

TAMPERING

AWARD NO. 11
CASE NO. 11
CARRIER FILE: XY-KL-99-13
ORG. FILE: 1328-LV-990441-Y
(SUPPLEMENTAL AWARD)

PARTIES
TO
DISPUTE

NORFOLK SOUTHERN RAILWAY COMPANY
and
UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM

Claim of Kentucky Division, Louisville Terminal District, Conductor A. M. Meadows for restoration to the service with seniority unimpaired, payment for all time lost, including holiday and vacation pay, health and welfare benefits, and all notations of this incident removed from her personal record. The Claimant was held out of service beginning June 1, 1999 and was dismissed from service on July 9, 1999 for allegedly tampering with a urine sample by substitution on May 25, 1999.

FINDINGS AND OPINION

The Board after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and, that the parties were given due notice of the hearing thereon.

On March 18, 2000, the neutral member of this Board, at the behest of the parties to resolve this case expeditiously, rendered an interim but binding decision reinstating the Claimant to service. In this regard, the neutral member, taking into consideration the unique circumstances of this case, did "not believe that the Claimant acted with premeditation to dilute and/or tamper with the drug test she took in connection with her physical examination on May 25, 1999." (Interim Award at 1) Accordingly, the Claimant was returned to service subject to the following conditions:

1. Without a finding that the Claimant was guilty of a first-time positive occurrence, she, nevertheless, will be subject to random testing for a period not to exceed one year. This requirement will serve as a precautionary measure for both the Carrier and the Claimant.
2. Claimant will be required to take and pass a physical examination which will include a drug screen.
3. Claimant will be required to take and pass a rules examination.

(Id., 2-3)

On information and belief, the Claimant satisfied the foregoing conditions and returned to service with full restoration of her benefits and unimpaired seniority rights, but without pay for the time she was in a dismissed status.

The decision to return the Claimant to service should be viewed in context with the factual record in this case which points up several mitigating factors that prompted the Board to vacate her dismissal. Claimant entered the Carrier's Accelerated Conductor's Training Program on March 17, 1997 and established seniority in yard and train service as a conductor on August 17, 1997. At the time of the incident at issue, she performed her duties without incident. On April 7, 1999, the Carrier's Director of Medical Services notified the Claimant to undergo a periodic physical examination and drug screen before the end of May, 1999. She personally scheduled her physical examination/drug screen on May 25, 1999, which was her rest day. The physical examination and drug screen were taken at the Norton Health Care Clinic, where the Claimant completed the necessary forms and provided a urine sample. On June 1, 1999, she was informed by the Carrier's Medical Review Officer that her urine sample was not tested because it was determined by the Smith Kline Beecham Clinical Laboratories that this sample was not consistent with human urine. The laboratory result of the Claimant's drug screen indicated that her urine sample had been substituted; i.e., her creatinine and specific gravity levels were outside the acceptable range defined by DOT laboratory guidelines, thus classifying the sample as a substitution.¹ After reviewing the laboratory report, the Medical Review Officer determined that the Claimant's aborted drug screen represented "a refusal to test." After conveying this information to the Claimant, the Medical Review Officer did not question her about the drug testing procedures or whether she may have been taking medication. The results of this drug screen triggered an investigation to inquire whether the Claimant violated the Carrier's Policy on Alcohol and Drugs in that she allegedly "tampered with a urine sample by substitution, thereby constituting a refusal to test during a company required physical on May 25, 1999." Claimant was removed from service on June 1, 1999 pending the investigation, which was eventually held on July 1, 1999.

Before the investigation was held, the Claimant endeavored to prove indisputably that she had not substituted or tampered with her drug screen specimen. On June 6, 1999, she voluntarily submitted to a second drug screen urinalysis performed at the American Medical Laboratories. This was an observed collection, which was tested within DOT parameters. The results indicated that no drugs were detected.² She was then examined by another physician at the Family Medical Center on June 7, 1999, who, after consultation with a pathologist and urologist, made the following written observation:

¹ Creatinine concentration is a by-product of muscle metabolism and a natural component of urine; specific gravity is a ratio comparison of the urine sample and water. According to the laboratory results, the Claimant's urine sample had a creatinine concentration of 4.5 mg/dl, which was below the required level that must exceed 5 mg/dl and well below the level of 20 mg/dl marking the boundary of a "dilute" sample. A urine sample with a creatinine concentration equal to or below 5 mg/dl and a specific gravity equal to or less than 1.001 or equal to or greater than 1.020 is not consistent with human urine. Normal human urine has a creatinine concentration greater than 20 mg/dl and a specific gravity between 1.003 and 1.030.

