PUBLIC LAW BOARD 2779

AWARD NO. 95

PARTIES TO DISPUTE

CARRIER
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY

AND

ORGANIZATION
UNITED TRANSPORTATION UNION

CARRIER'S FILE NO.
01-87-50-D

ORGANIZATION'S FILE NO.
TC-WE 87-50-D

STATEMENT OF CLAIM

Claim of Trainman D.C. Syverson, for reinstatement to the services of the Transportation Company, with vacation and seniority rights unimpaired, in addition to the payment of any and all health and welfare benefits until reinstated, and that he be compensated for any and all lost time, including time spent while attending an investigation held on October 27, 1986 at Sioux City, Iowa.

STATEMENT OF BACKGROUND

At or about 1:50 a.m. on date of September 26, 1986, while Claimant was performing duties as a rear brakeman on Train RMCPC at Sioux City, Iowa, three (3) cars of coal derailed as the train passed through a switch which had been lined for another train, while making a pick up movement. Carrier conducted an inspection of the derailment site and based on its determination, there was reasonable cause to suspect crew members of being under the influence of alcohol and/or drugs, subjected Claimant and his fellow crew members to a breathalyzer test. In Claimant's case, the results of this test proved to be negative. Next, Trainmaster R.G. Gibbons took Claimant and the other crew members to Marion Health Center for the purpose of collecting urine samples to determine if any of the employees involved might have been under the influence of drugs.

According to Gibbons, once at the Health Center he provided the staff with four (4) urine drug testing kits, one (1) per crew member, which the Carrier keeps on hand for just this purpose.

Gibbons related that the kit consists of a small box containing a styrofoam container and inside the styrofoam container is a specimen tube for the urine sample and a seal that eventually is placed over the top of the specimen tube. The seal accommodates such information as the identification of the individual by name providing the sample, the number of specimens provided by the individual, the date the sample was given, and the signature of the shipping official. According to Gibbons it was the staff at Marion Health Center who labeled each specimen tube with the individual's name and that this was done with a black felt tipped pen. One at a time, each of the four (4) crew members was given his specimen tube and was instructed to go to the bathroom to provide the urine specimen and afterward, to return to the desk counter area. At the desk area, a Marion Health Center staff person received the specimen tube and placed the crew member's name on the seal and recorded the date. Gibbons related that he then signed the seal on the line provided for the signature of the shipping official. The tubes were then put back in the styrofoam container which in turn was put back in the kit box. Gibbons explained that each kit contains a Federal Express waybill. In Claimant's case the Waybill was 884832841. According to Gibbons, each of the kits were sent to the CompuChem Lab in North Carolina. Gibbons related that at about 5:00 p.m. on Thursday, October 2, 1986, he received the results of Claimant's drug urinalysis from CompuChem Lab. The written Drug Urinalysis Report dated September 29, 1986. showed that of the nine (9) drugs the urine was tested for, only one proved to yield a test result of positive and that was for Cannabinoids or marijuana. The quantity measured by Gas Chromatography/Mass Spectrometry and found to be in Claimant's urine was 134 ng (nanogram). In explanation of this measurement, it was noted that any amount of cannabinoids in excess of 20 ng/ml is considered a positive test result.

Following receipt of Claimant' test results, Carrier summoned Claimant to attend a formal investigation in connection with the following charge:

> "Your responsibility for your violation of Rule G while you were employed as brakeman on RMCPC, Extra 7003 North, on duty Sioux City, Iowa, 12:15 a.m. September 26, 1986."

After two (2) postponements, one by Claimant and one by the Organization, the investigation was held on date of October 27, 1986. It was at the investigation that Gibbons provided the foregoing explanation as to why and how the urine tests were given. In his testimony, Claimant asserted that Gibbons did not observe him either going to the bathroom or actually urinating in the specimen tube. However, Claimant attested, he did provide Carrier with a proper sample of his urine. Notwithstanding the test results provided by CompuChem, Claimant denied that he ever smoked marijuana either prior to or during the time he was on

