

April 27, 2023

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MTA - LONG ISLAND RAIL ROAD

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IN THE MATTER OF
IBEW DISCIPLINE CASE NUMBER

3870-22

EMPLOYEE - DARREN DREW

-----X

April 27, 2023
9:53 a.m.

Hillside Maintenance Complex
93-59 183rd Street
Hollis, New York 11423

CONTINUED TRIAL OF
EMPLOYEE - DARREN DREW

TRANSCRIPT OF PROCEEDINGS

Reported by:
Julia M. Speros

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A P P E A R A N C E S:

MTA LONG ISLAND RAIL ROAD
TRIAL OFFICE
93-59 183rd Street, Building 1
Hollis, New York 11423

BY: SETH MAGGIORE
Hearing Officer

Also Present:

Mr. Ricardo Sanchez
IBEW General Chairman

Mr. Michael Colombo
IBEW Financial Secretary

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PROCEEDINGS

MR. MAGGIORE: Good morning. Today is April 27, 2023. The time is approximately 9:53 a.m. This trial is being held in Room 251 at the Hillside Maintenance Complex.

My name is Seth Maggiore. I am the Manager of the Trial Office. I will be serving as the Trial Officer.

Present at this time is the charged employee, Darren Drew, along with his Union representative, Mr. Ricardo Sanchez of the IBEW. Also present as an observer is Michael Colombo, Financial Secretary of the IBEW.

Before we begin, I just ask everybody to silence their phones, if you haven't done so already.

Mr. Drew, you're being afforded this trial in connection with the charges outlined in the Notice of Trial that has been marked into evidence as Carrier Exhibit 1.

Mr. Drew, do you waive a reading of the Notice of Trial?

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1 MR. DREW: Yes.

2 MR. MAGGIORE: Mr. Sanchez, does the
3 Organization waive a reading of the
4 Notice of Trial?

5 MR. SANCHEZ: Yes.

6 MR. MAGGIORE: Okay. After this
7 trial was put in recess on March 8,
8 2023, a Trial Continuation Notice was
9 sent to Mr. Drew via Certified and First
10 Class Mail to 219-53 Ryan Road,
11 Laurelton, New York 11413. A copy was
12 also sent to the Organization.

13 It is a one-page document bearing
14 Certified Mail number
15 70220410000344303991. It is dated
16 March 16th.

17 I am handing copies to Mr. Sanchez
18 and Mr. Drew. (Handing.)

19 Mr. Drew, did you receive a copy of
20 this Trial Continuation Notice?

21 MR. DREW: Yes.

22 MR. MAGGIORE: Mr. Sanchez, did the
23 Organization receive a copy?

24 MR. SANCHEZ: Yes.

25 MR. MAGGIORE: If there are no

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1 objections, I will mark and enter this
2 as Carrier Exhibit 21.

3 Any objections?

4 MR. SANCHEZ: No.

5 MR. DREW: No.

6 (Whereupon, Carrier Exhibit 21 was
7 marked.)

8 MR. MAGGIORE: Next, I have United
9 States Postal Service Tracking History
10 bearing the same Certified Mail number
11 as Carrier Exhibit 21.

12 I'm showing copies of this to
13 Mr. Drew and Mr. Sanchez -- (handing) --
14 for their verification that the
15 Certified numbers match.

16 MR. DREW: (Perusing.)

17 MR. SANCHEZ: (Perusing.)

18 MR. MAGGIORE: Do the numbers match?

19 MR. SANCHEZ: Yes.

20 MR. DREW: Yes.

21 MR. MAGGIORE: Okay. If there are
22 no objections, I will mark and enter
23 this as Carrier Exhibit 21-A.

24 Any objections?

25 MR. SANCHEZ: No.

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1 MR. DREW: No.

2 (Whereupon, Carrier Exhibit 21-A was
3 marked.)

4 MR. MAGGIORE: I note for the record
5 it is a two-page document.

6 I note for the record that the First
7 Class mailing of Carrier Exhibit 21 has
8 not been returned to the Carrier as
9 "undelivered".

10 Mr. Drew, would you please identify
11 yourself for the record with your full
12 name and IBM number?

13 MR. DREW: My name is Darren Drew;
14 IBM number is 50112.

15 MR. MAGGIORE: Before continuing, I
16 will remind you of your rights for this
17 trial.

18 You are entitled to be represented
19 by a duly-accredited Union
20 representative, subject to the terms and
21 conditions of your applicable agreement
22 without cost to the Carrier.

23 Do you understand that right?

24 MR. DREW: Yes.

25 MR. MAGGIORE: Who would you like to

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1 represent you?

2 MR. DREW: Mr. Sanchez.

3 MR. MAGGIORE: You also have the
4 right to summon any relevant person or
5 produce any relevant evidence that will
6 enable you to defend yourself against
7 the charge placed against you at no cost
8 to the Carrier.

