PUBLIC LAW BOARD NO. 5022

PARTIES TO DISPUTE) TRANSPORTATION COMMUNICATIONS UNION
) NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF CLAIM

1. The Carrier acted in an arbitrary, capricious and unjust manner, and in violation of rule 24 of the Agreement, when by notice of April 3, 1989, it assessed as discipline against Claimant, Ms. W. Winston, termination from the Company's employ.

2. The Carrier shall now reinstate Ms. Winston to service with seniority rights unimpaired and compensate her an amount limited to daily wages, overtime and holiday pay, had discipline not been assessed.

3. The Carrier shall now expunge the charges and discipline from the Claimant's record.

4. The Carrier shall now reimburse Ms. Winston for any amounts paid by her for medical, surgical, or dental expenses to the extent that such payments would be payable by he current insurance provided by the Carrier. (Carrier file CHG-TCU-378, TCU file 393-C9-031-D).

OPINION OF BOARD

As a result of charges dated March 1, 1989, investigation eventually held on March 21, 1989 and by letter dated April 3, 1989 Claimant was dismissed from service for failing to follow instructions to timely submit to a drug test under the Carrier's drug testing policy.

During the period January 6 through January 15, 1989 Claimant was absent and late a number of times.[1] On January 16, 1989, Transportation Manager A. Sudano instructed Claimant to take a fitness-for-duty physical examination at Mercy Presidential Towers. While agreeing to submit to the physical examination, Claimant refused to take a drug test as requested. Sudano spoke to Claimant by phone and explained to Claimant that

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1 *See* Carrier Exh. 10 attributing Claimant with five days of absence and reporting late on two days. Claimant testified that she was off four consecutive days before returning to work (Tr. 99).

her refusal to take the drug test would be considered as a positive test result for drugs. Claimant continued in her refusal to take the drug test.[2]

Under asserted authority of the Carrier's drug and alcohol testing policy (PERS-19), by letter dated January 24, 1989 the Carrier's Medical Director Dr. J. R. Young instructed Claimant to provide a negative urine sample at the Amtrak Dispensary or, if the nurse was not available, to submit to the test at Mercy Presidential Towers, within 30 days of the date of the letter. Pursuant to the Carrier's policy, Dr. Young also gave Claimant the option of entering the Employee Assistance Program. Dr. Young further informed Claimant that if she failed to comply with his instructions, then Claimant would be subject to dismissal.

Claimant reported to the Carrier's nurse's office on February 22, 1989 to take a drug test only to find a notice stating that the nurse was on vacation. The posted notice further stated that if assistance was needed, contact should be made with the personnel office. Instead of contacting the personnel office or going to Mercy Presidential Towers as instructed in Dr. Young's January 24, 1989 letter, Claimant went home.

On February 24, 1989 Claimant called Division Manager Personnel R. Czekanski and requested to take a drug test on February 27, 1989. Czekanski denied the request and informed Claimant that she was beyond the 30 day period for complying with the previously given instructions for taking the test.

Claimant was then dismissed for failing to comply with the Medical Director's January 24, 1989 letter. This claim followed.

Rule L provides:

> Employees must obey instructions, directions, and orders from Amtrak supervisory personnel and officers except when confronted with a clear and immediate danger to themselves, property or the

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2 Claimant testified (Tr. 108-110) that within a few hours of her initial refusal to take the drug test she returned to provide a sample but was unable to do so under appropriate safeguards and eventually "told the nurse that I can't take the test, that I will let the department handle it, whichever matter they saw fit. She said fine and I left." In the end, Claimant did not submit to the test.

public. Insubordinate conduct will not be tolerated.

Rule 23(a) provides:

> (a) Employees, after completing sixty (60) calendar days of service, will not be required to submit to physical examination unless it is apparent their physical condition is such that an examination should be made.

The Organization attacks the Carrier's requirement in this case that Claimant take a drug test as part of the fitness-for-duty examination. The Organization views this drug testing requirement as "the most pernicious form of testing yet ... the selection process is totally discriminatory and subjective ... there is absolutely no criteria for who gets tested." Organization Submission at 1.

In other circumstances, the parties have litigated the propriety of the Carrier's right to require drug testing under this Agreement. *See e.g.*, PLB 4418, Awards 16, 26 and 28 holding that Rule 23(a)'s restriction imposed on the Carrier from requiring employees who have completed 60 calendar days of service to submit to a physical examination unless "it is apparent their physical condition is such that an examination should be made" prohibited the Carrier from requiring a drug test as part of return-to-duty physicals after employees were absent 30 days or more.[3] However, the Carrier's requirement of a drug test as part of the fitness-for-duty physical has not been tested under this Agreement.

