Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24682
Docket No. 44420
96-1-95-1-c-4737

The First Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers - Chicago and North Western Transportation Company - General Committee of Adjustment requests this Division consider and authorize the reinstatement to service of Engineer D.D. Davidson, Northeastern 2 Seniority District, with full seniority and vacation benefits, health and welfare benefit payments for all time withheld from service and payment in full for all time lost and personal file expunged of all records of this matter and payment of $125.00 for re-test at Smith Kline-Beachan on December 28, 1994."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Engineer Douglas Davidson (Claimant) has been employed by Carrier for eighteen (18) years. The record indicates that on December 15, 1993, Claimant was assigned to operate a suburban commuter train with Crew 7128. Claimant reported to the Chicago Passenger Terminal at approximately 5:25 a.m. During his round trip, the Transportation Superintendent contacted Claimant, directing him to report for a random drug test upon his return.

When Claimant returned to the Terminal, he reported to Collection Agent M. Lazar in the basement area. The Superintendent instructed the Collection Agent to place Claimant at the head of the line so that he would not be tardy for his next scheduled departure. According to the Claimant's unrefuted testimony, the following took place:

> "Mr. Lazar took me and Conductor Crandall down the hallway from the TV room, where we were originally staged and filled out the paperwork, and I must state quite clearly in the record that Mr. Lazar had us sign the chain of custody and control forms prior to giving a specimen. When Mr. Lazar took Mr. Crandall and I down the hall to the washroom, he cautioned both of us to be careful because a urinal had backed up and the floor was flooded. There are, I believe five (5) urinals on the south wall, and then beyond that there are five (5) toilet stalls that have partitions and the north wall has a row of sinks, and the west three (3) most urinals had a large puddle in front of them. There were three (3) employees of the building who were working on the urinal, janitors, building engineers, and Mr. Lazar originally wanted Mr. Crandall and I to urinate at the urinals, using the two (2) most east ones where we could stand and not be standing in the puddle of water. There were numerous other employees in the washroom, shaving, using the toilets, and after a brief, maybe thirty (30) second attempt, Mr. Crandall was at one urinal and I was at the other, we both protested to Mr. Lazar that the tests are supposed to allow some type of privacy and that we objected to having to give a specimen out in the open where there were numerous employees working right next to us. So at that point, Mr. Lazar allowed us to go back into the toilets. I went in the toilet that was furthest to the west, and Mr. Crandall went in the stall that was furthest to the east, and we gave our specimens there. Inside the cubicle, I was alone. We both finished at about the same time, and gave our specimens to Mr. Lazar."

On December 22, 1993, an individual identifying himself as John Stuhler -- a physician associated with the Carrier, telephoned Claimant and asked general medical history questions, e.g., length of employment, Social Security number, and whether Claimant had seen a physician in the last two (2) weeks. Dr. Stuhler was, in fact, President and CEO of Substance Abuse Management, Inc, under contract as a consulting medical review officer (MRO) for Carrier in drug testing matters. According to Claimant, until Stuhler finally asked whether he had recently submitted a sample in a random urine test, Claimant thought Stuhler was calling about his most recent FRA annual physical, which had revealed Claimant suffered from "Perony's disease", a sleep disorder.

However, eventually the MRO informed Claimant that the specimen he submitted at the Chicago Terminal on December 15 had been tested by "CompuChem Laboratory" in North Carolina on December 17 and 18. According to the MRO, that sample allegedly tested positive at 188 nannograms per milliliter for THC-9-carboxylic acid, an inert metabolite of marijuana. When Claimant requested that he be provided with the results of the tests, the MRO responded that he would "double check to make sure the tests were correct," and that he would "get back to him."

According to Claimant, the MRO called back approximately one (1) hour later, stating that the results were indeed positive for 188 nannograms per milliliter of THC, or marijuana. The MRO asked Claimant if he was taking any medication for the diagnosed Perony's Disease, noting that he had "never heard of it before." Claimant explained that the appropriate medication was "like Valium", and would render him unable to work if he were taking that medication. Finally, Claimant told the MRO that he disputed the test results and thought there had been some irregularities with regard to the collection process.

Claimant was called for duty at Proviso at 4:40 a.m. on December 23, 1993 and allowed to work the first leg of his trip. Claimant made the trip to Butler, tying up at 11:50 a.m., with transport to the hotel. However, at approximately 3:00 p.m. that afternoon, Claimant received a phone call from the Transportation Center, informing him that he had been removed from service by the Medical Department. When Claimant inquired as to how he was to get home from Butler, he was told to "find your own way home."