9 Do you understand that right?

10 MR. DREW: Yes.

11 MR. MAGGIORE: You're also entitled
12 to cross-examine any witness and examine
13 any evidence that may be produced by the
14 Carrier or have your Union
15 representative do so on your behalf.

16 Do you understand that right?

17 MR. DREW: Yes.

18 MR. MAGGIORE: Mr. Drew, are you
19 ready to continue with the trial today?

20 MR. DREW: Yes.

21 MR. MAGGIORE: Mr. Sanchez, is the
22 Organization ready to continue with the
23 trial today?

24 MR. SANCHEZ: Yes.

25 MR. MAGGIORE: Okay. At this time,

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1 the Carrier does not have any witnesses
2 to call.

3 Mr. Sanchez, do you have any
4 witnesses you would like to call or
5 Carrier witnesses you'd like to recall?

6 MR. SANCHEZ: We'd like to recall
7 Carrier witness Corinne Swicicki, Senior
8 Manager, Manpower.

9 MR. MAGGIORE: All right. The time
10 is approximately 9:58 a.m. We're going
11 to take a brief recess in order to
12 recall Ms. Swicicki.

13 We're off the record.

14 (Whereupon, a brief recess was
15 taken.)

16 MR. MAGGIORE: The time is
17 approximately 10:17 a.m. and we're back
18 on the record.

19 We've been joined by Corrine
20 Swicicki who has been recalled by the
21 Organization.

22 Before we begin, can you please
23 state your full name and IBM number for
24 the record?

25 MS. SWICICKI: Sure. Corrine

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1 Swicicki, 54910.

2 MR. MAGGIORE: Thank you.

3 Mr. Sanchez, you may question Ms.
4 Swicicki.

5 MR. SANCHEZ: Ms. Swicicki, I'm
6 going to start off by apologizing if
7 this is redundant, but I just want to
8 get it into the record, so --

9 MS. SWICICKI: Okay.

10 MR. SANCHEZ: How long have you
11 worked for Long Island Rail Road?

12 MS. SWICICKI: Approximately
13 15 years.

14 MR. SANCHEZ: Okay. And in what
15 positions?

16 MS. SWICICKI: I was a Central
17 Manpower Clerk and then was promoted to
18 Head Clerk, Assistant Manager, Manager,
19 and now Senior Manager, Manpower
20 Resource Management.

21 MR. SANCHEZ: And how long have you
22 been in your current position?

23 MS. SWICICKI: Approximately,
24 three years.

25 MR. SANCHEZ: Okay. And can you

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1 explain some of your responsibilities in
2 this position -- in your current
3 position?

4 MS. SWICICKI: Sure. I oversee the
5 Central Manpower Office, that is 24/7.
6 I make sure that all employees adhere to
7 corporate and departmental policies,
8 handle all payroll, any payroll issues,
9 and communicate with unions and
10 management.

11 MR. SANCHEZ: Okay. And are you
12 familiar with the Collective Bargaining
13 Agreements of the groups you oversee --
14 or you manage?

15 MS. SWICICKI: Yes, I have knowledge
16 of them, yes.

17 MR. SANCHEZ: Okay. And are you
18 familiar, as part of your job with Long
19 Island Rail Road, of all corporate
20 policies that affect the employees you
21 oversee?

22 MS. SWICICKI: Yes.

23 MR. SANCHEZ: In your opinion -- or,
24 I guess, have you been led to believe
25 that policy supersedes contract

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1 language?

2 MS. SWICICKI: Yes.

3 MR. SANCHEZ: So, that's your belief
4 is that the policy can supersede
5 contract language?

6 MS. SWICICKI: The CBA is their
7 contract, but the corporate or
8 departmental policy has to -- I'm
9 uncertain.

10 MR. SANCHEZ: Okay. Could you give
11 me an example of if you're certain of
12 any -- can you give me an example of one
13 that would supersede -- a policy that
14 would supersede something in the CBA?

15 MS. SWICICKI: About sick forms.

16 MR. SANCHEZ: Okay.

17 MS. SWICICKI: In your CBA, it says
18 a doctor's note is required and
19 corporate policy, it's an SLA-28 form
20 that's required.

21 So, it's not just from a doctor's
22 office, it's a corporate doctor's note
23 that is needed.

24 MR. SANCHEZ: Okay. Are you
25 familiar with MED-005, which is the drug

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1 and alcohol policy?

2 MS. SWICICKI: Yes.

3 MR. SANCHEZ: All right. It's
4 carrier Exhibit 5.

5 If it were amended, would you be
6 made aware? If there were any changes
7 or amendments made to that policy, would
8 you be --

9 MS. SWICICKI: Yes.

10 MR. SANCHEZ: Okay. You'd be made
11 aware.

12 Do you know if the policy has been
13 amended within the last two years?

14 MS. SWICICKI: Yes.

15 MR. SANCHEZ: And can you tell me
16 what the amendment or change was?

17 MS. SWICICKI: Yes, I can.

18 MR. SANCHEZ: Okay. And I'm sorry,
19 you're reading from Carrier Exhibit 5,
20 correct -- and that's the policy -- just
21 so we --

22 MS. SWICICKI: Alcohol and Substance
23 Abuse Corporate Policy and Procedure.

24 MR. MAGGIORE: That's the one that
25 was issued in March 2022?

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1 MS. SWICICKI: Yes.