Although the propriety of the drug testing question in the fitness-for-duty context has been raised by the Organization in this matter, we are unable to reach the merits of that issue in this case and therefore express no opinion on the validity of the Carrier's requirement that employees submit to drug tests as part of a fitness-for-duty examination. Here, Claimant refused to take the drug test as part of the fitness-for-duty examination and the Carrier treated that refusal as a positive test result.[4] Claimant was then given a direct

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3 *Cf.* SBA 1020, Award 21 which permitted the Carrier to require a drug test as part of the return-to-duty physical for on-board service employees absent 30 days or more under that Agreement. The difference between the return-to-duty drug testing decisions issued by PLB 4418 and SBA 1020 is that the Agreement covering the on-board service employees interpreted by SBA 1020 did not contain the prohibiting testing language limiting examinations found in Rule 23(a) of this Agreement.

4 *See* PERS-19 attached to the investigation transcript at par. V(D) ("An employee who refuses to

order to submit to a second drug test within 30 days of Dr. Young's January 24, 1989 letter. It is undisputed that Claimant did not submit to a drug test administered by the Carrier within that period. As such, Claimant was insubordinate. *See* SBA 1020, Award 22:

> The record establishes that Claimant understood the instruction and further was informed of the consequences of failure to comply with the instruction. If Claimant objected to the type of test used by the Clinic and questioned the test's reliability, nevertheless, his obligation was to comply with the instruction and protest the matter later in accord with the orderly procedures under the Agreement.

That conclusion is, by no means, one of first impression. *See*, SBA 928, Award 32; PLB 3783, Award 72; SBA 973, Awards 211 and 214.[5]

The Organization argues that because the requirement to test was invalid, the instruction to submit to the test was also invalid and, therefore, Claimant cannot be considered insubordinate. We disagree.

The Organization recognizes that its position goes against the well-accepted rule that employees must "obey now, grieve later". *See* Hill and Sinicropi, *Management Rights* (BNA, 1986), 507 ("Arbitrators have uniformly held that management is entitled to expect obedience by an employee to the directions and orders of those in a supervisory capacity, even though an employee believes that the orders, if carried out, would be unfair or would otherwise violate the labor agreement."). That rule contemplates that disagreements with supervisory instructions are to be resolved through the grievance procedure after the instruction has been followed.

However, the Organization claims that this case falls into an exception to that rule. The Organization is correct that the "obey now, grieve later" rule is not absolute. Aside from the most often litigated safety exception (which, although embodied in Rule L, is

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provide a sample or to cooperate in the testing procedures will be treated as if she/he had a confirmed positive test result.").

5 Claimant's testimony that she misinterpreted the dates in Dr. Young's January 24, 1989 letter (Tr. 124, 128, 130) is insufficient to excuse her failure to follow the directions given to her. The letter was clear. *See* SBA 928, Award 32 where a similar argument was rejected.

clearly not applicable in this case), other exceptions do exist. *See Management Rights*, *supra* at 508-511 [citations and footnotes omitted]:

> ... [T]here are some situations where an employee may engage in self-help. ... [A]n employee is not expected to obey an order that is criminal or otherwise unlawful. ... [A]rbitrators have considered additional exceptions. For example, exceptions have been urged where the company violates a provision in the contract prohibiting it from engaging in a specific act. ... [F]or the exception to apply the order "must be in such flagrant disregard of the agreement between the parties as to be oppressive of the employees' rights". An exception may also be appropriate where working and then grieving would make the very dispute covered by the grievance moot.
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> Some employees resort to self-help simply because they believe that the grievance procedure will not provide an adequate remedy. They believe, in other words, that unless they refuse the order, the subject matter of the grievance will be moot because it will be impossible for an arbitrator to restore the *status quo ante*.
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> There is no uniform solution to this problem other than to suggest that the parties take a common-sense approach and balance the competing interests.

We do not find these exceptions applicable. First, the Organization has not demonstrated that the Carrier's requiring Claimant to submit to a drug test as part of a fitness-for-duty examination and then requiring Claimant to give a negative sample within a 30 day period is criminal or otherwise unlawful so as to invoke an exception to the "obey now, grieve later" rule.