As Claimant checked out of the hotel, he received a second phone call informing him that formal charges of Rule G violation had been assessed. Claimant ultimately arrived at his home at approximately 4:00 a.m. on December 24, 1993. Later that morning, BLE General Chairman MacArthur notified Claimant that Carrier's Assistant Vice President had informed him that Claimant had been "pulled out of service and flunked a urine drug test for marijuana." The General Chairman instructed Claimant to get a second independent urine drug screen.

Claimant contacted his physician and received a referral to Smith Kline Beacham Laboratory in Schaumburg, Illinois, where he gave another urine sample on December 28, 1993. According to Claimant, the circumstances surrounding this test "differed vastly" from the conditions under which he submitted the initial sample at the Chicago Terminal. Claimant offered the following account:

"I arrived at the collection site and had to present my prescription and, of course, my photo ID. I was told to wash my hands, and then while the technician observed me, I urinated into the bottle. I then went into the waiting room and the technician and I filled out the chain of custody forms and we put the stickers on the bottle and I initialed them and he sealed it in a shipping kit and I initialled the seal on that."

The Smith Kline Beacham Panel 10 test for which Claimant submitted the specimen on December 28, was tested for ten different drugs: the five that were originally tested for in the CompuChem test, and five (5) additional drugs which Carrier does not test for. Further, the cutoff level was 50 nannograms per milliliter rather than 100 nannograms per milliliter for which Claimant had previously been tested. In that sense, this test was "more strict" than the initial test. The results of the test, for which Claimant paid $74.75, were negative.

Claimant's formal disciplinary Investigation, originally scheduled for December 26, 1993, was postponed while he underwent previously scheduled surgery for the Perony's Disease and took a weeks' vacation commencing January 31, 1994. Claimant's next contact with the Carrier came from Carrier's EAP Director advising Claimant that he should contact the Mental Health and Drug Abuse portion of the insurance program who would refer him to a rehab center for evaluation.

On February 8, 1994, Claimant contacted the MRO and asserted his right under DOT Regulations (49 CFR 219.709) to have his original urine specimen retested prior to the formal Investigation. Claimant deferred to the MRO's laboratory choice of MetPath, Inc., of WoodDale, Illinois, as the retest center and the MRO arranged for an aliquot portion of the sample allegedly given by Claimant on December 15, 1993 to be forwarded by Compuchem in North Carolina to Metpath for retesting. The disciplinary Investigation was adjourned until March 2 for the retest. However, on February 22, 1994, the MRO informed Claimant that the retest results had been "inconclusive" and that he had directed Metpath Laboratory to try a "different type" of test.

On February 23, 1994, Claimant sent the MRO the following letter:

"This is in reference to our telephone conversation of February 22, 1994, approximately 11:00 a.m., in which you stated that there was an undisclosed problem with my urine specimen, ID# 518226656, that was shipped from CompuChem to MetPath for a retest in accordance with 49 CFR 219.709. You further stated that the retest performed by MetPath was inconclusive, and that MetPath would attempt to repeat the retest. By your use of the word inconclusive, I refer (sic) that the retest did not show a positive result. At this time, I withdraw my consent, strenuously object to any further testing of my specimen. I demand all written documentation including the chain of custody forms connected with the shipment and retest of my specimen. Additionally, I demand complete written disclosure of the results of the original retest performed by MetPath as we discussed on February 22, 1994."

Claimant then contacted BLE General Chairman MacArthur and explained what had occurred with the retest, and asserted that the "inconclusive" results should be declared negative retest. Mr. MacArthur contacted Carrier, requesting that Claimant be "returned to service and compensated for all time lost," as a result of the testing procedure and results.

On February 25, 1994, the retesting laboratory, MetPath, informed the MRO that there were "technical problems" with Claimant's original specimen. The record indicates that MetPath performed two (2) separate gas chromatography/mass spectrometry (GC/MS) analyses on the specimen provided by CompuChem. Those retests, performed at a threshold cutoff level of 5 ng.ml, the limit of detection for that laboratory, was unable to confirm the presence of any THC metabolites in the urine. It was subsequently reported that "unknown interfering substances" prevented a valid retest. [It is stipulated by the Parties that the "interfering substance" was a by product of the natural chemical deterioration of the aging urine sample.] Because of that development, Carrier again postponed the Investigation until March 15, 1996.

