CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 23993
Docket No. 43605
90-1-88-1-B-1839

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(The Boston and Maine Railroad Corporation

STATEMENT OF CLAIM:

"Claim of Engineer David J. Avery for: the rescinding of the discipline of discharge as outlined in the Notice of Discipline dated August 13, 1987; restoration to service with seniority rights unimpaired; and pay for all time lost as a result of the discharge, with proper adjustment of Railroad Retirement credits and vacation qualifying time."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Pursuant to written notice, the Carrier timely convened an Investigation on July 28, 1987 to determine if Claimant had violated Rule G on January 25, 1987.

Claimant, who was the Engineer on Train POSE, was about to conclude a lengthy tour of duty on the morning of January 25, 1987, when the train collided with a cut of cars fouling the main line at Fitchburg, Massachusetts. Claimant's engine tipped over on its side. Fortunately, there were no fatalities but Claimant and other crew members were injured.

The General Road Foreman arrived at the accident scene as the crew was emerging from the tipped over engine. The Road Foreman spent ten minues at the accident scene before transporting Claimant and the crew to the hospital to undergo urinalysis and blood tests. The Road Foreman declared that the basis for directing Claimant to take drug and alcohol screenings was Federal Railroad Administration (FRA) Regulation Subpart C, Section 219.201-(a)(1) and Section 219.201(a)(2)(i) or (ii). Specifically, the Road Foreman testified, at page 10 of the transcript as follows:

"Hearing Officer: So in recap Mr. Peterson, because of the derailment you took the crew to the hosptial for treatment of their injuries and because the damage, I think you said was in excess of $50,000 that triggered the need for a tox test. Is that correct?

Mr. Peterson [Road Foreman]: That's correct. I also figured that damage was over $500,000 and that also required a "tox" test too. Two criteria I felt."

The Road Foreman indicated that he did not inquire into the cause of the accident before taking Claimant to the hospital.

The record contains a conflict between Claimant's testimony and the Road Foreman's observations concerning the events at the hospital. Claimant related that the hospital personnel were extremely busy and did not follow test procedures. Claimant recalled that he urinated into a cup and then the doctor took the urine sample out of Claimant's sight. A couple of minutes later, Claimant signed a test tube-like container filled with urine. The Road Foreman testified that the doctor collected the urine samples in an orderly fashion, from one crew member at a time. The doctor immediately transferred each sample to the proper receptacle for mailing to the laboratory.

In a report dated May 7, 1987, which was received by the Carrier on June 5, 1987, the Center for Human Toxology (CHT) informed the Carrier that Claimant's blood and urine samples had tested positive for benzoylecgonine, a metabolite of cocaine. The report indicated that the amount of benzoylecgonine measured in Claimant's blood was 234 mg/ml and the concentration of the metabolite in Claimant's urine amounted to 3,770 mg/ml. The concentrations substantially exceeded the FRA thresholds of 50 ng and 300 ng for the presence of cocaine in the blood and urine respectively. The initial screen was confirmed by gas chromatography with a flame ionization detector.

The Carrier's Director of Personnel Administration explained the reason for the lengthy time lapse between the date of the accident and the Carrier's receipt of the test results. Claimant's specimens were originally sent to the Civil Aereo Medical Institute (CAMI) which was the designated testing facility pursuant to FRA Regulations. The Organization submitted evidence (at the Investigation) that CAMI had falsified test results and lacked adequate equipment to perform drug and alcohol screening tests. Because of the CAMI's unreliability as well as defects in its tests, the Department of Transportation terminated its contract with CAMI on March 31, 1987, and simultaneously designated CHT as the approved laboratory. Thus, Claimant's urine and blood specimens were stored at CAMI for some time and then sent to CHT. The Director of Personnel Administration related that he spoke with an FRA Assistant Counsel who assured the Director that the chain of custody over Claimant's specimen was properly documented and unbroken. Aside from the Director's double hearsay testimony, the record does not contain any other evidence demonstrating a secure chain of custody over Claimant's specimen between January 25, 1987 and May 7, 1987.

Claimant denied ingesting cocaine either before going on duty or while on duty on January 24 and 25, 1987. Claimant further asserted that he has never taken any controlled substance. Claimant submitted character evidence to support his disavowal of drug usage. Claimant presented affidavits from a lcoal police chief and selectman attesting that they knew Claimant for six years and, to their knowledge, Claimant never used drugs. In another statement, a licensed psychologist attested that there was nothing in his experience of treating Claimant for his accident injuries suggesting that Claimant was a chronic intravenous drug abuser. The Road Foreman related that Claimant appeared "shaken" at the accident scene but so were the other crew members. The Road Foreman did not observe any ususual conduct by Claimant. Claimant appeared and acted normally. The POSE conductor and brakeman testified that Claimant operated the train in a very professional manner and he did not exhibit any symptons of drug impairment.

