

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25475
Docket No. 45819
03-1-02-1-U-2924

The First Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim in behalf Engineer T. L. Near, SS No. 341-62-1988, Union Pacific Railroad Northern Region, Council Bluffs Service Unit, that claimant be reinstated to service with full seniority and vacation benefits restored, compensated for any and all lost time, including time spent at the investigation, and the time claimant's Locomotive Engineer's Certificate was improperly revoked by the Union Pacific Railroad, reimbursed for any and all medical expenses incurred while claimant was dismissed from service, that claimant be removed from the Union Pacific Discipline Policy and that this incident be expunged from claimant's personal record when claimant was investigated on April 26, 2001 on the following charge:

'that you allegedly used an illegal or unauthorized drug as evidenced by the positive test result of the FRA random test administered to you, in accordance with the Union Pacific Drug and Alcohol Policy (effective March 1, 1997) at 3:00 a.m. on January 25, 2001 at Clinton, Iowa, while you were employed as an Engineer.

This would be a violation of Union Pacific Operating Rule 1.5 of the General Code of Operating Rules (effective April 2, 2000), Union Pacific Drug and Alcohol Policy (effective March 1, 1997) and the Transportation Code of Federal Regulations title 49 Part 219 Section 102(drug)."

FINDINGS:

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

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

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

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

On January 25, 2001, the Claimant, an Engineer (as well as the Conductor on his crew), was selected to undergo a random Federal Railroad Administration (FRA) drug screening. Inasmuch as the results of the drug tests were positive for marijuana, the Carrier convened an Investigation to determine if the Claimant violated Carrier Rule 1.5 (Rule G). The Carrier provided the Claimant with an opportunity to enter the Bypass Program but the Claimant declined.

Prior to the Investigation, on February 11, 2001, the Organization requested that the Carrier provide the specimen collector and certain laboratory personnel as a witness at the upcoming Investigation. In addition, the Organization's February 11, 2001 correspondence had a litany of 112 categories of documents that the Organization demanded the Carrier to produce. The Carrier denied the Organization's request for witnesses and documentation stating that a manager from the Carrier's Alcohol and Drug Testing Department would appear at the Investigation. Indeed, the Senior Manager of Alcohol and Drug Testing testified at the Investigation. On March 22, 2001, the Organization reiterated its request that the collector be produced as a witness at the Investigation. The Carrier again denied the Organization's request.

At the April 26, 2001 Investigation, the Organization repeated its request that the collector be called as a witness. The Organization based its request on the basis that alleged improprieties occurred during the collection process.

At the Investigation, the Claimant and his Conductor testified that the collector did not first review with them the test instructions including the steps to insure the chain of custody of the urine sample. However, the Claimant conceded that he had been tested in the past and so, he was familiar with the testing procedures.

The Claimant and the Conductor also testified that the collector had them complete all the test paperwork, including initialing the specimen labels, before they provided urine specimens. Federal regulations specifically require that the individual being tested places his initials on the tamper proof labels after the labels are affixed to the specimen bottles containing the individual's urine.

The Conductor testified that the restroom, where he gave the specimen, was not adequately prepared because, for example, the collector had not dyed the toilet water blue. The Claimant was vague about the condition of the restroom where he voided.

Next, because the Claimant could not urinate immediately, there was a delay in producing his sample. The Claimant left the immediate area to drink water and smoke a cigarette and so, for a time, he was out of the collector's view. Proper procedures require the individual being tested to remain within the collector's vision, at least, until he enters the secured lavatory.

After the Claimant was able to urinate, he handed the cup to the collector and, according to the Claimant, he resumed dressing in the room. When he came out, the collector was already pouring the liquid into two separate containers (for a split sample). The Claimant testified that he walked away for a few moments and when he returned, the bottles were already in a sealed, plastic bag. Thus, the Claimant emphasized that he did not see the collector paste the labels on the specimen bottles or place the bottles into the transportation bag. Procedures require the individual being tested to watch the complete urine packaging process.

At the Investigation, the Senior Manager of Testing stated that he was upset and unhappy with the manner in which the collector obtained and handled the samples given by and the Conductor. Indeed, the Senior Manager apologized for the collector's improper activities. Nevertheless, the Senior Manager declared that none of the collection problems nullified the test. The Senior Manager elaborated

that the improprieties did not compromise the validity of the test even though the procedure was not accomplished in accord with applicable FRA Regulations.

