included as

part of the regular physical required of the Claimant. The test was positive for a controlled substance. The Claimant was notified that he was disqualified for service pending a further examination after a period of 45 days to produce a drug screen negative for a controlled substance. It was also recommended to the Claimant that he meet with the Employee Counselor and follow his recommendations. In addition, Claimant was advised that if he enrolled in a company approved program his time for providing a negative drug screen would be extended to 45 days from completion of the program or for 125 days, whichever came first. The Claimant did not act upon any of the recommendations, he did not enter a program and he did not provide another drug screen result. Consequently, he was charged with:

> "Your alleged failure to comply with the Conrail Blood Testing Policy as you were instructed in the letter dated June 5, 1987, from Medical Director Dr. O. Hawryluk in that you did not, within forty-five (45) days of that letter, provide a negative drug screen."

Neither the Claimant nor his representative appeared at the hearing pursuant to the notice. After waiting approximately one half hour for the appearance of the Claimant and/or his representative, the hearing was commenced. After proof of due service of the charge and notice of the hearing and upon the evidence presented, the finding was made that the Claimant was guilty as charged and was disciplined by "Dismissed In All Capacities." Upon appeal, the Claimant

requested leniency in view of his length of service with a clean record. The Carrier's position is that in recognition of the responsibility to the public for safe operation, consideration for the safety of fellow workers, protection of not only railroad property but the property carried by the railroad and as a matter of public policy everything should be done that would be legally possible to prevent operation by employees who were not in full possession of all their faculties by reason of the use of or evidence of a controlled substance or alcohol in their systems. The Carrier contends that it has sent to all Conrail employees a revised medical policy that would include the drug screen to be given as part of the regular physical examinations and of the procedures that would be followed in the event that a drug screen resulted in a positive finding. A summary of the Medical Drug Testing Policy was enclosed with the letter notice. The policy warns employees that they would be subject to dismissal if they tested positive for the presence of an illegal drug in their system and if thereafter a negative drug screen test within 45 days from the date of the letter from the Carrier's Medical Director, was not produced. In short, the Carrier argues that the employees have due notice of the importance of refraining from the use of controlled substances, the opportunity provided for the employee to clear himself and the penalty for failing to do so to which the employee would be subject.

The Organization's position is that with the Claimant's length of service and a record clear of any discipline he should be entitled to continue his Railroad career. However, and concededly not argued on the property, the Organization raised at the hearing before the Board the argument that the Board lacked jurisdiction because this was a Major Dispute as defined by a recent decision of a Federal District Court. It was argued that the inclusion of the drug screen was a change in a working condition that may not be promulgated unilaterally.

The Board is of the opinion that it does have jurisdiction in this case. It is not disputed that the physical examinations required periodically and usually after an employee has been absent from service for a period of time is standard operating procedure that has long been practiced without objection. It is a matter of public knowledge that the medical profession has advanced in its knowledge of infirmities of persons developed from the constant research of medical science. An examination that at one time may have consisted of nothing more than a test for blood pressure and pulse rate has been advanced to encompass findings relative to other conditions that may prove disabling and/or disqualifying for continued service of the employee. It certainly is a matter of public knowledge that the use of controlled substance has become a public enemy in our society. The most stringent efforts have been made and are

being advanced to prevent the flow of the drug into the country, to educate residents and persons in this country to refrain from the use of controlled substance and in every way conceivable to eliminate the use of controlled substance from our society except for the prescriptive use by qualified physicians. The spectre of death and disablement following the use of controlled substances has frightened society to the point where random testing of employees has been used. While random testing has been curbed by court decisions, testing where there is some reason to believe that it is required is permitted. Just as a test would include good eye sight and good hearing, recognition of the disabling factors of controlled substance would require testing to assure that physical and mental ability to function, especially in the railroad industry, is not unreasonable. Therefore, the unilateral inclusion of such a test would not convert the issue to the possibility of a Major Dispute. It should also be considered that the positive result of a drug screen test is not in and of itself the basis for disciplinary action. Reasonable and sensible safeguards have been included in the drug control policy instituted not only by this Carrier but by Carriers across the country. The affected employee is given the opportunity to rid himself of evidence of a controlled substance in his system within a period of time sufficient to produce that result. There is also provided counseling and the possibility of a rehabilitating program