As of the date of the Investigation, Claimant remained out of service due to his injuries stemming from the collision.

On August 13, 1987, the Carrier discharged Claimant for violating Rule G on January 25, 1987.

Subpart C, Section 219.201 of the FRA Regulations states:

Event for which testing is required.

(a) List of events. On and after December 1, 1985, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraph (a)(1) through (3) of this section:

(1) Major train accident. Any train accident that involves one or more of the following:

(i) a fatality;

(ii) Release of a hazardous material accompanied by --

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $500,000 or more.

(2) Impact accident. An impact accident resulting in --

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more.

(3) Fatal train incident. Any train incident that involves a fatality to any on-duty railroad employee.

(b) Exception. No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.

(c) Good faith determinations. (1) The railroad representative responding to the scene of the accident/incident shall determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative shall consider the need to obtain samples as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required deteminations.

(2) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(3) A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but its later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present."

Section 219.203(a)(3)(i) contains an exception which excludes an employee from being tested in the event of an impact accident or fatal train incident as referred to in Section 219.201. Section 219.203(a)(3)(i) reads:

(3) An employee is excluded from testing under the following circumstances:

(i) In any case of an accident/incident for which testing is mandated only under 219.201(a)(2) of this subpart (an "impact accident") or 219.201(a)(3) ("fatal train incident"), if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident.

II. THE POSITIONS OF THE PARTIES

At the onset, the Carrier asserts that this Board lacks jurisdiction to interpret and apply the FRA Regulations. Section 219.9(a)(3)(5) expressly states that the Department of Transportation has the authority to determine if any covered employer has complied with the testing regulations. Since the Carrier premises its defense exclusively on the FRA regulations, this dispute can only be adjudicated by the FRA.

Alternatively, the Carrier contends that it strictly adhered to the FRA Regulations. The Carrier emphasizes that this case does not present a discretionary, probable cause trigger for the drug testing. According to the Carrier, the Road Foreman determined, in good faith, that the property damage probably amounted to $500,000 and definitely exceeded $50,000. The Carrier submits that because the collision was both a major train accident and an impact accident as defined by Section 219.201 of the regulations, the Carrier was legally required to test Claimant. Also, the Hearing Officer properly discounted Claimant's testimony about the alleged chaotic conditions at the hospital. The Road Foreman observed the physician secure Claimant's urine sample in conformity with the regulations. Next, the Carrier points out that the Organization did not come forth with any evidence demonstrating that someone tampered with Claimant's samples. The FRA conducted an Investigation into the chain of custody over Claimant's specimens and concluded that the chain had been maintained. The Carrier deems it illogical for the Organization to argue that the high levels of the cocaine metabolite found in Claimant's blood and urine means that Claimant is innocent of breaching Rule G. The results demonstrate guilt, not innocence. Finally, the Carrier contends that since the Road Foreman could not determine who was at fault when he arrived at the accident scene, Claimant did not fall within the test exemption.

The Organization argues that (1) the Carrier failed to show any legal necessity to test Claimant, (2) the Carrier did not comply with FRA Regulations, and (3) the Carrier disregarded overwhelming objective evidence exculpating Claimant from the Rule G charge. The Organization first contends that the Carrier failed to demonstrate that testing Claimant was mandatory under FRA Regulations 219.201. The Organization points out that the Carrier did not present any evidence substantiating the Road Foreman's bare assertions that the property damage amounted to $500,000 or even the lower threshold, $50,000, for an impact accident. Since the Investigation was convened several months after the incident, the Carrier should have brought in records showing