Second, the inquiry turns to the question of whether the Carrier's fitness-for-duty drug testing requirement is in "flagrant disregard" of the Agreement so as to invoke the exception to the "obey now, grieve later" rule that an employee need not follow an order that is prohibited by the Agreement. PLB 4418, Award 28, relied upon by the Organization, demonstrates when this exception applies. In Award 28 it was determined that the Carrier could not dismiss an employee for refusing to timely comply with a direction to submit to a follow-up drug test under PERS-19 because the return-to-duty drug

testing aspect of PERS-19 violated Rule 23(a)'s limitation on the administering of physical examinations. Referee Stallworth concluded for the majority (*id.* at 9-10) [emphasis added]:

> Thus, the Board must conclude that the Carrier's application of PERS 19.2 to Claimant *was specifically contrary to Rule 23(a)* of the parties' Agreement. Therefore, requiring Claimant to comply with PERS 19.2 not only violated the Agreement, but was also erroneous under the terms of PERS 19.2 itself, since those terms make PERS 19.2 inapplicable where they conflict with a labor agreement.

Therefore, in Award 28 the majority concluded that the facts in that case placed the employee's refusal to follow the instruction to timely submit to a drug test into the "flagrant disregard" of the Agreement exception to the "obey now, grieve later" rule (i.e., "specifically contrary"). That is not this case. Here, from a plain reading of Rule 23(a), we cannot say that the Carrier's imposition of a drug test as part of the fitness-for-duty examination is a flagrant disregard of the Agreement. Although we do not reach the merits of the Carrier's argument, we cannot dismiss as totally out of hand the Carrier's assertion that the drug testing requirement of the fitness-for-duty physical may fall under the exception language in Rule 23(a) which permits the imposition of physical examinations where "it is apparent their physical condition is such that an examination must be made". As shown by PLB 4418, Award 28, the return-to-duty drug testing requirement did not arguably fall into that exception language. But, authority for fitness-for-duty drug tests may fall under the Rule 23(a) exception. The argument advanced for upholding the Carrier's ability to require fitness-for-duty drug tests is that since the exception language in Rule 23(a) permits a fitness-for-duty examination (and assuming a given set of facts justifying a requirement that an employee take a fitness-for-duty examination in the first instance), the Carrier has the general authority to administer a drug test as part of the Carrier's general authority to determine the fitness of its employees. *See* SBA 1020, Award 21 where, in the return-to-duty drug testing context under the On-Board Service

Agreement as opposed to fitness-for-duty testing under this Agreement, return-to-duty drug testing was found to be a reasonable exercise of the Carrier's authority to make physical fitness determinations and was an action that was not prohibited by the language of that Agreement. In the final analysis, because of the arguments presented by the Organization on the merits of the Carrier's ability to conduct fitness-for-duty drug tests under this Agreement (again, which arguments we are unable to reach in this case), the rationale for upholding return-to-duty drug tests under the On-Board Service Agreement may not be applicable to fitness-for-duty drug tests under this Agreement. But, because of the exception language in Rule 23(a) of this Agreement which generally permits fitness-for-duty examinations, we cannot say that requiring a drug test as part of that examination is a "flagrant disregard" of the Agreement as the majority found the return-to-duty drug test to be in Award 28.[6]

Third, it cannot be said that submitting to the drug test and then grieving the matter renders the dispute moot or that the grievance procedure could not yield an adequate remedy for Claimant in the event it was determined that the Carrier could not require a drug test as part of the fitness-for-duty examination. *See* Organization Submission at 2 ("an

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6 The Organization takes exception to the fact that the hearing officer found as irrelevant testimony at the investigation concerning the basis for the decision to require the fitness-for-duty examination and hence, the drug test on January 16, 1989. In hindsight, perhaps that ruling was questionable given the current undecided status of the fitness-for-duty drug testing issue. However, we cannot say that ruling was prejudicial on the issue before us. That ruling does not change the conclusion that administering of a drug test as part of a fitness-for-duty examination is not in flagrant disregard of the Agreement in light of the exception language in Rule 23(a) which permits fitness-for-duty examinations. The evidence precluded by the hearing officer went in great part to the question of whether Claimant's condition was such that a fitness-for-duty physical was appropriate. That is a separate question from the issue in this case of insubordination for Claimant's failure to submit to a drug test within 30 days after being instructed to do so.

