

PUBLIC LAW BOARD NO. 4571

PARTIES) UNITED TRANSPORTATION UNION (T)
TO)
DISPUTE) ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"Claim of Kirk Yard Yardman Mr. S. A. Lewis be adjusted for reinstatement to the service of the Railway with pension, vacation and seniority rights unimpaired in addition for all time lost as a result of an investigation held May 20, 1987."

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Claimant was a Switchman on a Miscellaneous Transfer assignment which had become involved in a derailment at about 12:50 A.M. on May 12, 1987. The derailment was determined by Carrier to be a reportable accident under established regulations of the Federal Railroad Administration (FRA). In this respect, there were two personal injuries and, in addition, damage to rail and equipment which was estimated by Carrier to exceed the \$5,200 threshold for a reportable incident.

On the basis of the foregoing determinations, Carrier proceeded to direct all crew members to submit to a urinalysis test on the basis of the "reasonable cause" provisions of Part 219 - Control of Alcohol and Drug Use, Subpart D - Authorization to Test for Cause, of the Code of Federal Regulations. In pertinent part the sections invoked by Carrier read:

"Subpart D -- Authorization to Test for Cause

Section 219.301 Testing for reasonable cause.

(a) Authorization. A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing, or both, to determine compliance with Section 219.101 of this part of a railroad rule implementing the requirements of Section 219.101. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service.) The provisions of this subpart apply

only when, and to the extent that, the test in question is conducted upon the authority conferred by this section.

(b) Reasonable cause for breath tests. The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) Reasonable suspicion. * * * * *

(2) Accident/incident. The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) Rule violation. * * * * *

(c) Reasonable cause for urine test --

(1) Accident/incident and rule violation. Except as provided in paragraph (c)(2) of this section, each of the conditions set forth in paragraphs (b)(2)('accident/incident') and (b)(3)('rule violation') of this section as constituting reasonable cause for breath testing also constitutes reasonable cause with respect to urine testing.

(2) Reasonable suspicion. * * * * *."

Claimant was transported to the US Steel Dispensary, where he was directed to provide a urine sample for drug and alcohol testing. This sample was then sent to the MetPath Central Laboratory, Wood Dale, Illinois, for analysis. Claimant's sample was reported to have tested positive for the chemical THC, or an active chemical ingredient in marijuana.

Upon its receipt of the test results from the Laboratory, Carrier directed Claimant report for a formal hearing. This hearing was held on May 20, 1987. Claimant was thereafter advised by letter dated May 27, 1987 that it had been determined that he was guilty of violation of Rule "G" and that he was therefore dismissed from all service of the Carrier.

There is no question that both the Laboratory screening report, dated May 13, 1987, and its confirmation report of May 14, 1987, show that Claimant tested positive for THC. The follow-up report stated confirmation "outside established reference range" was by means of GC/MS (Gas Chromatography/Mass Spectrometry). This is reportedly the most scientifically-recognized method currently capable of providing quantitative data specific to the actual atomic weight of each drug in a specimen and the metabolites in a

blood sample.

The above findings notwithstanding, study of the record reveals that Carrier failed to properly provide Claimant full benefit of testing procedures set forth by the FRA in holding Claimant to be in violation of Carrier's Rule "G".

Section 219.305(d), Urine test procedures and safeguards, of the FRA regulations reads:

"(d) In any case where a urine test is intended for use in the railroad disciplinary process, the employee shall be given the opportunity to provide a blood sample at the independent facility for analysis by a competent laboratory."

At the company hearing, Claimant said that when he asked to have a blood test that "the lady told me at the Dispensary, they do not give blood tests there." For reasons not explained in the transcript, Claimant's testimony in this regard went unrefuted, as did further testimony to the extent that both this lady, who Claimant identified by name, and her helper appeared confused or uncertain as to how the testing procedures were to be conducted. Certainly, in view of Claimant having stated that he was at the Dispensary for approximately three hours it would seem that if there was any question about Claimant's request to have a blood test or what tests were required under FRA procedures, there was ample time for the Dispensary personnel to have made appropriate inquiry about such matters before releasing Claimant. Moreover, the Dispensary personnel could have been called, but were not, to offer testimony at the company hearing if there was reason to doubt the veracity of Claimant's several statements.

As the FRA has set forth in Section 219.305(b), Urine test procedure and safeguards, Carrier was responsible for establishment of appropriate procedures. This section reads:

"(b) The railroad shall establish procedures with the medical facility and the laboratory selected for testing to insure positive identification of each sample and accurate reporting of laboratory results."

Study of the record also reveals that the Laboratory test reports did not fully meet the requirements of Section 219.307, Standards for urine assays, of the FRA regulations. Subsection (c), parts (iii) and (iv) stipulate that the railroad shall ensure that the laboratory reports will show "the sensitivity (cut-off point) of the methodology employed for confirmation," and, "any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test" As mentioned above, the Laboratory reported only that confirmation was outside the established reference range. There was no reference on the report as to what constituted the cut-off point

of the methodology employed for confirmation.

The record also reveals that at the company hearing Claimant had said that upon advice of his union representative the day following the Carrier test, he arranged for a urinalysis and blood test from a private laboratory. In this connection, Claimant introduced into the hearing record a report of a urine and blood test administered at St. Mary's Hospital in Hobart, Indiana on May 14, 1987. This report stated that Claimant tested negative for the presence of alcohol and that no drugs were detected in screening tests for what was said to be "acid drugs" and "basic drugs."

In denying the claim at the highest appeals level, Carrier, in a letter to the Organization's General Chairman, stated that the test which Claimant had administered at St. Mary's Hospital was of no value because it had been "advised" that it did not test for THC, nor could it detect THC.

This Board does not find the overall dispute to necessarily turn on this latter issue. However, the Board feels constrained to state that it believes that the hearing officer had the responsibility to question the St. Mary's Hospital report at the company hearing when all parties were present to give consideration to any needed clarification. He did not do so, but rather let the report be entered into the record as an exhibit without any question whatsoever. Moreover, even if it was to be held that valid reason existed to hold that Carrier had only become aware during the appeals procedure of information vital to a defense of its actions, the record fails to show Carrier had met a necessary burden of proof through the introduction of evidentiary statements from the Hospital during the handling of the claim on the property. As the record stands, the Carrier allegation that St. Mary's Hospital did not test for the chemical THC must be considered of no probative value and outweighed by acceptance of the St. Mary's Hospital test report into the hearing record.

Question also remains as to whether in taking Claimant to the US Steel Dispensary in Gary, Indiana, Carrier was in compliance with Section 219.305(a) of the FRA Regulations. Here it is provided:

"Urine shall be collected at an independent medical facility."

The Dispensary is a medical facility operated by Carrier's parent corporation, USX Corporation. As one representative for Claimant brought out during the company hearing, it is questionable as to whether the Dispensary may be defined as an "independent" medical facility. However, despite this Board giving recognition to the issue, it offers no determination on such matter since it was not a dispute which we find to have been fully joined on the property during handling of the instant claim.

In the circumstances, and especially in the light of the Claimant

having been denied right of a blood test, this Board believes it must be concluded that the claim be sustained. We will therefore direct that Claimant be reinstated to service with seniority and other benefits unimpaired and that he be compensated for wages lost, less unemployment compensation and other earnings, if any, received while out of service.

AWARD:

Claim sustained.



Robert E. Peterson, Chairman
and Neutral Member

Pissent

John F. Ingham
Carrier Member

H. Durward Masters

H. Durward Masters
Organization Member

Joliet, IL
December , 1988