that the amount of damage exceeded the two threshold levels. Next, the Organization argues that, if the Road Foreman reasonably inquired into the cause of the accident, he would have easily ascertained that, inasmuch as a cut of cars was fouling the main line, Claimant was not culpable for the accident. The Road Foreman admitted that Claimant was the key witness on behalf of the Carrier in the disciplinary Investigation assessing blame on the train crew that left the cars fouling the main line. Thus, the Organization concludes that Claimant was excluded from compulsory drug testing pursuant to FRA Regulation, Section 219.203(a)(3)(i). Also, the Organization aruges that the Carrier failed to comply with the proper procedures for securing Claimant's urine sample both at the hospital and at CAMI. The urine was taken out of Claimant's sight at the hospital. According to the Organization, the Carrier fell far short of proving an adequate chain of custody over Claimant's blood and urine samples. Claimant's sample was stored at a disreputable laboratory for two months. The Organization vigorously avers that the hearsay statement allegedly uttered by an unidentified FRA employee does not validate the chain of custody. Last, the Organization advocates that most of the objective evidence in the record conclusively shows that Claimant did not have cocaine or any cocaine metabolite in his system on the day of the accident. The Organization argues that the Carrier relied solely on the test results while ignoring the sworn character evidence that Claimant had a drug free reputation. The Organization points out that the Carrier disregarded observations of witnesses, including those of the Road Foreman, at the accident scene that Claimant did not show any symptoms of being impaired. The concentrations of the cocaine metabolite allegedly found in Claimant's specimens were so high that medical evidence, furnished by the Organization indicates that Claimant would have been clinically dead. The Organization submits that for Claimant's urine and blood to test positive for cocaine at such high levels, Claimant would have had to be ingesting prodigious amounts of cocaine at the accident site.

III DISCUSSION

Although the Carrier did not raise its jurisdictional argument on the property, it may properly contest our jurisdiction at any point during the adjudicatory process since the issue cuts directly to this Board's power to decide this Claim. However, after careful consideration, we find that we have jurisdiction over this case. This Board is reluctant to interpret external law. Nevertheless, we can take judicial notice of the FRA Regulations on drug and alcohol testing when both parties rely on those regulations and an Interpretation of the regulations is inextricably related to determining if the Carrier presented substantial evidence proving Claimant committed the charged offense. The regulations, themselves, do not vest the Department of Transportation with exclusive jurisdiction to interpret the regulations. Indeed, Section 219.605(d) indicates that the regulations are compatible with discipline procedures contained in railroad collective bargaining agreements. In addition, General Question and Answer No. 22 under Appendix 4, Part 219, Subpart D states that all disputes regarding pay and benefits will remain subject to Section 3 of the Railway Labor Act. This Board, therefore, has at least concurrent jurisdiction (and, perhaps, primary jurisdiction) with the FRA to pass judgment on whether the Carrier presented substantial evidence to prove Claimant committed the charged offense even if, to reach a decision, we must consider the FRA regulations. See also First Division Award 23911.

Our analysis of the merits of this case commences with whether or not the FRA regulations mandated the Carrier to, in turn, compel Claimant to undergo drug and alcohol tests. For the reasons specified below, we find the accident was an impact accident as opposed to a major train accident. The Road Foreman inconsistently testified that the property damage amounted to both $50,000 and $500,000. When there is a collision between an engine and boxcar causing the engine to tip over, there is the presumption of some property damage, but it does not necessarily amount to $500,000. Absent additional evidence concerning the extent of property damage, we find that the Carrier official did not make a good faith determination of the damage at the accident scene. This Board realizes the officer must quickly estimate the damages. In this case, the record only shows that Claimant's engine landed on its side. There was no elaboration on track damage and the extent of visible damage to either the engine or the box car. Absent some explanation, the official's bare assertion that damage amounted to $500,000 is insufficient to show the incident was a major train accident. Nonetheless, the incident was an impact accident.

The next question is whether Claimant should have been excluded from the testing under Section 219.203(a)(3)(i). The Carrier officer was obligated to make a good faith Investigation, as permitted by time and circumstances, to ascertain who was culpable for the accident. If the good faith detemination proviso in Section 219.201(c) did not also apply to Section 219.203(a)(3), the exclusion would be superfluous. Officers could simply avoid making a determination of employee fault so they could test everyone in the vicinity of the accident. This Board holds that if the Road Foreman had made even a quick, cursory inquiry into the cause of the accident, he would have easily determined that the train fouling the main line was the cause of the accident. There is no evidence in the record that the Carrier officer even asked Claimant or any other crew member what happened. Like the property damage estimates, we acknowledge that Carrier officers must quickly decide if testing is warranted and who is potentially culpable for the accident. They lack the benefit of hindsight. Thus, this Board cannot consider the fact that an Investigation held after the accident revealed that another crew was responsible for the accident. However, the FRA Regulations, require Carrier officials to balance the need to promptly test employees before alcohol or drugs dissipate from the employee's system with first attempting to render a good faith determination, to the extent feasible, of the cause of the accident. As discussed earlier in this paragraph, the record does not contain any evidence that the Carrier officer herein engaged in even a cursory inquiry into the cause of the accident.

