

PUBLIC LAW BOARD NUMBER 4107

UNITED TRANSPORTATION UNION

and

Award Number 6
Claim of M. J. C. Gray
(Termination)

BURLINGTON NORTHERN, INC.

STATEMENT OF CLAIM: "Claim of Engineer M. Gray for reinstatement to service with seniority unimpaired and payment for all time lost from April 17, 1985, for allegedly violating Rule G of the Consolidated Code of Operating Rules."

FINDINGS: The Board, upon the whole record and all the evidence, finds that: the Claimant and Carrier involved in this dispute are, respectively, Employee and Carrier within the meaning of the Railway Labor Act, as amended (the "Act"); that this Board is properly constituted and has jurisdiction over the dispute; and that the parties were given due notice of hearing.

Claimant M. J. C. Gray was employed by the Carrier as an Engineer and was assigned to Alliance, Nebraska. On April 14, 1985, the engine being operated by claimant executed a trailing point movement through a switch aligned against him. The switch was damaged. The crew testified that the engine had been located on one side of the turnout prior to their lunch break but was, for reasons unexplained in the record and unnoticed by the crew, on the other side of the turnout before the post-break move. Claimant did not observe the position of the turnout, even though the engine was operating short hood toward the switch in question and the switchpoints and stand were or should have been visible.

A run-through switch is a "Human Factor Accident - Minor", as defined in the Carrier's November 5, 1984 Memorandum, which clarified and restated the Carrier's unilaterally-established policy regarding drug testing of employees. Under the Carrier's policy, such an accident constitutes "probable cause" for purposes of requiring urine tests of all employees responsible for the accident.

Carrier officials observed claimant's behavior shortly after the incident and had conversation with him. They testified that nothing in Claimant's actions, appearance, speech, or other conduct gave indication that he was under the influence of alcohol or any other prohibited drug.

Claimant provided the Carrier with a sample of his urine, after having been told by its officials that he would be withheld from service if he refused to do so. Carrier officials then transmitted the sample to their test facility, Western Pathology Consultants, Inc. ("Western"). Claimant was returned to service, pending the results of Western's tests.

Claimant's urine specimen was tested by Western for Tetrahydrocannabinol ("THC"), the primary psychoactive ingredient in marijuana. Western utilized a testing procedure consisting of one thin layer chromatography ("TLC") test, the positive result of which was confirmed by a separate test, different in methodology, called Enzyme Multiplied Immunoassay Technique ("EMIT"). The variation on that technique utilized by Western is called "EMIT d.a.u.". EMIT allows a semi-quantitative analysis of the sample, producing a positive result only at THC concentrations above a predetermined level. The threshold level utilized by Western was 100 nanograms per milliliter ("ng/ml"). Western notified the Carrier in writing of the test results.

Claimant had no prior rules violations involving drugs during his eight years of service with the Carrier. He denied use of any substance containing THC "at the time of the incident" and denied having been "under the influence" of any drug at that time.

The Carrier did not charge claimant with any rules violation for running through the switch. However, based on the test results from claimant's urine sample, the Carrier conducted an investigation with respect to his alleged violation of General Rule G of the Consolidated Code of Operating Rules, which states, in part:

"Employees must not report for duty under the influence of . . . marijuana or other controlled substance . . . that may in any way adversely affect their alertness, coordination, reaction, response, or safety."

Following an investigatory hearing, at which the facts described above were adduced, the Carrier dismissed claimant for "being under the influence of a controlled substance while performing service" in violation of Rule G. This proceeding followed.

The parties each supplemented the transcript of hearing with extensive scientific documentation concerning testing methodology and the relationship between drug use and impairment. The Board's review of those documents is summarized in the Discussion and Analysis section of this Opinion.

Positions of the Parties

Before the Board, the Carrier argues that its policy of testing employees for drugs following operating accidents is within its right to establish and enforce operating rules in the interest of safety. The Carrier denies any obligation to bargain with the Union about the policy or its implementation.

The Carrier asserts that it has historically tested its employees and that the current testing is merely a continuation of exercise of its managerial rights. It asserts further that testing for drugs is merely a method of enforcing operating rules prohibiting such substances.

The Carrier asserts the reasonableness of its rule requiring testing an employee for drug use whenever that employee is responsible for an operating accident. It asserts that no physical manifestation of impairment other than the triggering incident is necessary to establish reasonable probable cause to test.