The MRO next directed CompuChem, despite Claimant's written protest, to draw yet another aliquot sample of at least 10ml. from the remaining urine allegedly collected from Claimant on December 15, 1993. When Claimant again protested this action, the MRO informed him that it was "too late" because CompuChem had already sent the aliquot to Health Care/MetPath in Southfield, Michigan, for further retesting. But HealthCare refused to test that aliquot (Specimen ID# 0604500664) because it found the amount of urine provided insufficient volume for valid testing. Carrier, advised that there would not be any formal Investigation until those second retest results were available.

The well traveled Specimen ID# 0604500664 was next sent at the MRO's direction to yet another laboratory for retesting, Medical Science Labs in Wauwatosa, Wisconsin. On March 11, 1994 Medical Science Labs again performed two (2) GC/MS analyses and reported the presence of TCH metabolites at 19.4 ng./ml. in a specimen to which Claimant's Social Security number was attached. However, close examination of the paperwork indicates that the Specimen ID # for the sample which tested positive was not the aliquot of Claimant's alleged sample (#0604500664) but rather a sample bearing Specimen ID# 0604510057. Nonetheless, as soon as the MRO advised that a positive retest had been made, Carrier rescheduled the Investigation. Additionally, the General Chairman received the following:

> "This is in reference to your February 23, 1994 letter concerning the results of Mr. Davidson's re-test. In researching the content of your letter, I was able to determine that the results of that test not inconclusive, but as described to me, were 'unsuitable for testing'. I have been advised that this is neither a positive or negative result and as such I see no basis for your request to return Mr. Davidson to service as stated in your letter."

The Investigation was scheduled for April 15, 1994, however, it was again delayed due to Dr Stuhler's health. After two additional postponements, the Investigation finally commenced on April 19, 1994. Subsequent sessions were held on May 17, June 8, June 15, June 28, July 12, July 26, August 23, with a final conclusion on September 13, 1994. Thereafter, Claimant was dismissed from service by Discipline Notice 16 dated September 23, 1994, based on the "findings from the investigation." The Organization's appeal was initially denied, and Claimant subsequently declined an offer of "leniency reinstatement" which was conditioned upon withdrawal of this claim.

From the very onset of collection through the bungled retesting, there are many reasons in this convoluted record why Carrier's conclusion that Claimant tested positive for TCH metabolites was fatally flawed. It is necessary to look no further than the mishandling of the sample collections on December 15 to find transgressions of DOT standards of sufficient seriousness and magnitude to render everything that followed in this tortuous record <u>void ab initio</u>. If the threshold flaws were not enough, the demonstrated egregious violations of procedures and process by the Carrier's subcontracted "Medical Review Officer", would warrant reversal of the central findings upon which Carrier premised Claimant's guilt. An example will suffice: The discrepancy between Claimant's Specimen ID Number and the sample which Medical Science Laboratories tested positive was demonstrated on the record at the third day of Investigation on June 8, 1994, and the MRO certified that he could not explain that discrepancy.

At the fourth day of the Investigation on June 15, 1994, the MRO asserted that the mistake in specimen numbers was just a "clerical error"; but when challenged could produce no substantiation for that assertion. During June 1994, while the Investigative hearings were in recess, the MRO induced Dr. Frederic of Medical Science Laboratories to create an "affidavit" to "correct" the misidentification of the Specimen ID Numbers and to retroactively edit a letter backdated to March 15, 1994 by deleting a full paragraph which raised chain of custody doubts regarding the aliquot allegedly tested positive by Medical Science Labs. In addition, at the MRO's insistence, Dr. Frederic rewrote a sentence in that letter to completely alter its original meaning by deleting the underlined and bracketed words: "I am [not] sure [if] this is sufficiently documented to meet your approval." After these documents were altered to his satisfaction, the MRO then entered the re-manufactured documents into the Investigation record at the sixth and final session on July 12, 1994.

Thus, these putative "objective men of science" demonstrated that they had sufficient self-interest at stake in these proceedings that even evidence tampering was not an unacceptable means of achieving the desired result of a "positive" retest to try and vindicate the flawed initial sample collection. It is self-evident that Carrier's conclusion that the Medical Science Labs retest was valid was premised upon those spurious documents. For any and all of the above reasons, this claim is sustained. The period of time when Claimant was unavailable for work due to surgery and recuperation shall be factored into the computation of his backpay damages under this Award.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of November 1996.