In summary, Claimant was exempt from the mandatory testing. Since the Carrier did not have a reasonable basis under the FRA Regulations for directing Claimant to undergo the urine and blood tests, we must disregard the test results. Therefore, the Carrier did not present substantial evidence proving that Claimant violated Rule G. Claimant should be reinstated to service with back pay from the time that he would have returned to work after recovering from his injury.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of May 1990.

CARRIER MEMBERS' DISSENT
TO
FIRST DIVISION AWARD 23993, DOCKET 43605
(Referee LaRocco)

The Majority has held that where a Carrier tests an employee because it believes that an FRA Rule requires that the employee be tested, this Board has jurisdiction to interpret the Rule to determine if such requirement exists. In our view, this Board does not have jurisdiction to make such interpretation.

The Majority reaches its conclusion on the bases that the FRA Rules do not specifically preclude this Board from making an interpretation and, further, that the FRA, in a response to General Question and Answer No. 22, "stated that all disputes regarding pay and benefits will remain subject to Section 3 of the Railway Labor Act."

With respect to the Majority's first point, the fact that the FRA did not specifically preclude this Board from determining what is required under an FRA Rule hardly lends comfort to a conclusion that the FRA intended that this Board have such authority. We believe it is more likely that the FRA did not include such preclusion because it never imagined that such eventuality would occur.

The Majority's second point is that the FRA's Question and Answer No. 22 indicates that the FRA understood that this Board, in handling a Claim under Section 3 of the Railway Labor Act, would be required to interpret FRA Rules. Such conclusion is also misplaced. The Majority has read

far too much into the FRA's Answer. All the FRA said was that if an employee sought to challenge an assessment of discipline which arose from a positive test result taken under FRA Rules, the appropriate tribunal was one under Section 3 of the Railway Labor Act, and that nothing under FRA Rules was designed to prevent resort to that forum. The FRA never said that if one of the issues in the discipline case involved the Carrier's obligation to test the employee pursuant to an FRA Rule, that the appropriate forum to determine the FRA Rule requirement was this Board, not the FRA. In our view, when this Board determined that the pivotal issue was whether the Carrier had the obligation to test the Claimant under FRA Rules, it should immediately have stayed further consideration of the dispute and directed the parties to obtain an Interpretation from the FRA. There is nothing in any of the FRA's Rules or Questions and Answers to suggest that the FRA would have declined to respond to such request.

Indeed, we do not believe that in an area as important as drug testing following an "impact accident," the FRA would willingly and intentionally cede its authority to this Board to determine, on a case by case, referee by referee basis when a Carrier was obligated to test an employee.

Furthermore, this Board has consistently and repeatedly held that its jurisdiction extends no further than the

interpretation of collective bargaining agreements. It does not extend to the interpretation or application of statutes or regulations. There are numerous Awards of all Divisions of the Board recognizing that the jurisdiction of the Board is limited to the interpretation of collective bargaining agreements. See, for example, First Division Awards 23909, 23107, 20368; Second Division Awards 6462, 2531; Third Division Awards 22093, 19790, 19619, 17627, 15143, 14745, 2167.

Finally, the Majority's decision raises very serious concerns for the future. As a single illustration, if the identical situation in this case were to recur, could the Carrier refuse to test the employee, and successfully defend against a citation by the FRA, on the basis that a Majority of the Board in this case did not interpret the FRA's Rule as requiring a test? Has the FRA lost the right to interpret its own Rule under the factual situation involved here, or in any factual situation that may come before this Board in the future? If not, does the Majority intend that the Carrier possibly be subject to contrary decisions of the FRA and this Board in identical fact situations, based upon differing interpretations of the same FRA Rule? Is the Carrier officer on the scene now required to make a determination of whether to order an employee tested under FRA Rules on the basis of how this Board may interpret the

FRA Rule?

The above represent no more than a few of the troubling questions raised by the Majority decision. We submit that the Board should have refused to interpret the FRA Rule on the ground that it did not have jurisdiction to do so. We dissent.

Martin W. Fingerhut
M. W. Fingerhut

Robert L Hicks
R. L. Hicks

LABOR MEMBERS' CONCURRING OPINION

AND

RESPONSE TO THE CARRIER MEMBERS' DISSENT

TO

AWARD NO. 23993, DOCKET NO. 43605

The Dissentors have reiterated the protest they raised in their Dissent to Award No. 23911, Docket No. 43541, that this Board lacked jurisdiction to interpret the FRA Regulations (49 C.F.R. Section 219, Subpart C) which applied to the circumstances of that (and the instant) case. There are only two differences between the Dissentors' earlier, erroneous arguments and the present renditions.