The Carrier states that it did not charge claimant with the run-through switch because it had grounds to discharge him for the more serious drug charge. It did not withhold claimant from service following the incident, pending the test results, because its policy does not so provide unless there are "other circumstances" which require withholding the employee from service.

The Carrier urges further that the testing methodology which Western utilized produced accuracy approaching 100% and showed clearly that claimant had THC in his system. It argues that the concentration of THC in claimant's urine was sufficiently high as to render it virtually impossible to have come from any source other than claimant's willful consumption of a substance containing THC.

The Carrier argues that scientific evidence establishes that the psychoactive substances in marijuana are so toxic and persistent that there is a reasonable presumption that they continue for an extended period of time to influence detrimentally the motor skills and mental processes of a person who has consumed it. It urges, therefore, that any employee who tests positive for THC in his or her urine at any level should be found to have been in violation of Rule G because of the likelihood of impairment.

The Carrier asserts that, in any event, a concentration of THC in excess of 100 ng/ml, as was found in claimant's urine, constitutes impairment, per se, and, therefore, a violation of Rule G. It argues that, since a level of 20 ng/ml has been held to be the minimum level which affects a person's performance, the THC level found in claimant's urine of five times (or more) higher than that minimum demonstrates certain impairment.

The Carrier asserts that termination for willful violation of Rule G is, under the circumstances, appropriate. The Carrier urges, therefore, that the claim be denied.

The Organization asserts at the outset that the Carrier's probable cause drug testing policy represents a material change in terms and conditions of employment of covered employees and cannot be imposed without bargaining.

With respect to the Carrier's application of its probable-cause testing policy, the Organization asserts that claimant was not properly subject to testing since his culpability in the run-through switch was not established. Indeed, the Organization argues that the locomotive might have been moved to the other side of the switch by persons other than the crew.

The Organization argues that the testing methodology utilized by the Carrier is inferior to the methodology utilized in other cases and does not produce sufficiently reliable results to support the conclusion that claimant was impaired.

The Organization also argues that the Carrier failed to prove, as it was required to do, that claimant was "under the influence" of THC. It points to claimant's denial of impairment or drug use at any relevant time and to the absence of any previous Rule G violations. It points out that he evidenced no physical manifestation of being under the influence of drugs.

The Organization argues further that there was no evidence warranting the conclusion that the THC in his urine rendered him per se "under the influence" and interfered with his job performance in violation of Rule G. The Organization asserts that available scientific evidence does not establish a reliable correlation between THC levels and impairment, particularly for persons who have consumed the substance containing THC at some time other than the period during which the THC "high" is manifest.

The Organization asserts that the evidence does not establish that claimant was in violation of Rule G. It urges, therefore, that the claim be sustained.

Discussion and Analysis

Each employee of the Carrier has a responsibility to himself, his fellow employees, the Carrier, and the public to maintain physical and mental alertness and unimpaired judgment while subject to duty. Use of drugs by an employee in derogation of those responsibilities cannot be condoned or accepted.

The Carrier clearly has the right to promulgate operating rules. Employee conduct which impacts on the workplace is a legitimate employer concern and regulation. However, the application and enforcement of the Carrier's rules are subject to the grievance process.

The Carrier's drug testing program implicates off-duty conduct and involves compromises of employee privacy, including analysis of bodily fluids. It threatens employees with job loss, under circumstances which may permanently stigmatize them in the work force. In light of the serious consequences to employees, the limits of existing scientific knowledge as to the nature and duration of impairment caused by marijuana and of the relationship between positive tests and impairment, caution is required in the review of discipline based on drug test results.

Burden and Quantum of Proof

In arbitration cases arising under the Act, in which the evidentiary hearings are held on the property by the Carrier and proceedings before Public Law Boards are in the nature of appellate review, factual determinations are made by the company-appointed hearing officer. Under the established procedures of the parties, such determinations will not be disturbed insofar as they are not arbitrary or capricious. The discipline will not be overturned if it is supported by substantial and convincing evidence, based upon consideration of the record as a whole.

Nevertheless, it remains the Carrier's obligation, no less in drug cases than in disciplinary actions based on other alleged rules violations, to prove its case by substantial and convincing evidence.