On or about January 30, 2001, the Claimant and the Carrier were notified that the sample, with the labels having the Claimant's initials on them, tested positive for the marijuana metabolite. The Claimant requested that the split sample be tested and the result was positive for THC. The testing laboratories conducted initial and confirming tests on both samples.

Following the Investigation, the Carrier assessed the Claimant a Level 5 on its Upgrade Discipline Policy, which constituted permanent dismissal. The Carrier also revoked the Claimant's certification as a Locomotive Engineer.

The Claimant appealed the certification revocation to the Locomotive Engineer Review Board (LERB). In a decision dated February 6, 2002, the LERB reversed the Carrier's decisions on the grounds that the Claimant suffered "substantial harm" due to the Carrier's failure to call the collector as a witness at the Investigation.

While the Organization urges the Board to follow the LERB's ruling, the LERB's decision is a factor in our evaluation of the evidence in the record but it is not the conclusive or determinative factor. The LERB's decision is the final ruling concerning federal drug policy and the FRA Regulations, but it is not binding on the Board. However, LERB's decision is some evidence in support of the Organization's argument that the collection process was so defective that the test results must be disregarded.

At the onset, the Board must accept the renditions of the Claimant and his Conductor as factual since the Carrier failed to call the collector as a witness. The Senior Manager could testify about how the Carrier generally conducts a collection but, because he was not present when the Claimant's urine was collected, he cannot refute the Claimant's version of what transpired. Special Board of Adjustment No. 235, Award 3145.

Besides the LERB decision, the record reveals a series of substantial irregularities in the collection procedure. Even though the Claimant had taken drug tests in the past, he must be informed of the proper procedures for the test so that he can safeguard his own rights. Also, and of a secondary concern, the

collector's notification of the procedures to the employee undergoing the test encourages the collector to strictly abide by mandated procedures.

This may otherwise have been a harmless error, but when coupled with numerous lapses in the procedure, this small defect becomes more significant.

The first flaw in the procedures is that the Claimant left the area several times before providing the sample.

The next defect in the collection procedure was the collector's failure to permit the Claimant to initial the labels on the specimen bottle after the labels had been affixed to the bottles. In this case, the Claimant filled out all of the paperwork and initialed the labels, long before he even voided a sample.

Next, the Claimant did not see the collector paste the chain of custody labels, containing his initials on the specimen bottles. Indeed, the record reflects that the Claimant never saw the labels with his initials on the bottles since the bottles were already in the plastic bag when the Claimant returned to the room.

The Senior Manager of Alcohol and Drug Testing was so concerned about the sloppiness of the collection procedures that he apologized for them. However, he thought that none of the defects affected the validity of the test. In all probability, the Senior Manager may be correct, but the Board cannot foresee all of the possible, albeit highly unlikely, occurrences that could adulterate a urine sample. In addition, the collection procedures are in place for a reason and it is good policy to induce the Carrier to strictly comply with the procedures. Stated differently, the Board cannot overlook the irregularities because it cannot be absolutely certain that none of the irregularities could have invalidated the integrity of the urine sample. Indeed, in Public Law Board No. 5731, Award 7, the Board disregarded the positive drug test results where the employee undergoing the test initialed the tamper proof labels before the labels were affixed to the specimen bottles. The Carrier must strictly comply with all regulations and procedures when collecting urine specimens to erase any doubts about the propriety of the test results.

In this case, many of the irregularities might have been explained, ameliorated, or ultimately found to be harmless error if the Carrier had called the collector as a witness at the Hearing. If the Carrier had called the collector to the Investigation, the collector might have explained the reason for deviating from the

procedures or he might have been able to provide sufficient testimonial evidence (or documentary evidence) that the defects in the procedures were totally harmless.

The Organization repeatedly and persistently implored the Carrier to call the collector to the Investigation but the Carrier improvidently rejected the request. The Carrier acted at its own peril by failing to call an essential witness to the Hearing. The Carrier's failure to call the collector deprived the Claimant of a fair and impartial Investigation in violation of Section 2 of the System Disciplinary Rule. The LERB's decision buttresses our conclusions herein.

The Carrier shall reinstate the Claimant to service with his seniority unimpaired and with pay for time lost.

AWARD

Claim sustained.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 19th day of September 2003.