Carrier Members' Dissent
to
First Division Award 24682
Docket 44420

(Referee Eischen)

In this case, the Carrier argued in vain that none of the errors made during the collection and testing process was fatal to the positive test result.

Approximately three weeks following the issuance of this Award, the Carrier received the attached December 6, 1996 decision of the FRA Locomotive Engineer Review Board (FRA Docket EQAL-95-16) concerning the parallel appeal which the Claimant made regarding the revocation of his engineer's certificate as a result of the incident. The LERB considered the same evidence which was considered by this Board. In fact, the brief before the LERB was attached to and constituted the major portion of the Carrier's Submission.

The LERB held, that while the revocation of the certificate had been improper (it should instead have been suspended pending evaluation and treatment if necessary), "The urine specimen collection and test procedures did not contain any 'fatal errors' that would cast any doubt on the credibility of the positive test result. Therefore, the Board concludes that the Petitioner was in violation of Section 219.102." The LERB also held, "As a result of Petitioner's positive drug test, Petitioner was ineligible to hold a certificate pending an evaluation by an EAP counselor."

The Locomotive Engineer Review Board's findings support the Carrier Member's dissent to this Award. Also, although the Carrier will remove the notation of discipline from the Claimant's record pursuant to the Award, the LERB findings make it clear that no payments to Claimant are owing since during the entire time out of service he has been ineligible to hold a certificate.

M. W. Fingerhut - Carrier Member

LABOR MEMBERS' CONCURRING OPINION

AND

RESPONSE TO THE CARRIER MEMBER'S DISSENT

TO

AWARD NO. 24682,[1] DOCKET NO. 44420
Referee Dana Edward Eischen

The record of the case which led to Award No. 24682 depicted an alarming picture of the aftermath of an improperly conducted Federal Railroad Administration (FRA) mandated random drug/alcohol test. As the Board has noted in the Findings in detail, the sample collection procedures and sample retesting, among many other things, were highly flawed and improper. Even worse, the Carrier's Medical Review Officer (MRO) tampered with evidence in an attempt to support the result of the initial, fatally flawed test. This Board ordered, of course, the Claimant's reinstatement with pay for all time lost. Now we have the Carrier Member's dissent announcing the Carrier's intention to ignore the Board's Award and Order for back pay based upon the theory that a decision of the FRA Locomotive Engineer Review Board[2] which considered a "parallel appeal" justifies such non-compliance. There are many reasons why this point of view is wrong and will not prevail.

The threshold question is whether the LERB had jurisdiction to make any "determinations" at all with respect to the sample collection and testing. We think not. Since the Claimant had

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1. The copy of the Carrier's Dissent provided us erroneously indicates the subject Award as No. 31140. The correct number is as shown above.

2. With the alleged positive drug/alcohol random test result, the Carrier suspended and then revoked the Claimant's locomotive engineer's license. The Claimant filed a petition with the FRA Locomotive Engineer Review Board (LERB) challenging the Carrier's decision to revoke his license. In Docket No. EQAL 95-16, the LERB ruled that the Carrier should not have revoked the Claimant's license. The LERB decision contained certain other "determinations," one of which was that FRA concluded that the initial specimen collection and test procedures did not contain any "fatal errors." It is this "determination" that the Dissenter now argues supports the Carrier's refusal to honor the Board's order that the Claimant be paid for lost time.

disputed the positive test result from the outset, Section 219.104 (c), supra, provides for "[a] post-suspension proceeding conforming to the requirements of a collective bargaining agreement, together with the provisions for adjustment of disputes under Section 3 of the Railway Labor Act." Thus the Regulations establish the procedures for disputing test results which arise after an alleged positive test and vest this Board, not the LERB, with exclusive jurisdiction to adjudicate those disputes. This is precisely what took place in this case. The Carrier conducted a formal Investigation under the Agreement's hearing and discipline Rule, after which the Carrier's reliance upon the flawed drug/alcohol test results and related disciplinary action was duly brought before this Board.