The Obligation to Bargain Concerning Testing

The authority of this Board is confined to the interpretation and application of the applicable collective bargaining agreement between the parties, that is, to "minor disputes" within the meaning of the Act. The Board has no power to rule that a claim is a "major dispute"; such determination is for the courts.

The Board is advised by the parties that litigation is pending in Federal Court with respect to the Carrier's obligation to bargain with the Union concerning its drug-testing program. That litigation has not, as of the date of issuance of this Award, been resolved. Absent such resolution, the Board will assume, but does not hold, that the Carrier has the right unilaterally to implement the drug testing policy here at issue.

Probable Cause to Test

The Carrier argues that its policy of testing an operating employee when that employee has culpable responsibility for an accident is entirely reasonable. While there are clearly many causes of accidents other than drug use, even where human error is present, it would be naive, in light of the Carrier's

historical experience and the prevalence of drugs in society, to ignore drug-caused impairment as a possible factor in accidents.

In light of the crucial importance of alertness and judgment required of railroad operating employees and the significant potential for injury and damage which might result from operating railroad equipment under the influence of drugs, the Board concludes that the Carrier's policy of probable cause testing following accidents is not unreasonable on its face.

The Organization argues that claimant was not shown to be culpable in the incident and that no probable cause existed to support the test. The Board is not persuaded. Claimant's apparent failure to look out the locomotive windows and observe the track in the direction of locomotive movement constitutes the type of unexplained inattention to duty which establishes cause for purposes of allowing the Carrier to test. Claimant's conduct in the incident would not be explained, even if persons other than the crew had moved the locomotive to the other side of the switch; he still failed to observe the track ahead.

Neither is the Board persuaded by the Organization's argument that testing was not warranted in the instant case because claimant had no physical manifestation of impairment. The run-through switch itself raises the probability of claimant's inattention to duty. While such inattention may, of course, be caused by a number of factors, the Board does not believe that it is unreasonable to allow the Carrier to investigate and attempt to ascertain the cause of such an incident, including testing the urine of each responsible employee for the presence of drugs.

Propriety of Testing Methods Utilized

The scientific literature supplied by the parties (specific citations will not be supplied in the interests of brevity, absent special reason) indicates that the TLC and EMIT tests utilized by Western are widely utilized in the medical community to identify the presence in urine of prohibited drugs. EMIT is subject to a 1-5 percent incidence of false positives. TLC produces a 3-5 percent incidence of false positives. The EMIT d.a.u. procedure utilized by Western to confirm the TLC results is primarily utilized as a screening test. Neither test is as specific or reliable as testing techniques utilizing a gas chromatograph or a gas chromatograph combined with a mass spectrometer ("GC/MS"), the results of which approach 100% accuracy and produce a precise quantitative reading.

An EMIT or TLC screen, with GC/MS confirmation, appears, from review of the scientific materials, to be the methodology preferred by researchers, including the Federal Government's

Center for Disease Control, to detect the presence of drugs. CDC recognizes, however, that there are other acceptable methods. The EMIT or TLC screen plus GC/MS confirmation allows a precise quantitative measure of THC concentration by a virtually fail-safe method.

Carrier consultant Dr. Michael A. Evans described in an Affidavit introduced in the pending litigation the testing methodology utilized by the Carrier in that case as EMIT, confirmed by GC/MS. Neither the Evans Affidavit nor other information in the record indicate that the Carrier committed, by contract or rule, to utilize the procedure described in that Affidavit. Indeed, Dr. Evans stated in his Affidavit that GC/MS was not the only validating test which might be utilized.

The Carrier stated that, in the instant case, its alternative method of testing (EMIT d.a.u. screen, with GC/MS confirmation) was not used because of the unavailability of the GC/MS test in the Alliance area. It chose to have claimant's samples delivered by hand to the local testing facility.

The Board does not believe that the Carrier's right to test for probable cause frees it to utilize tests, testing facilities, or testing methodologies which would unfairly jeopardize employees due to unreliability. However, within those parameters, and absent contractual requirement, the Carrier may utilize any testing methodology which is efficacious. It is not limited to utilizing the best, preferred procedure available.

Taken together, the literature suggests that an acceptable testing program requires utilization of generally accepted, reasonably reliable testing methodologies and consistent results between two tests of the sample, utilizing different types of tests. Acceptable methodology should, in addition, minimize false positives. In the EMIT/TLC combination utilized in the instant case, the percentage of false positives from EMIT multiplied by the percentage of false positives anticipated from TLC is no more than .0025%.