First, the Dissentors previously claimed that this board should have dismissed the earlier case because we allegedly lacked subject matter jurisdiction, whereas they now believe, equally erroneously, that the Board should have obtained an interpretation from FRA before complying with our statutory duty to consider the evidence and resolve the dispute. The Dissentors point to no authority to ground this belief, but merely speculate that had FRA been asked to interpret, it might not have declined.

We suggest to the Minority that there is absolutely no need to speculate. As noted by Majority:

"The FRA regulations, themselves, do not vest the Department of Transportation with exclusive jurisdiction to interpret the regulations."

FRA's Final Rule very clearly vests this Board with the authority to take judicial notice of the subject regulations in order to assess the evidence and

arguments presented in support of the parties' positions. As we stated in our Response to the Dissentors to AWARD 23911, which is, also, perfectly applicable here:

"Not only has FRA fashioned 49 CFR Part 219 regulations so as to be compatible with Section 3 of the RLA by repeated references (twice in Appendix 4 alone), it has also inextricably intertwined the regulations with collective bargaining agreement discipline/hearing rules. In its amendments to the Final Rule, FRA provides at Part 219.605:

> '(d) Hearing procedures. Nothing in this part shall be deemed to abridge any additional procedural right or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of the positive test result.'

Additionally, we would point out to the Minority that this case falls no less appropriately within this Board's jurisdiction than any other case requiring notice of regulation or statute where such regulation or statute is interwoven into the fabric of the collective bargaining agreement. Recent examples of such cases include disputes requiring observation of the Hours of Service Law (Award No. 22925), Federal Employers' Liability Act (Awards Nos. 23812 and 23840), Title VII of the Civil Rights Act (Award No. 23821), to name a few.

In consonance with the blending by FRA of agreement rules, RLA provisions and these FRA regulations, the parties properly presumed the Board's jurisdiction.

* * * * *

In conclusion, 49 CFR Part 219 is inextricably integrated into the parties' agreement, and disputes pertaining to claims for back pay and benefits are specifically directed by Part 219 to be handled in accordance with Section 3 of the RLA; thus the cogent Findings were drawn from the essence of the collective bargaining agreement. The parties to this dispute joined the FRA regulation compliance issue and indicated no reluctance to the Board's invocation of jurisdiction in this dispute. The Dissentors' untimely suggestion that this Board lacked jurisdiction is preposterous and for the reasons stated herein must be rejected."

Indeed, the Dissentors' flawed jurisdictional argument does not now become any more correct by operation of its repetition.

The second aspect distinguishing the current dissent from its predecessor is the litany of interrogatories written by the Dissentors and described as "future concerns".

We are certain it is possible to allay these concerns simply through knowledge of and compliance with the regulations, i.e., Subpart C, Section 219.203 (a)(3)(i). In this case the officer who arrived on the scene of the accident should have made a reasonable, good faith attempt to determine whether claimant had a role in the cause of the accident. The regulations hold the carrier harmless from FRA imposed penalties if, after a good faith judgment, the officer errs in either deciding to require or not to require testing of specific employees involved in an accident. The key is that an effort must be made, and in this case, it was not. The implication of this fact, were we dealing with an FRA citation, is obvious.

Whether a Part 219 regulation may ultimately be applied to differing effect by FRA and a Section 3 tribunal is not a matter for much concern. Because the regulations are looked at for different purposes by these respective jurisdictions, there may be very little touching with respect to a pertinent regulation in circumstances where the agencies happen to examine the same occurrence. Perhaps a decision of one agency may influence a decision of the other. Whatever the case, this would certainly not be a new phenomena, as anyone with some experience in this industry is aware. Consider, as just one example, a disciplinary hearing flowing from a report of an FRA Inspector who witnessed an engine operated while a safety appliance was nullified.

In sum, this Board has not intruded upon FRA's functions to cite, investigate and/or assess fines against carriers for FRA Rules violations. Part 219 did not eliminate collective bargaining agreement grievance handling provisions or resolution of disputes through the Section 3 apparatus of the Railway Labor Act. In fact, FRA intentionally intertwined Part 219 regulations with the grievance handling procedures of collective bargaining agreements and Section 3 for the specific purpose ultimately accomplished by this Award.

Award No. 23993 is drawn from the essence of the collective bargaining agreement. The parties to this dispute joined the FRA regulation compliance issue and indicated no reluctance to the Board's invocation of jurisdiction in this dispute. The Dissentors' jurisdictional complaint is without merit and must, again, be rejected.

R.K. Radek

G.R. DeBolt

G.T. DuBose

L.W. Swert