On this property, under this Agreement it has already been decided that an employee can refuse to take a return-to-duty drug test. PLB 4418, Award 28. The question then arises when, if ever, an employee can refuse to take a fitness-for-duty drug test. If, after the propriety of fitness-for-duty drug testing is finally adjudicated under the Agreement and if that resolution is adverse to the Carrier but the Carrier continues to require such tests, then a strong case can be made for the employee who refuses to take the test. There, after finally adjudicated, a further requirement by the Carrier that the employee must take the test can be considered a flagrant disregard of the Agreement. But, at this point, that conclusion cannot be reached. As the Organization states in its Submission at 1, "This is the first case to be arbitrated" on the fitness-for-duty drug testing issue. Therefore, until such time as the issue is resolved, the "obey now, grieve later" rule must prevail.

employee's only recourse in such a situation is to refuse to submit to the drug test. Otherwise no remedy would be possible ...."). Even if Claimant tested negative and no disciplinary action resulted, the dispute over whether the Carrier could require the drug test in the first instance could have been pursued.[7] Had Claimant submitted to the test and tested positive and if it was determined through the grievance process that the Carrier improperly required Claimant to submit to the test in the first instance, the grievance procedure is well-equipped to restore the *status quo ante*. Specifically, if a determination is made that the Carrier's drug testing requirements violated the Agreement, the grievance procedure could afford Claimant reinstatement, restoration of all lost benefits and seniority, clearing of her record and backpay.[8]

The Organization's alluding to the contention (Organization Submission at 28) that the Carrier's violation of Claimant's asserted privacy rights cannot be remedied in the grievance procedure is not persuasive to invoke application of the exception to the "obey now, grieve later" rule. Violation of asserted privacy rights are constitutional questions and not questions arising under collective bargaining agreements. *See* SBA 1020, Award 21 at 22:

> Questions of public policy, like questions of statutory interpretation and constitutional considerations, are for the courts and not for this Board. *See Alexander v. Gardner-Denver*, ... 415 U.S. [36

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7 *See e.g.* PLB 3783, Awards 195, 196 and 197 relied upon by the Organization. Those awards address the question of when the Carrier could test in accident situations. While those awards do not concern, as here, the employee who is discharged after refusing to timely submit to the drug test as instructed, a reading of those awards shows violations of that Agreement were found and remedies were fashioned in other contexts thereby supporting the conclusion that the grievance procedure can remedy the asserted kinds of violations alleged in this case. *See also*, PLB 4418, Award 16 where the employee tested negative and was made whole for missed time and expenses incurred as a result of having to take the return-to-duty examination and drug test.

8 Indeed, in other awards submitted by the Organization, full remedial relief was afforded through the grievance process where employees tested positive for drugs and the testing requirement was subsequently protested and determined to be invalid. *See* First Division Award 23993 (discharge of employee who tested positive for cocaine rescinded and employee reinstated and made whole where it was found that the carrier improperly required the employee to submit to a drug test - "Since the Carrier did not have a reasonable basis under the FRA Regulations for directing claimant to undergo urine and blood tests, we must disregard the test results"); PLB 4418, Award 26 (employee who tested positive reinstated and made whole since return-to-duty drug testing was found to be violative of the Agreement); PLB 3139, Award 87 (same result).

(1974)] at 57 ("[T]he resolution of ... constitutional issues is a primary responsibility of courts ....").

Therefore, in this forum, Claimant's asserted violation of privacy rights cannot invoke the exception to the "obey now, grieve later" rule that no adequate remedy exists for her under the grievance procedure.[9]

In sum, since Claimant refused to comply with the Carrier's instructions to submit to a second drug test within 30 days after Claimant was considered to have tested positive due to her first refusal to take a drug test as part of the fitness-for-duty examination, substantial evidence in this record demonstrates that Claimant was insubordinate. If Claimant desired to challenge the requirement that she submit to a fitness-for-duty examination; that as part of the examination she had to submit to a drug test; or otherwise comply with the instructions given to her by Dr. Young under FERS-19, Claimant's obligation was to "obey now, grieve later". The exceptions to that doctrine are not applicable in this case. To adopt the Organization's position in this case that Claimant was not obligated to comply with the instructions given to her would be an invitation to chaos as employees could then selectively decide which directions given by management they desire to follow. Therefore, taking a "common sense approach and balanc[ing] the competing interests", *Management Rights, supra*, in this case primary resort to the grievance procedure must prevail over self-help and must be the orderly method for determining the validity of the Carrier's policies - an opportunity that the parties will have in the future given the appropriate set of facts. Having found that Claimant was insubordinate, in the context of this case, we do not find that dismissal for that insubordinate conduct was either

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9 We recognize that other Boards have reached different conclusions. *See e.g.*, PLB 3139, Award 86 cited by the Organization where an employee who refused to submit to a drug test and was dismissed for insubordination was reinstated and made whole because the underlying direction to take the test was found to be lacking in probable cause. Part of the rationale for rejecting the "obey now, grieve later" doctrine was that "A grievance could hardly undo the personal humiliation and the unreasonable invasion of privacy associated with the administration of an invalid mandatory drug screening test." *Id.* at 8. While we certainly respect the opinion of that learned Board, we nevertheless disagree with the rationale because, as discussed, privacy concerns are constitutional questions and not matters arising under collective bargaining agreements and are therefore appropriately adjudicated in judicial and not arbitral forums.