The Board concludes that the testing procedure and methodology utilized by the Carrier in the instant case met minimum scientific requirements and were sufficient to satisfy the Carrier's evidentiary burden to establish the presence in claimant's urine of THC.

The record does not contain convincing evidence that claimant's urine contained any specific concentration of THC. TLC, the screening test utilized by the Carrier, does not provide reliable readings as to the concentration of cannabinoid substances. The Carrier did not utilize any confirmatory procedure with respect to the level of THC in claimant's body

through GC/MS. The Carrier's assertion that the concentration of THC was "in excess of" the 100 ng/ml level was based solely on the semi-quantitative EMIT test 1/.

The Board is not convinced of the efficacy of utilizing EMIT to establish a precise level of THC. EMIT is not generally accepted for the purpose of proving THC concentration; and the ability of the test to avoid positive results at the 100 ng/ml cut-off for sample concentrations below the cut-off figure is not established. High THC concentrations established by GC/MS would add an additional level of specificity and reliability to the Carrier's evidence that claimant was impaired; and the absence here of such reliable test results dilutes the Carrier's proofs.

Since quantitative test results are only one factor in the Board's analysis, the Board will assume, for purposes of further discussion, but does not hold, that the Carrier established that claimant's urine contained THC at a concentration of 100 ng/ml, the minimum level which would have produced a positive result on the EMIT test as administered by Western.

Positive test result as a violation of Rule G

The Carrier argues, in the first instance, that only negative tests for THC should be acceptable from employees and that a positive tests for THC at any level should be held to be a violation of Rule G. See page 18 of the Carrier's Submission (" . . . the Carrier has determined that the only appropriate, the only safe policy, is to insist that only negative results are acceptable."). It urges that the known, continuing psychoactive properties of THC and its metabolites should create a presumption of impairment from any positive test. Based on the wording of Rule G applicable at the time of the incident in light of the scientific evidence, the Board is not persuaded.

It is clear from the text of of the Rule applicable to this claim that use of THC-containing substances is not prohibited, per se, by Rule G, so long as use does not occur on the property or while the employee is subject to duty. The Rule does prohibit an employee from being "under the influence" of THC while subject to duty. Indeed, the charge against claimant is that he was "under the influence" of THC.

1/ The Board notes that 49 CFR 219.307 (b) of Federal Railroad Administration Regulations, although not applicable at the time to the incident here at issue, specifically requires that a confirmatory test be administered in urine testing situations which is "capable of providing quantitative data specific to the drug." It specifically states that an immunoassay (of which EMIT d.a.u. is a type) is not an acceptable test for that purpose.

The Board notes that, in 1986, the Carrier amended Rule G to provide that the presence of THC or any of its metabolites at any level would create a presumption that the employee was "under the influence". The change is not before us; and we decline to draw any inference in the instant case from the post-claim change.

Rule G does not define the phrase "under the influence". However, the Board concludes, in recognition of the origin of the Rule to prohibit impairment caused by alcoholic beverages, that it means, for purposes of Rule G, ". . . not only the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in [the affecting substance], and which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess." See Black's Law Dictionary, 5th Ed., West Publishing Co., St. Paul, 1979.

The cases cited by the Carrier (discussed below) make clear that even slight impairment is sufficient to establish a violation of Rule G's prohibition of being "under the influence". Accordingly, the Board makes no distinction for purposes of Rule G between being "under the influence" and being "impaired" (as some state driving laws do) and uses the terms interchangeably. Impairment must, however, be proven and will not be assumed.

In support of its position that claimant's positive THC tests demonstrated that he was "under the influence" within the meaning of Rule G, the Carrier points to Award Number 14 of Public Law Board Number 3715 (Lazar, Chairman and Neutral). Claimant in that case was discharged as a result of positive tests for THC. A number of factors, discussed below, distinguish that case from the instant claim; however, the Board in that case appears to have relied on a quotation from David H. Powelson, M.D., that ". . . people who use marijuana are clinically 'stoned' all the time."

This Board has reviewed the scientific literature furnished by both parties, but finds precious little clinical support for Dr. Powelson's proposition, if by it he means that THC users are always "under the influence" or impaired. The available research simply does not bear out Dr. Powelson's sweeping statement; and this Board declines to adopt it as a basis for analysis.