duty on date of September 26, 1986. However, notwithstanding this denial, the record evidence reveals that shortly after being dismissed from service, specifically the middle of November, 1986, Claimant voluntarily admitted himself in the Vietnam Veteran's Outreach Program conducted by the Human Effectiveness Institute beginning sometime in December of 1986. As of August, 1987, Claimant was attending weekly group sessions for Vietnam Veterans experiencing post traumatic shock syndrome as well as attending individual counselling sessions. According to Therapist, Patricia M. Vaughan of the Human Effectiveness Institute, Claimant has addressed in therapy his previous drug use among other issues. In a letter dated August 12, 1987, directed to Carrier's Director, Employee Assistance Program, John A. Sizemore, Vaughan opined that Claimant had made good progress in therapy, that his assets include his increased understanding of his previous drug use, his strong motivation to regain employment with the railroad, and his strong support system. Vaughan asserted that there are no major barriers to Claimant's maintaining his current lifestyle free from chemical use. In Vaughan's view, Claimant exhibits strong motivation to maintain a healthy and effective state of life and accordingly she recommended that Carrier consider rehiring him for his previous position. Vaughan's opinion was concurred in by George V. Komaridis, a Licensed Consulting Psychologist at the Human Effectiveness Institute, who, in an earlier letter to Sizemore dated April 1, 1987 opined that Claimant has been showing a great deal of change and improvement in his attitude and is abstinent from mood altering drugs. Komaridis added that in his view Claimant would be able to remain abstinent and would be able to cope effectively with problems in the future and that he should be able to undertake and handle any tasks or assignments related to any job that he holds including work on the railroad.

In other testimony at the investigation, Gibbons noted that Carrier had, consistent with the safety regulations of the Federal Railroad Administration (FRA) posted Division Manager's Bulletin No. 21, dated May 2, 1986 which referenced the use of alcohol and drugs as set forth under new FRA regulations, and which supplanted in part Division Manager's Bulletin No. 1 dated January 7, 1986. In relevant part, Division Manager's Bulletin No. 21 dated May 2, 1986 reads as follows:

> Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the Company reasonably suspects that you are under the influence of, or impaired by, drugs, or alcohol while on duty. Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to sixty days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment.

However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used a drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

Rule G, Page 95 of Timetable No. 8, prohibits the illegal use, illegal possession or illegal sale of any drug by employees while on or off duty. A positive urine test shall be treated for purpose of disciplinary action as evidence of drug usage.

You are not required to provide a blood sample at any time, except in the case of certain accidents and incidents subject to Federal post-accident testing requirements (49 C.F.R. Part 219, Subpart C).

A complete copy of the Federal regulation is available for your review at the Office of the Assistant Vice President and Division Manager.

/s/ G.F. Maybee
Asst. Vice President
and Division Manager

When questioned at the investigation if he was familiar with and understood Division Manager's Bulletin No. 21, Claimant responded in the affirmative. Gibbons testified that at the time Claimant and the other crew members gave urine specimens he apprised them, consistent with the provisions contained in Division Manager's Bulletin No. 21, that they could have blood samples taken at the expense of Carrier if they so elected. According to Gibbons, all the crew members including Claimant informed him they did not want a blood test or blood sample taken. Claimant acknowledged that he also was familiar with and understood Rule G which reads in relevant part as follows:

* * * *

> Employees shall not report for duty, be on Company property or be on duty under the influence of, or use while on duty or on Company property any drug or other substance that may in any way adversely affect their alertness, coordination, reaction, response or safety. This prohibition includes prescription medications.
>
> The illegal use, illegal possession or illegal sale of any drug by employees while on or off duty is prohibited.

In other testimony, Claimant stated he had eight (8) years of service with the Carrier and that in his view he had compiled an excellent work record. A review of his service record reveals that in January of 1980 he received fifty (50) demerits for failure to pass radar surveillance checks, in February of 1984 he received a twenty (20) day deferred suspension for a derailed car and failure to report the accident, in June of 1984, he received a letter of reprimand for a missed call, and in November of 1984 he received a letter of reprimand for excessive absenteeism in the first ten (10) months of 1984.

The instant claim arises challenging Carrier's dismissal of Claimant based on its determination Claimant was guilty as charged. The record evidence reflects that Claimant's dismissal became effective as of October 30, 1986.

FINDINGS

The Board, after hearing upon the whole record and all evidence, finds 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 dated July 15, 1980, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

As its first line of defense, the Organization alleges a procedural defect, claiming that Carrier failed to timely respond to its letter of appeal dated November 19, 1986, sent by Certified Mail on November 24, 1986 and received by Carrier on November 26, 1986. The Organization contends that as a result of not receiving any response by Carrier within the permissible sixty (60) days pursuant to the Controlling Schedule Rules as supplemented by time limitation provisions of Memorandum Agreement dated March 12, 1948 and effective February 1, 1948, it dispatched a second letter of appeal to Carrier prepared on date of January 24, 1987. Carrier responded to this second letter of appeal by letter dated February 6, 1987, wherein Carrier asserted it had issued a denial letter dated December 16, 1986 that it sent by regular mail and that said letter had not been returned

by the Postal Service to its office. Carrier asserted that it had not violated the agreed upon time limit of sixty (60) days for filing its response. Additionally, Carrier reasserted its declination of the claim on the basis of Claimant's urine test results which proved positive for Cannabinoids.