When the LERB concluded that the Carrier should not have revoked the Claimant's license, it had gone as far into the matter as it could. FRA erred in issuing any "determinations" at all concerning whether the testing procedures had been fatally flawed,[3] or whether Claimant's drug test was positive. That function had been allocated to the mechanism of the Agreement's Disciplinary and Appeal Rules procedures, and the Adjustment Board, and the questions concerning the Claimant's test results were brought to that venue and resolved in his favor.

Another error in the Dissenter's reasoning is that the Claimant would have been ineligible to work during the entire time he has been held out of service (which time, incidentally, continues on the date this Concurring Opinion is being written), and, therefore, he is not entitled to receive pay for time lost. Even if, again, arguendo, the FRA was correct that the Claimant was in violation of Section 219.102, he would have been ineligible to hold a certificate, pursuant to Section 240.119 (c)(4)(i), only during a period of evaluation and primary treatment, if required. The period of ineligibility would have been a matter of days, at the most. Back pay might have been offset by those few days, at most.

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3. Being familiar with the record of this case, the authors must state, in all candor, that it is impossible for us to understand FRA's determination that no fatal errors had taken place with respect to the testing procedures. The errors which did take place, particularly the MRO's willful tampering of related evidence, were highly prejudicial and obscene, in our view. Certain aspects of this case are somewhat reminiscent of the CAMI scandal, the incident involving the laboratory reporting drug test results purportedly derived from equipment it did not have. Part 219 establishes specific standards for urine drug testing procedures and safeguards including a schedule of fines for violations of them. If the "determinations" made by the LERB can be rationalized in the face of such contradictions of those standards as occurred in this case, there was very little purpose in formulating testing procedures and safeguards Regulations in the first place.

However, since this Board's decision, not the LERB's, must govern the back pay issue, and since the Board has invalidated the alleged positive test result, the Carrier is liable for the full period of the Claimant's out of service time.

The Findings and remedy fashioned by the Board in Award No. 24682 are both correct and appropriate. We are certain they will be fully implemented.

Richard K. Radek

Richard K. Radek, Labor Member

J. A. Cassidy, Jr., Labor Member

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 24682

DOCKET NO. 44420

NAME OF ORGANIZATION: (Brotherhood of Locomotive Engineers

NAME OF CARRIER: (Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

Remand for "clarification", by Judge James F. Holderman of the U. S. District Court, Northern District of Illinois, in Case No. 97 C 778, September 25, 1997.

On November 15, 1996, this Division issued Award 24682, which read in pertinent part as follows (Emphasis added):

STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers - Chicago and North Western Transportation Company - General Committee of Adjustment requests this Division consider and authorize the reinstatement to service of Engineer D.D. Davidson, Northeastern 2 Seniority District, with full seniority and vacation benefits, health and welfare benefit payments for all time withheld from service and payment in full for all time lost and personal file expunged of all records of this matter and payment of $125.00 for re-test at Smith Kline-Beacham on December 28, 1994."

FINDINGS:

". . . Claimant was dismissed from service by Discipline Notice 16 dated September 23, 1994, based on the 'findings from the investigation.'

The Organization's appeal was initially denied and Claimant subsequently declined an offer of 'leniency reinstatement', which was conditioned upon withdrawal of this claim.

From the very onset of collection through the bungled retesting, there are many reasons in this convoluted record why Carrier's conclusion that Claimant tested positive for TCH metabolites was fatally flawed. It is necessary to look no further than the mishandling of the sample collections on December 15 to find transgressions of DOT standards of sufficient seriousness and magnitude to render everything that followed in this tortuous record void ab initio. If the threshold flaws were not enough, the demonstrated egregious violations of procedures and process by the Carrier's subcontracted 'Medical Review Officer', would warrant reversal of the central findings upon which Carrier premised Claimant's guilt.

. . . [He] had sufficient self-interest at stake in these proceedings that even evidence tampering was not an unacceptable means of achieving the desired result of a 'positive' retest to try and vindicate the flawed initial sample collection. It is self-evident that Carrier's conclusion that the Medical Science Labs retest was valid was premised upon those spurious documents. For any and all of the above reasons, this claim is sustained. The period of time when Claimant was unavailable for work due to surgery and recuperation shall be factored into the computation of his backpay damages under this Award.

AWARD

Claim sustained in accordance with the Findings."