Tests available to detect THC are extremely sensitive; they respond to very small quantities of THC and its metabolites, which remain in the tissues and bodily fluids of users for a considerable period of time after the drug is consumed. While the long-term retention of THC by users raises questions as to its impact on performance, the scientific exploration of which has begun, the research has not established a significant relationship between such retention and impairment.

Historical application of Rule G

The Carrier argues, nevertheless, that prior application of Rule G to employee involvement with alcoholic beverages provides precedent for its position that the presence at any level of a prohibited drug would constitute a violation. It asserts that Rule G has historically been applied to prohibit any presence of alcohol in the system of employees, without regard to whether the alcohol was actually impairing the employee. The Carrier cites in support of that assertion NRAB Second Division Awards 8821, 9854, and 24664, Third Division Awards 22249, and 24684, Award Number 1 to PLB Number 94, and Award Number 14 to PLB 1916.

The Board does not read those awards as standing for the proposition for which they are offered. Each record contained either evidence of impairment in addition to the test results or blood alcohol concentrations near or above external, statutory standards for intoxication. In several of the cases, the corroborative evidence included the odor of alcohol, a strong indication of recent alcohol consumption.

In NRAB Third Division Award No. 24684, the Board held that even slight impairment from alcohol would constitute a violation of the rule. However, it stated further, "an employee who [has a] slight tracing of alcohol may or may not manifest faculty impairment. That conclusion depends upon the coupling of competent evidence of such impairment along with the test results." (Emphasis added). Since such evidence was adduced (loud talk, hitting or falling into a waste container), the Board found a violation of the rule in that case.

The record in the instant case contains no such corroborative evidence. Further, in contrast to alcohol, no legal standards for intoxication or impairment from THC are presented by the parties; and the scientific research does not yield data on the duration of impairment following consumption.

THC Concentration in Excess of 100 ng/ml as Indication of Impairment

The Carrier argues that claimant's urine contained at least five times as much THC as the 20 ng/ml level described in Dr. Evans' Affidavit as the minimum to establish impairment, and that the positive test should, therefore, be deemed proof of impairment. However, review of the scientific research simply does not support the proposition that a user can be deemed to be impaired on the basis of a given level of THC in his or her urine. Indeed, much of the scientific evidence with respect to the relationship between positive test results and job impairment indicates that the "high" from ingesting marijuana probably lasts and causes impairment no longer than a few hours.

Arthur McBay, PhD., of the Office of the Chief Medical Examiner of the State of North Carolina, summarized in 30 Journal of Forensic Science at pp. 987-993 his review of the scientific literature with respect to that correlation:

"Scientific evidence which would serve as a basis . . . that [the person who used the drug] was impaired at some time, based on the results of any specimen, does not appear to be available and has not been found in the literature.

* * *

Impairment caused by marijuana use alone by the average subject is at best very subtle, is not identifiable by expert observation, is probably not significant beyond 2 h after smoking, and is not correlatable with cannabinoid concentration. Studies relating unsafe performance with cannabinoid concentrations have not been found in the scientific literature." (Emphasis added)

In 1983, a broad-based panel assembled by the National Institute of Drug Abuse ("NIDA") examined the relationship between drug concentration and impairment in the context of driving. Its Report, "Drug Concentrations and Driving Impairment", was published at 254 Journal of the American Medical Association 2618 (1985). The Report contains numerous cautions as to the conclusions which may be drawn with respect to the relationship between drugs (other than alcohol) and impairment. Its conclusion with respect to urine testing is that:

"Testing of drugs or drug metabolites in urine is only of qualitative value in indicating some prior exposure to specified drugs. Inferences regarding the presence or systemic concentration of the drug at the time of driving or impairment from drug use are generally unwarranted." (Emphasis Added)

In light of the scientific evidence, the Board concludes that there is no substantial evidence that THC concentrations in an employee's urine at or above any particular level directly establish that the employee was "under the influence" or otherwise impaired by the drug.

Some studies indicate that interference with performance of a complicated mechanical task (piloting an airplane) continues for a period of up to 24 hours after use, quite a bit longer than the marijuana user's perception of diminished ability. Those studies indicate further that both the user's perception and

motor skills may be diminished. Such studies indicate, within the limits of the research, that THC-caused impairment, for purposes of the ability of railroad operating employees to perform their duties, extends for a period of time beyond the immediate, post-ingestion "high".