Even though the applicable schedule rule containing the time limit provision does not require that notification be made by Certified Mail as opposed to the regular mails, we are of the view that it is only prudent, and sound business procedure to send notification of the type here involved in such a way as to be able to verify, by documentary proof, its transmission, in order to avoid such claims of procedural defect as here alleged by the Organization. While we are inclined to accept that Carrier did respond in a timely manner because of its having produced the December 16th letter of denial, nevertheless we can never eliminate altogether the modicum of doubt concerning the possibility that the denial letter was prepared only after the Organization alerted Carrier to the procedural defect. However, assuming arguendo we are willing to accept the validity of the Organization's argument on this point due to the absence of conclusive proof the letter was prepared and sent on the dates Carrier claims it was prepared and sent, we do not also accept the attendant proposition that the remedy incorporated in the claim must be accepted in whole as the basis for resolving the time limit violation. After all, numerous sustaining awards have been issued by this and other Boards and on the various Divisions of the National Railroad Adjustment Board, which have been modified pursuant to the Findings rendered. Based on this rationale, we are in full concurrence with Award No. 144 of Public Law Board 1459, wherein the Board held the following:

> It is undisputed that the applicable time limit rule was not observed by Carrier and that claimant is therefore entitled to pay for time lost for at least the period from April 3, 1979, the date of his dismissal to the date Carrier's letter denying the claim was mailed, July 16, 1979.
>
> The time limit violation does not in and of itself, however, mean that claimant must be reinstated to service. Accordingly, a controversy still exists as to whether he should also be compensated for the time lost from July 16 until November 7, 1979, the date he was actually reinstated.

Based on our concurrence with this holding coupled with our view that the small doubt we have regarding the timeliness issue must be resolved in favor of the Organization's position, we find that Claimant is entitled to pay for time lost for the period beginning October 30, 1986 the date of his dismissal and ending February 6, 1987, the date of Carrier's denial letter sent to the Organization by Certified Mail on the same date.

As its second line of defense regarding the merits of the case, the Organization charges that Claimant should be exonerated on the basis that Carrier committed serious violations of the FRA regulations pertaining to control of drug and alcohol use, specifically 49 CFR Parts 219.301, 219.303, and 219.307, when it subjected Claimant and fellow crew members to urine testing. In support of its charges, the Organization submitted into evidence a letter dated March 19, 1987 from FRA Associate Administrator for Safety, J.W. Walsh, to W.D. Sing, the crew member who was the Engineer on the job and one of the four (4) employees tested. According to this letter, Sing had written a letter dated October 14, 1986 to the FRA alleging Carrier had violated FRA regulations pertaining to control of drug and alcohol use that occurred following the subject accident on the morning of September 26, 1986. Sing also alleged that the tests were improper in that crew members who had no direct involvement in the incident were required to be tested, and that the procedures for obtaining the specimens, as prescribed in FRA's regulations and the Field Manual, were not followed. In his reply, Walsh indicated the FRA had conducted and completed an investigation of Sing's allegations and found the facts to be generally as he described them. Among the findings arrived at were the following:

1. Based on interviews with personnel at Marion Health Center, the FRA learned they had not been given detailed instructions about the prescribed procedures, citing FRA regulation 49 CFR 219.307 as applicable. Walsh indicated that the procedures followed at the medical facility raise significant question about the identification of the individual specimens.

2. According to its investigation, the FRA concluded there was no sufficient evidence to indicate that the Engineer, Conductor or Front Brakeman were directly involved in the rule violation which resulted in the derailment, citing FRA regulation 49 CFR 219.301 as applicable.

3. Statements by crew members evaluated by the FRA indicated that after the initial breath test proved positive, a second test within a period of not less than fifteen (15) minutes was not performed, citing FRA regulation 49 CFR 219.303 as applicable.

Walsh apprised Sing that based on these findings, representatives of the FRA Chicago Regional headquarters met with the Manager of Operating Rules of the Carrier and apprised him of the FRA's concern about this and similar incidents, and further, advised him of the FRA's interpretations of the regulations applicable in this incident. Walsh conveyed to Sing that the FRA informed the Carrier that any future violations of these regulations could be the subject of prosecution efforts by the Agency (FRA).