The claim before the Board was for "the reinstatement to service of Engineer D.D. Davidson, Northeastern 2 Seniority District, with full seniority and vacation benefits, health and welfare benefit payments for all time withheld from service and payment in full for all time lost and personal file expunged of all records of this matter and payment of $125.00 for re-test at Smith Kline-Beacham on December 28, 1994." (Emphasis added). The Board sustained the claim on November 15, 1996 and ordered compliance within 30 days. Following litigation initiated by BLE to compel compliance, the case came back to us on remand from Judge James F. Holderman of the U. S. District Court, N.D. of Illinois, as follows (Case No. 97 C 778, September 25, 1997):

"For the following reasons, both motions for summary judgment are denied and this action is hereby remanded to the NRAB for clarification of its November 15, 1996 order, Award No. 24682.

Petitioner Davidson was dismissed from his employment with respondent as a locomotive engineer and respondent revoked his locomotive engineer certificate pursuant to 49 C.F.R. § 240-117(e) following a positive result in a random drug testing. Davidson contested the drug test result and filed a claim before the NRAB, First Division, seeking, among other things, reinstatement and back pay. Davidson also appealed the revocation of his engineer's license before the Locomotive Engineer Review Board ('LERB') of the U.S. Department of Transportation, Federal Railroad Administration, which has exclusive jurisdiction regarding the certification of locomotive engineers. On November 15, 1996, the NRAB issued Award No. 24682 and found in favor of Davidson, stating that the random drug testing was fatally flawed and therefore the results should be considered void. The NRAB sustained all of Davidson's claims and ordered respondent to reinstate Davidson and pay Davidson's claim for back pay. Twenty-one days later, on December 6, 1996, the LERB issued its decision. Contrary to the NRAB decision, the LERB found that there were no fatal errors in the random drug testing of Davidson and concluded that Davidson violated 49 C.F.R. § 219.102 by testing positive for marijuana. The LERB determined, however, that respondent's decision to revoke Davidson's certificate was improper. As a result of the positive drug test result, the LERB concluded chat Davidson was only ineligible to hold an engineer certificate. The LERB stated that before Davidson can be eligible again for certification he must comply with 49 C.F.R. § 24 0. 119(d), which requires evaluation by a counselor.

Petitioners argue that respondent must comply with the NRAB decision and reinstate him and pay all of his back pay from the date he was dismissed by respondent, regardless of what the LERB concluded, since the two boards are independent of one another. Respondent argues that, pursuant to federal law, it is required to abide by the LERB decision and therefore Davidson cannot be reinstated to his position until he receives drug counseling. Respondent also states that it would have been required to suspend Davidson's engineering certificate following Davidson's positive drug test result, which the LERB determined was proper, and therefore it

does not owe Davidson any backpay for the time during which Davidson would have been suspended. Petitioners state that while there does exist a two-tier approach whereby the LERB deals with disputes over certification, 49 C.F.R. §§ 219 and 240 make it clear that disciplinary actions are to be dealt with by the NRAB. Petitioners point out that the Federal Railroad Administration ('FRA') made clear that when a certificate is erroneously revoked or suspended as a result of a poorly conducted drug test, the most effective remedy is the award of back pay by the NRAB.

In this case. however, a problem has arisen that most likely was not contemplated by the FRA. In this case, there exist two orders, one by the NRAB and one by the LERB, in which each board reached a conflicting result. The NRAB concluded that Davidson's drug test was fatally flawed. The LERB, however, concluded that Davidson's drug test did not contain any fatal errors. When the NRAB issued its order for respondent to reinstate Davidson pay all back pay, the NRAB did not have the decision of the LERB before it, since the LERB's decision was issued twenty-one days after the NRAB's decision. This court acknowledges that respondent must comply with both of the orders of the NRAB and the LERB, however, the issuance of the LERB's decision makes the NRAB's decision unclear. This court believes that a remand of this case to the NRAB will aid all of the parties in this case. While the NRAB certainly has jurisdiction to determine issues of reinstatement and back pay awards, the decision by the LERB, with which respondent must also comply regarding Davidson's certification, could impact the NRAB's findings. The NRAB should have the first chance to resolve this conflict and interpret its award given the new factual issue, the LERB's decision, that was not present at the time it tendered its decision since it has the exclusive jurisdiction to determine the award of reinstatement and back pay. With the knowledge of the LERB's decision, the NRAB should be allowed to clarify its order by specifically determining whether or not Davidson is entitled to back pay for the time when he should have had his engineering certificate suspended, per the order of the LERB, and the NRAB can clarify whether or not it believes that Davidson is required to submit to counseling in compliance with the LERB's decision and 49 C.F.R. § 240.119(d) before respondent reinstates Davidson. Such a clarification by the NRAB will undoubtedly aid the parties in their dispute."
(Emphasis added).