arbitrary or capricious. The propriety of the Carrier's requirement that employees submit to a drug test as part of fitness-or-duty examinations is left to the parties to fight over on another day.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

V. S. Marshall
Carrier Member

J. C. Campbell
Organization Member

Chicago, Illinois
~~January 15~~, 1991
March 20,

EMPLOYEE MEMBER'S DISSENT

TO

AWARD NO. 1

OF PUBLIC LAW BOARD NO. 5022

The majority has gone to great lengths to avoid the central issue presented by this case: Does the carrier have the right to compel employees to submit to invasive, "fitness-for-duty" drug screens, absent any probable cause or standardized testing criteria?

The Board adopts the dubious position that it cannot address this issue at all, because in its eyes the claimant's refusal to submit to the drug test magically transformed the dispute to a simple insubordination case. Had the employee submitted, the Board says, then it could have reached the merits of the policy -- even if the employee tested positive. (Never mind the fact that Carrier's written policy states that an employee refusing to submit to a test will be treated as if they tested positive.)

In so finding, the Board turns its back on a legion of precedential awards which hold that it is not dismissable insubordination to refuse an improper instruction to submit to a drug test (see, e.g. Award 86, PLB 3139; Award 28, PLB 4418; Third Division Award 27802; Award 129 of SBA 924; and Award 59, PLB 4267.)

The Board also finesses the central tenet of those other awards: that no after-the-fact remedy exists for an employee who is improperly instructed to submit to an invasive drug test.

Ironically, to support its position that post-factum

remedial relief is possible, this Board can only point to cases "where employees tested positive for drugs and the testing requirement was subsequently protested and determined to be invalid" (note 8 of Award.) In such cases, the employees were made whole for lost earnings. The Board also (in note 7) refers to an employee being made whole for the time lost while waiting for the results of a return-to-work drug test, which was subsequently found to violate the instant Agreement.

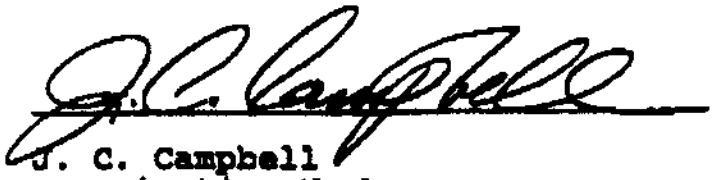
But in fitness-for-duty testing, the employee is already on the clock. The drug-free employee loses no time, but suffers the humiliation of the invasive procedure. What remedy is possible here? None whatsoever. Recently, this carrier instructed an employee who spilled tea on herself to submit to a drug test, in full view of a nurse. The employee was drug-free. No post-factum remedy was available. Yet, under this Award, she did not have the right to refuse.

As justification for this position, the Board tries to hide behind the fiction that "(v)iolation of asserted privacy rights are constitutional questions and not questions arising under collective bargaining agreements." We strongly disagree. The Board is fully aware that the courts have held that disputes over private railroad drug testing policies are minor, not major. The courts consciously passed the ball to arbitrators to decide the fairness and propriety of such policies. Most arbitrators have accepted that challenge, and have weighed privacy concerns in their determinations as to whether policies are reasonable. They have further looked at privacy concerns in the context of past practice. (In the instant case, the Organization showed that there was no past

practice of fitness-for-duty testing without cause.) This Board's rationale puts employees' privacy concerns in limbo, exempt from either judicial or arbitral review. Under this strained rationale, arbitrators could not rule on genetic testing, strip searches, and a whole gamut of invasive employer practices, and only government employees would have standing to challenge such practices as constitutional violations.

Perhaps most disturbingly, the Board is only able to pigeonhole this case as solely an insubordination case by refusing to consider the facts before it. Here, the claimant was ordered to test after a few days' absence from work. There was no reasonable suspicion of drug use. There was no standard which triggered the drug test order. Had the claimant had another supervisor, it is almost certain she would not have been so instructed. In effect, she was ordered at the personal whim of her supervisor, who was not following any articulated guidelines. Shockingly, according to this Board, the issue of why the employee was ordered to test in the first place is not even relevant or subject to review. (See Award note 6.)

For all the above reasons, this award is palpably erroneous and carries no precedential weight.



J. C. Campbell
Organization Member
April 29, 1991