² This test reported negative findings for cocaine metabolites, amphetamines, marijuana metabolites, opiate metabolites and nitrates. There was no finding on "creatinine, urine."

***Although [Michelle Meadows'] urine test performed at Smith Klein Laboratory was very dilute, specific 1.001 and creatinine was 4.5 mg/dl, it is possible that she did not attempt to tamper with the specimen. She reports that she has been drinking large amounts of water and taking an herbal diuretic supplement as part of a weight loss program. A second observed test performed at American Medical Laboratories showed dilute urine as well with a creatinine of 8 mg/dl. ... It is possible that Ms. Meadows has consumed a large amount of fluids, or that she has a condition called diabetes insipidus.

* * * *

Additionally, the Claimant took a polygraph examination on June 16, 1999, which was conducted by A & B Polygraph Professionals. During this examination, the Claimant was questioned about and denied using illegal drugs before giving her urine sample on May 25, 1999, or that she diluted and/or placed any foreign matter in her urine sample or tampered in any way with that sample. Based on her answers, the examiner who conducted this test concluded that she told the truth. Next, the Claimant wrote the Carrier's Medical Review Officer on June 19, 1999 requesting a test of the split sample at her own expense. The Medical Review Officer denied her request on grounds that "... The Department of Transportation (DOT) procedures with respect to testing of split sample do not permit the testing of the split in the event of an adulterated or substituted specimen." Not to be deterred by this denial, the Claimant contacted the Terminal Superintendent at the location where she had worked and sought his assistance. He suggested that she submit to another observed drug screen at the Norton Health Care Clinic, the same facility that performed her initial test on May 25, 1999. Acting on this suggestion, the Claimant returned to Norton Health Care on June 24, 1999 where she had another drug screen urinalysis which was analyzed in accordance with FRA guidelines identical to the test conducted on May 25, 1999. The only exception was that this was an observed collection. Here, too, the test results indicated that the Claimant was drug free.³ The following quantitations were also reported.⁴

		Parameters
Creatinine	5 mg/dl	20-300 mg/dl
Specific Gravity	1.002	1.003-1.030

In addition to the Claimant's drug screens and polygraph, the Organization's General Chairman advised the Carrier of the Claimant's eagerness "to provide a hair follicle test under medical observation" to prove conclusively that she had not used drugs. The Carrier rejected this offer on the basis that any medical evidence other than the Claimant's initial drug screen urinalysis would not be considered in her case.

As previously noted, the investigation on the charge against the Claimant was held on July 9, 1999. Shortly thereafter, the Carrier, on July 9, 1999, notified the Claimant of her dismissal from service for

³ The test reported negative findings for cocaine metabolites, amphetamine/methamphetamine, marijuana metabolite, opiates and phencyclidine.

⁴ See n. 1 supra at 1.

violating its medical policy on drugs; i.e., for tampering with her urine sample by substitution, thereby constituting "a refusal to test" during a company required physical examination on May 25, 1999.⁵

In challenging the Claimant's dismissal from service for allegedly tampering with or substituting her urine sample during a required drug screen, the Organization argued that she was denied a fair and impartial investigation because of the Carrier's refusal to consider evidence that would have exonerated her. From the Organization's perspective, the evidence in question, in significant part, provided an explanation for the condition of the urine sample the Claimant gave during her physical examination. According to this evidence, she was drinking a lot of water and taking an herbal diuretic supplement as part of a weight loss program prior to her drug screen on May 25, 1999; that a diuretic of this kind can cause a diluted urine specimen. The Organization stated unequivocally that the Claimant did not tamper with her urine sample as evidenced by the two observed drug screens she voluntarily took before her formal investigation. These drug screens, the Organization observed, were analyzed within the same parameters as her initial drug screen, both of which indicated similarly low creatinine levels and specific gravity. In this regard, the Organization referred to the correspondence from the Claimant obtained from her personal physician confirming the possibility of her low creatinine level. The Organization also asserted that the Claimant's polygraph examination and willingness to offer a hair follicle for testing would have served as corroborative evidence to prove she did not tamper with or substitute her urine sample on the day in question. Since she was denied the opportunity to have this evidence considered at the investigative hearing, the Carrier, in the Organization's judgment, deprived her of a fair and impartial hearing.