In the considered judgement of this Board, the Court erred in requiring the NRAB to attempt to reconcile findings of fact based on a fully-developed record concerning a disciplinary matter over which the NRAB has exclusive jurisdiction, set forth in its final and binding arbitration Award of November 16, 1997, with contrary *dicta* issued three weeks later as an aside by LERB in its peremptory decision in a collateral licensing proceeding. [What passes for reasoning in the LERB's tortured decision is typified by its concluding sentence: "*Based on its review of the record, the Board finds that CNW acted responsibly when it removed from service a person testing positive for a controlled substance, however CNW's revocation of Petitioner's engineer certification was improper under the provisions of Title 49 Part 240 of the Code of Federal Regulations. The Board therefore grants the petition of Mr. Davidson. However, the Board points out that before Petitioner can be eligible again for certification, he mus comply with the provisions of Section 240.119(d).*"] The Orwellian twist of suggesting that the NRAB rewrite history so as to conform with LERB's new reality serves neither logic nor fairness; both of which were far better served had the Court required LERB to take as "the law of the case" the NRAB's carefully considered, well-supported and conclusive factual findings that the test was *void ab initio*.

The NRAB respectfully declines the Court's invitation to "clarify whether or not it believes that Davidson is required to submit to counseling in compliance with the LERB's decision and 49 C.F.R. § 240.119(d) before respondent reinstates Davidson" because, *inter alia*, that issue is moot: Davidson was reinstated to service by Carrier on August 21, 1997 with no requirement to undergo treatment or counseling. While preserving our serious reservations over the terms of this remand, we shall nonetheless endeavor to respond to the Court's explicit and specific mandate to determine "whether or not Davidson is entitled to back pay for the time when he should have had his engineering certificate suspended, per the order of the LERB." We take the primary premise of the Court's remand to be that we suspend reality and assume, *arguendo*, that the LERB decision had been prior in time and had been properly introduced as evidence on the Hearing record in Docket 44420, which we considered before rendering our November 15, 1996 decision in Award 24682. We can say without equivocation that the LERB decision would have had no effect at all upon our central holding that the tests conducted by Carrier were *void ab initio* due to fatal flaws in the testing and chain of custody protocols.

In short, we would have then, just as we do now, reject as completely unpersuasive and inconsistent with the overwhelming weight of the evidence before us

LERB's purported factual holdings to the contrary. Notwithstanding, since no appeal of the LERB decision was perfected by Davidson, we must take as a given the bottom line of that decision, *i.e.*, that Davidson's license was not revoked but it was suspended for part of the time covered by our back pay order. As to whether back pay otherwise due and owing to a successful Claimant is payable during periods of FRA suspension or revocation, this Board's position is set forth in the following precedent decisions:

> "... [I]t is believed that Carrier denied Claimant due process in this matter which is a violation of Claimant's Agreement right to a fair and impartial investigative hearing.
>
> Given the above reasons, this Board is compelled to rule that the pending claim, which has been filed in this matter, must be sustained as presented. Having made the preceding determination, however, the Board is also compelled to rule that we have no jurisdiction to remedy the FRA's 30 days revocation of Claimant's Engineer's Certification. Such a matter involves a statutory appeal procedure; and the questions of whether or not said revocation was proper, and whether or not Carrier will be required to reimburse Claimant for lost wages incurred during the period of said 30 days license revocation will ultimately depend upon a ruling by the FRA which that agency has the sole and exclusive jurisdiction to make." NRAB First Division Award 24424 (Emphasis added).
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> * * *
>
> "The Board is aware that Claimant has appealed the FRA's 30-day revocation of his Locomotive Engineer's Certification. The Board has no jurisdiction to review the FRA portion of this case. The questions of whether or not the revocation was proper, and whether or not the Carrier will be required to compensate Claimant for lost wages incurred during the period of the license revocation are issues that must be determined by the FRA, the agency invested with sole and exclusive jurisdiction over such matters. *See* First Division Award 24424." NRAB First Division Award 24782 (Emphasis added).

Referee Dana E. Eischen who sat with the Division as a neutral member when Award 24682 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 26th day of January 1999.