While we find the results of the FRA investigation illuminating, we do not find them to be specifically applicable to Claimant's case. As it is noted, Claimant, as the Rear Brakeman, was the only crew member excluded from the FRA findings as not being directly involved in the rule violation which resulted in the derailment. Thus, insofar as Claimant is concerned, Carrier did have reasonable cause pursuant to 49 CFR 219.301 to require him to submit to urine testing as a result of the occurrence of the subject accident and the fact that he was the one crew member directly involved. This point is not disputed by the Organization which concedes that Claimant was in charge of making the pick up movement. With regard to Carrier's failure to administer a second breathalyzer test, we find this also not to be applicable to Claimant as he did not test positive in the first and only breathalyzer test given him. It is clear from the applicable FRA regulation, specifically 49 CFR 219.303 as cited, that Carrier is required to administer a second test where the first breathalyzer test bears a positive result. As to the most damaging finding by the FRA contained in point 1 above, we find we must respectfully disagree with the conclusions reached as they pertain to the Claimant's case. We believe we are in a position to refute the FRA findings here in light of the fact that we have the benefit of evaluating additional evidence by way of witness testimony, whereas FRA's investigation was more limited in that it was based on interviews of the medical staff personnel only. Quite frankly, it is not known from Walsh's letter who among the medical personnel were interviewed and how many months after Sing's allegations were received by the FRA that the interviews took place. We do not know the specific questions that were posed, the quality and thoroughness of them, nor are we privy to the answers. This is in contrast to our review of Carrier's investigation which contains a verbatim transcript and the correspondence exchanged by the parties in the handling of the dispute. It is our view that testimony solicited from the principal parties in a time frame much close to the occurrence of the events giving rise to the instant matter before us is far superior and much more reliable to the incomplete investigation conducted by the FRA. We are persuaded that Carrier exercised due caution in accordance with FRA regulations in extracting and handling the urine sample provided by the Claimant. Claimant himself acknowledged in his testimony that he gave a proper sample of his urine. As the procedure testified to by Gibbons regarding the labeling and handling of Claimant's specimen was not refuted by other testimony or evidence adduced at the investigation, we must conclude that this was also in conformance with the applicable FRA regulations. As further evidence that the procedures followed by the CompuChem Laboratory were also proper within the FRA regulations, we note that the report furnished by CompuChem is competent in that it provides all the information required by FRA. Furthermore, the results of the Claimant's test are greatly bolstered and supported by the fact that Claimant did have a chemical dependence on mind altering drugs as established beyond doubt by the written documentation reporting on his problem and his effort at rehabilitation.

Given the established fact that Claimant had a drug problem, we find Claimant's testimony at the investigation to have been less than truthful when he asserted he had not smoked marijuana either prior to or while on duty on the date in question. We wish to make very clear that we do not countenance outright lies and that we have factored this aspect into our deliberation regarding the outcome of this case. Even though we may agree that Claimant may have paid his debt to society for the mistakes he has made, we do not agree he should be given an opportunity to return to performing railroad work. It is well established that while Carrier has reinstated employees in violation of Rule G because of alcohol under certain circumstances, it has not done so with respect to employees in violation of Rule G because of drugs. It is our view that in order for us to override this policy, the circumstances of an individual case must be very persuasive. We do not find this to be so in the circumstances surrounding Claimant's case for several reasons, to wit: (1) by Claimant's own admission, he was aware of the pertinent rules and regulations pertaining to use and possession of alcohol and drugs in relation to work, namely Division Manager's Bulletin No. 21 and Rule G, and acknowledged his awareness of what his responsibilities were thereunder; (2) the record evidence establishes beyond any doubt that Claimant knew he had a chemical dependence on drugs, yet did nothing to correct this problem until after the fact of his involvement in the subject derailment. Claimant's dereliction in this regard subjected himself and his co-workers to potential serious harm to well-being and safety on the job, a situation which is found by us to be intolerable in an industry as hazardous as railroading; and (3) Claimant was given an opportunity to yield a blood sample free of any cost to him as a means of countering the presumption of impairment, yet he declined to yield a blood sample. Thus, given this declination, we find we must concur in Carrier's presumption that Claimant was impaired by the controlled substance of marijuana on the date, day, and time in question.

Given the substantial evidence against Claimant and Carrier's consistent and unalterable policy not to reinstate employees found to be in violation of Rule G because of drugs, we rule to deny the subject claim in its entirety with the exception of his entitlement to limited back pay as previously set forth elsewhere above.

A W A R D

CLAIM DENIED AS PER FINDINGS.

Employee Member

Carrier Member

Neutral Member and Chairman

Dated at Chicago, Illinois
July 29, 1988.