The Board believes that consumption of THC within a relatively short time of an incident would constitute evidence of impairment within the meaning of Rule G.

THC Concentration in Excess of 100 ng/ml
as Indication of Time of Consumption
or Chronic Nature of Consumption

The Carrier argues that THC concentration in excess of 100ng/ml constitutes proof per se of impairment. The level of THC concentration in claimant's specimen would, in the view of the Carrier, be either the result of consumption of marijuana a short period of time before the test or of chronic marijuana usage. Either instance, argues the Carrier, equals impairment.

The Board is persuaded that proof of marijuana consumption a short time before the incident would constitute evidence of impairment. In addition, scientific literature acknowledges the possibility of impairment as a result of long-term, chronic marijuana use. However, the record in the instant case yields no direct evidence of the time or manner of claimant's use. There is no evidence that claimant ingested the THC while subject to duty or shortly before or that he was a chronic user.

The Carrier would have the Board infer from the level of THC in the sample either recent use or chronic use. The Board is not persuaded that the factual record supports that inference. The scientific literature with respect to the relationship between THC concentration and marijuana use on which the Carrier relies demonstrates only that THC concentration in bodily fluids increases following ingestion and thereafter declines over time following use. It also establishes that different individuals appear to metabolize THC at different rates and to excrete it at different levels.

According to an explanatory exhibit accompanying Dr. Evans' Affidavit, typical low and moderate users of marijuana (1-4 "joints" per week) produce positive EMIT results (at the 20ng/ml threshold) for 3-5 days after discontinuing use. One Article ["The Metabolism of Delta-9 Tetrahydrocannabinol and Related Cannabinoids in Man", Wall and Perez-Reyes, 21 J.Clin. Pharm. 178S (1981)], indicates at page 185S that THC concentration in urine peaks approximately 24 hours following intravenous administration and remains at or above the 6 hour post-injection level until approximately 48 hours following administration.

Review of the other scientific evidence provided by the parties leads to the conclusion that there is no reliable way to deduce from a positive EMIT test at the 100 ng/ml level either that claimant consumed THC within a short period of time before the incident or that he was a chronic user.

Thus, the Board concludes that, in the instant case, a correlation between test results and impairment, even within the time parameters of the pilot study, has not been established, per se, by positive test results at the 100 ng/ml level. Any conclusion as to claimant's impairment based either on marijuana consumption on duty or immediately before coming on duty or on possible long-term, chronic consumption would be speculative. Such speculation is not sufficient to support discipline.

Employee Conduct as Evidence of Impairment

An employee's ability to perform the duties of his position can, in part, be measured by the employee's appearance, behavior, speech, and other observable characteristics. Observation or testing which might reveal lack of coordination or other physical symptoms, slurred speech, disorientation, or inappropriate responses or behavior would reinforce positive test results and, together, might establish the cause of an employee's lack of attention. In the instant case, as indicated, the Carrier's observations of and conversations with claimant following the accident revealed nothing unusual about claimant's appearance, conduct, or speech.

The Carrier argues, however, that the incident itself - characterized by unexplained inattention to duty - constitutes such corroborative evidence. The Board acknowledges that some incidents may point toward employee impairment, and has previously held that claimant's culpability in the incident justified testing. The Board concedes that it is troubled by the nature of claimant's conduct in the incident.

Ultimately, however, the Board is not convinced that the circumstances of the incident constitute substantial evidence of impairment. Evidence of inattention to duty is not direct evidence that an employee is "under the influence". Such inattention may have causes other than drug use, or no cause at all.

The Carrier's policy states that it will remove an employee from service when circumstances warrant. Such circumstances clearly would include indication or belief that the employee is impaired. In the instant case, however, the Carrier chose not to remove claimant from service as a result of the incident, undercutting the Carrier's after-the-fact characterization of the incident. As the Special Board of Adjustment Number 925 (Kasher,

Chairman) observed in its Award Number 22, "[t]he fact that claimant was allowed to return to duty after his testing demonstrates that he was deemed capable of performing his duties in a safe and conscientious manner by Carrier officials."