with a waiting period provided sufficient to allow the employee the opportunity to test negative for a controlled substance and to continue his gainful employment with the Carrier. Support for this position is found in an Award that is significant and almost on all fours with this case. PLB No. 4187, Award No. 6 discussed the FRA Rule that specifically provides, in substance, that railroads are not restricted from imposing an absolute prohibition of the presence of alcohol or any drug in the body fluids of persons in its employ for any purpose. In that Award reference is made to a Federal District Court Case in the Northern District of Illinois, Eastern Division where an action by the RLEA's petition to enjoin a Carrier from imposing drug screen urinalysis as part of its routine medical examination was denied and the Carrier granted summary judgment on the ground that a "Minor Dispute" was involved rather than a "Major Dispute" under the Railway Labor Act. The court commented that the required medical examinations are an established practice, that the examinations are governed by rules unilaterally promulgated and that there has been no objection to such practice or to any of the changes in the "battery of tests" used by the Carrier in its physical examinations. In substance and in part, the court concluded that the conduct of the physical examinations and the tests included are within the contract. By practice and acceptance, the Carrier has complete authority to determine the appropriate tests for

its medical examination. Parenthetically, this not only serves the Carrier's purposes but also is of benefit to employees many of whom do not avail themselves of doctor's services and physical examinations aside from that required by the railroad. Many employees have been helped and have had their lives extended by learning of conditions of which they were not aware.

The Board finds that the test in this case as part of the routine physical examination was not random testing. The requirement for such a physical examination removes it from the area of testing without reasonable cause. The practice of such testing removes it from the argument that it is a change in the working conditions.

In a Federal District Court Decision that held that the adoption of the drug policy and screening test was a "Major Dispute," the facts were different. In that case, random testing was involved, the possibility of the presence of a drug was determined by the sniffing of a trained dog and the result was used to determine a violation of Rule G. In the case where the decision was that a minor dispute was involved, one of the factors that was persuasive was that the inclusion of the drug screen test in the routine physical examinations was not for the purpose of charging Rule G violations. As in the case before this Board, a positive finding at the routine physical examination is used soley for the purpose of providing the employee with a reasonable and

sensible opportunity not only of complying with the Carrier's drug policy but also in ridding himself of a vicious and destructive habit.

The Board finds that in the present case, the employee was instructed, pursuant to a pre-announced policy, to take certain measures that would entitle the employee to resume his employment. The procedure to be followed was reasonable, allowed sufficient time to accomplish the desired result and would have allowed the Claimant to continue his career with the Carrier as the Organization has requested be done. As set forth in Award No. 6, of PLB No. 4187, "Carrier testing procedure is a proper and reasonable exercise of rights in an employee-employer relationship in providing for the safe conduct of business, and that the Carrier had just cause to dismiss Claimant for his failure to be in compliance with those rules and instructions that prohibit of active employment of those who depend upon or use drugs which may impair sensory, mental or physical functions." The charge in this case is that the Claimant failed to comply with the Conrail Blood Testing Policy and the instructions that had been issued with reference to that policy. The Claimant has been found guilty and in seeking leniency has conceded that he failed to comply as charged. Failure to at least attempt or to make some move toward compliance might be a mitigating factor. In this case, however, the Claimant portrayed no indication of a desire to continue his career with the

railroad when he completely ignored the opportunities presented to him to demonstrate that he desired to be continued as an employee of the Carrier.

AWARD

Claim Denied.

Dated: March 13, 1989

Irving T. Bergman
IRVING T. BERGMAN
Arbitrator

E. F. Lyden
ORGANIZATION MEMBER

CARRIER MEMBER

Dissenting to this award and particularly what I percieve to be an erroneous interpretation of the "minor vs major dispute" concepts interpreted therein.