In rejecting the Organization's arguments, the Carrier argued that if it were to accept the statement from the Claimant's personal physician as an explanation for the substituted sample, such acceptance would have been tantamount to asking the Carrier's Medical Review Officer and hearing officer to ignore federal guidelines which stipulate that a urine sample with specific gravity and creatinine levels in the Claimant's sample is a substituted sample and a refusal to test. Besides, the Carrier opined that the letter the Claimant attempted to submit from her doctor did not overcome the original laboratory report and the Carrier's Medical Review Officer's determination, both of which must be accepted as an irrefutable medical fact. The Carrier also disputed the Organization's notice that the drug testing procedures were flawed in the Claimant's case because no test was performed on the split sample she provided which was compounded by the Medical Review Officer's failure to ask her about prescription drugs. From the Carrier's perspective, the Organization's contentions were unpersuasive because they mistakenly relied on procedures relating to a positive test with those applying to a substituted sample. On this point, the Carrier noted that federal guidelines and companion Carrier policy establish that no split sample test or follow-up test is required once a Medical Review Officer determines that the sample is substituted. Nor is the Medical Review Officer, as in the Claimant's case, required to ask the tested employee about the use of prescription drugs since such an inquiry only applies if the laboratory test result is positive for prohibited drugs. Further, the Carrier asserted that the Claimant's subsequent drug screens under direct observation, taken at her own initiative, and which proved negative, still showed a tendency toward diluted urine but not so "diluted" as to

⁵ The Carrier's Policy on Alcohol and Drugs provides as follows:

An employee who refuses to provide a urine sample for testing when properly instructed to do so may be subject to dismissal for failure to follow instructions. Tampering with a urine sample by substitution dilution, or adulteration shall be deemed a refusal and will also be considered conduct unbecoming an employee and grounds for dismissal.

be "substituted." According to the Carrier, its Medical Review Officer found these subsequent tests unpersuasive but, nevertheless, supportive of the conclusion that the initial drug screen was tampered with because it could not be duplicated in subsequent tests by the Claimant's natural urination. The Carrier penultimately maintained that the polygraph test the Claimant took to support her assertion that she did not tamper with or substitute her urine specimen was inadmissible at the investigation because proof of this nature is unreliable and generally not permitted in evidence in legal proceedings. Overall, the Carrier felt that the Claimant was afforded a fair and impartial hearing that adduced sufficient evidence warranting her dismissal.

Since the issuance of the interim decision returning the Claimant to service, the neutral member of the Board has carefully reexamined the record and reevaluated this case. Based on this dual review, it is abundantly clear that the Carrier relied on the laboratory results of Claimant's May 25, 1999 drug screen as the only evidence supporting the finding that she either tampered with or substituted her urine sample. Here, the laboratory results were proof-positive to the Carrier's Medical Review Officer that the unusually low creatinine level and specific gravity indicated a tampered or substituted urine sample. At first blush, the Medical Review Officer's assessment cannot be faulted because the laboratories that analyze urine specimens for DOT regulated drug tests are subject to safeguards designed to ensure the accuracy of their results. Thus, in the typical case where an employee's denial of drug use or other misconduct is weighed against the laboratory report, the presumed accuracy of the report will ineluctably result in an arbitral tribunal deferring to a decision reached on the property not to credit the employee's denial. The instant case, however, is not typical.

As recounted herein, the Claimant went through great lengths to garner exculpatory evidence to present at the investigation to which she was summoned on the charge of tampering with or substituting her urine sample during the May 25, 1999 drug screen. Sight should not be lost on the fact that the Claimant's drug screen on the day in question was not a random test but one which she had complete control in scheduling in conjunction with the physical examination the Carrier required her to take. It would seem unlikely that the Claimant would indulge in the use of a controlled or prohibited substance before her drug screen. The record reveals that all mandated safeguards were followed by the collector to ensure the integrity of the urine sample she provided. In this regard, it was noted that the specimen was within normal range; a split-specimen was collected; and that the collector took no exception to the Claimant's demeanor or behavior. Yet the laboratory reported that the specimen she gave was substituted and not consistent with human urine because of the extremely low creatinine level and specific gravity. The inference to be drawn from this report is not that the Claimant adulterated her urine sample, or even diluted it with water, but rather she substituted something else for her urine in the collection cup. To credit this inference, without further explanation, that the Claimant provided a urine sample that was not "consistent with human urine," one must conclude that she procured a substance to use in place of her own urine and concealed that substance when she was in the presence of the collector, and that the substance looked like urine and had the temperature of urine. This, too, is highly unlikely.