The evidentiary standard to sustain violation of Rule G is markedly higher than that necessary to justify testing the employee. The Board concludes that neither the incident nor claimant's conduct thereafter constituted substantial evidence of impairment within the meaning of Rule G.

Prior Cases on the Property

The parties cited to the Board three prior cases on the property which have analysed and decided claims arising from drug testing. In Award Number 22 of SBA No. 925, the Board concluded that the Carrier had failed in its obligation to submit substantial and convincing evidence that claimant was "under the influence". A positive test for THC did not, the Board held, establish impairment. The Board notes that the procedures of SBA No. 925 did not include submission of scientific support for the positions of the parties. Further, the test results in that case contained a specific statement that they did not indicate impairment.

In Award No. 21 of PLB No. 3715, the Board sustained claimant's discharge for violation of Rule G, following positive tests for cocaine metabolites and amphetamines, the testing for which followed an operating accident. The apparent, though unstated, basis for the award in that case is that claimant was "under the influence" of cocaine and/or amphetamines, based on the positive test results and his conduct in the accident.

Neither the factual record nor the analytical basis for Board 925's determination in that case are stated, although there are obvious differences between the pharmacological effects of cocaine and amphetamines and the nature of impairment produced thereby, as compared with THC. The conclusory nature of the Opinion provides this Board little guidance.

In Award No. 14 before the same Board, discussed above, claimant's discharge for violation of Rule G was upheld, based upon positive tests for THC (including confirmation by GC/MS, although the level of THC detected by the confirmatory test is not stated in the Opinion). Claimant in that case admitted "occasional" use of marijuana and further admitted using marijuana on June 23rd before the triggering accident on the morning of June 25th. Those admissions possibly raised in the Board's mind inferences of both chronic use and proximate use; it is not possible to tell from the Opinion.

Award Number 14 is distinguishable from the instant case, in that neither repeated nor pre-incident consumption of marijuana were admitted by the claimant herein or established by the record. In addition, as indicated in the foregoing discussion, this Board does not accept the apparent conclusion of the prior Board that marijuana users are "stoned" and impaired, all the time.

The Board notes, in addition, that in the Awards of PLB 3715, the Carrier submitted scientific evidence in support of its position, but the Organization did not. Thus, the cases before the present Board are the first on the property in which both sides have made full presentations of the scientific evidence in support of their respective positions.

The prior Rule G violations of claimants in the PLB 3715 cases may have provided a basis to doubt any denial of drug use in those cases and may have reduced the value of mitigating circumstances. However, in the absence of violation of a "last-chance" agreement resulting from a prior Rule G violation, the Carrier's burden to prove impairment remains the same, whether or not the violation charged is claimant's first.

The Board does not find the prior cases on the property dispositive of the instant case, nor do the cases offer a convincing rationale upon which to base a conclusion that claimant was "under the influence".

Conclusion

The Carrier is engaged in a comprehensive effort to end employee drug use. It has a number of tools to help it do so, including use of drug tests for probable cause. This Board believes that, in instituting its probable cause testing policy, the Carrier attempted to act in good faith to respond to an urgent and difficult problem.


Railroad operating employees have an obligation to conduct themselves so as to ensure that they are fully fit for duty. Claimant's probable use of drugs at sometime in the past may have compromised that obligation, and the foregoing discussion should not be read to approve or permit his conduct.

The Board holds, however, that when the Carrier chose to discharge claimant for being "under the influence" of THC, based on positive drug tests, it bore the same burden as in other discipline cases of proving impairment by substantial and convincing evidence. The Board concludes that the Carrier has failed to meet that burden. Accordingly, the claim must be, and it hereby is, sustained.


AWARD: The claim is sustained. The Carrier is directed to remove the censure from claimant's record, to reinstate him to duty with seniority unimpaired, and to make him whole for wages and benefits lost during the time he was out of service. The Carrier shall make the Award effective within 30 days from the date hereof.

The Board will retain jurisdiction of the claim for a period of 60 days from the date hereof in order to allow the parties to bring before the Board differences which might arise in how the Award should be implemented. Any such differences shall be presented in writing to the Board, and the Board would thereupon establish a procedure for presentation and resolution of the dispute.


^{G.S/WTT}
Dated this ~~30~~th day of January, 1987.



M. David Vaughn, Chairman and Neutral Member



G. L. Shire, Carrier Member
D. S. H. T.



W. T. Pearl, Employee Member