Although the Carrier's Medical Review Officer accepted the laboratory report on the Claimant's May 25, 1999 drug screen without exception or further explanation due to his perceived and narrow notion of FRA regulations that a questionable specimen of the kind described is simply viewed as a refusal to test, the likelihood that she tampered with or substituted her urine sample appears miniscule. Nevertheless, the Carrier believed it proved the Claimant's guilt on the basis of a single laboratory report which, as noted, indicated a low level of creatinine and specific gravity in the urine sample she provided. To find that the

Carrier fully relied on the laboratory report in this case to substantiate the Claimant's guilt would be tantamount to finding that the laboratory report was infallible. To same effect, see First Division Award No. 24789 (Malin, 1997). While there is nothing in the record to corroborate the laboratory's conclusion that the urine sample was substituted and not human urine, credible evidence exists which tends to disprove that conclusion. The fact remains that the Carrier chose to disregard evidence produced by the Claimant based on two subsequent drug screens she took at her volition, including correspondence from her personal physician. Claimant's evidence revealed that, at the time of her physical examination and drug screen, she was taking an herbal diuretic supplement requiring her to consume large amounts of water as part of a weight-loss program. The combination of the diuretic and water conceivably lowered her creatinine level and specific gravity which the Claimant's personal physician's correspondence served to corroborate.

Had the evidence the Claimant obtained been considered at her investigation (exclusive of the polygraph examination, which is inadmissible evidence), it may have moderated the Carrier's decision dismissing her from service. Notwithstanding the FRA drug and alcohol regulations on what constitutes a "refusal to test," these regulations and companion Carrier policy must be balanced with due process considerations vis-à-vis the affected employee's fundamental right to a fair and impartial hearing. In the instant matter, the Carrier deprived the Claimant of these due process considerations. The Carrier had the obligation to develop all the facts germane to the accusation against her, which, in the neutral member's judgment, it failed to do when evidence that could have dispelled her purported culpability was held inadmissible at the investigative hearing. Consequently, the Claimant's due process rights guaranteeing a fair and impartial investigation were severely compromised in this instance.

Absent exculpatory evidence, the Board, oddly enough, is constrained from setting aside the penalty prescribed by FRA regulations, viz., a nine-month suspension, where the Claimant's urine sample from her initial drug screen has putatively been questioned as having been tampered with or substituted and, therefore, considered a refusal on her part to test. However, the Carrier's disciplinary action dismissing the Claimant from service was not insulated by government regulations and was vacated by the Board in its interim decision. That decision is hereby affirmed for the reasons stated hereinabove.⁶ In vacating her dismissal from service, which shall be expunged from her personal record, the Claimant's discipline will amount to a suspension of nine months.⁷ Upon the completion of this suspension, the Claimant should have received pay for any time lost between March 9, 2000 and the date she returned to service, which the Board originally, albeit erroneously, did not grant. In reversing the Board's earlier stated position on pay for time lost, the neutral member of the Board remands this limited compensable aspect to the parties for their further handling.

The Board will continue to retain jurisdiction over this case for the sole purpose of resolving any conflict that may possibly arise with respect to any compensation owed the Claimant.

⁶ It should be borne in mind by the Carrier that dismissal is not automatic under its policy but is a discretionary measure which was abused in the Claimant's case.

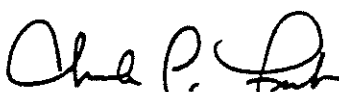
⁷ Claimant's nine-month suspension, for purposes of calculation, ran from July 9, 1999, the date she was dismissed from service, rather than June 1, 1999, when she was withheld from service pending the investigation. In the latter instance, the Claimant sought and was granted postponements so that she could obtain evidence to mount a defense regarding the charge against her. Such postponements delayed the Carrier's investigation.

AWARD

The interim decision of March 18, 2000 is affirmed as augmented by the findings hereinabove. Accordingly, the compensable aspect of the claim is remanded to the parties for further handling.

ORDER

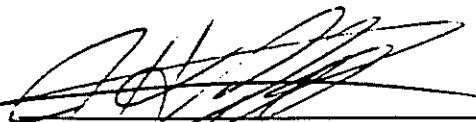
The Carrier and the Organization will comply with this Supplemental Award within thirty (30) days from the date hereof.



Charles P. Fischbach
Chairman and Neutral Member



K. J. O'Brien, Carrier Member



J. H. Clark, Employee Member

Dated at Chicago, Illinois,
this 30th day of March, 2001