2 MR. MAGGIORE: Okay. Yeah, that's
3 Carrier Exhibit 5.

4 MR. SANCHEZ: Okay. Carrier
5 Exhibit 5.

6 MS. SWICICKI: (Perusing.) Here we
7 go -- I apologize.

8 MR. SANCHEZ: No, don't apologize.

9 MS. SWICICKI: It is page 7 of 23
10 and they now included the -- "G", Arrest
11 and Conviction Reporting Requirements
12 Pursuant to the Federal Drug-Free
13 Workplace.

14 "An employee convicted of violating
15 any criminal drug statute in the
16 workplace must report the conviction to
17 his or her department head within the
18 five days of conviction.

19 It is the department head's
20 responsibility to report this to Labor
21 Relations and the Assistant Director,
22 Employee Services".

23 MR. SANCHEZ: And was that amendment
24 communicated to all the employees or
25 affected employees?

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1 MS. SWICICKI: Yes, we included it
2 in our Code of Conduct that was mailed
3 out to all employees.

4 MR. SANCHEZ: And did the employees
5 receive -- or sign anything confirming
6 receipt.

7 MS. SWICICKI: No.

8 MR SANCHEZ: Okay -- all right. Are
9 you familiar with the recently passed
10 New York State Cannabis and Marijuana
11 Taxation Act?

12 MS. SWICICKI: I'm familiar with it.

13 MR. SANCHEZ: Okay. So, basically
14 -- I'm just -- layman's terms, right --
15 basically it makes marijuana --
16 recreational marijuana legal for
17 21-years-old and has certain protections
18 -- legal protections.

19 So, that's the act -- so, you're
20 familiar with it?

21 MS. SWICICKI: (Nodding.)

22 MR. SANCHEZ: Okay. And can you
23 tell me if the Long Island Rail Road or
24 the MTA has changed any part of the MEDs
25 or the policy because of the new law?

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1 MS. SWICICKI: No.

2 MR. SANCHEZ: Okay. As part of your
3 job responsibilities, do you know the
4 difference between regulated employees
5 and non-regulated employees?

6 MS. SWICICKI: Regulated employees
7 are considered safety-sensitive
8 employees and --

9 MR. SANCHEZ: Well -- I'm sorry.

10 MS. SWICICKI: That's okay -- and
11 non-regulated is everyone else who is
12 not safety-sensitive.

13 MR. SANCHEZ: So, safety-sensitive
14 employees and regulated employees --
15 I'll rephrase the question.

16 The safety-sensitive employees that
17 are covered under Hours of Service,
18 what's the difference between those
19 employees and other employees that are
20 deemed safety-sensitive by the Carrier,
21 but not the Federal government?

22 MS. SWICICKI: So, what's the
23 difference between Hours of Service
24 employees and -- right?

25 MR. SANCHEZ: And employees that are

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1 not under Hours of Service.

2 MS. SWICICKI: So, Hours of Service
3 employees are -- they're
4 safety-sensitive employees and -- as
5 well, they have a restriction on the
6 hours that they can work in a day.

7 They are allowed to work up to -- no
8 more than 12 hours a day otherwise it's
9 a violation.

10 MR. SANCHEZ: Okay. And can -- when
11 you say safety-sensitive employees under
12 Hours of Service, who makes that
13 designation; is that the Carrier or the
14 Federal government -- because of their
15 position?

16 MS. SWICICKI: I can only speak on
17 the Carrier, that it has been intact for
18 many years that they're considered
19 safety-sensitive.

20 MR. SANCHEZ: Okay. So, is there a
21 difference -- is there a different
22 classification of employee --
23 electrician in this particular case --
24 that's not considered safety-sensitive?

25 MS. SWICICKI: No.

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1 MR. SANCHEZ: So, all employees --
2 all electricians on the Carrier property
3 are safety-sensitive?

4 MS. SWICICKI: Correct.

5 MR. SANCHEZ: Are all
6 safety-sensitive employees subject to
7 random testing on the Carrier's
8 property?

9 MS. SWICICKI: No.

10 MR. SANCHEZ: And can you tell me
11 which ones are not?

12 MS. SWICICKI: We have different
13 groups. We have -- so, those
14 electricians that own -- we have an
15 Hours of Service pool, so those
16 electricians that own Hours of Service
17 positions, they would be subject to
18 random drug testing.

19 We -- then we have another pool -- a
20 mechanical pool and that's where the
21 other -- electricians that don't own
22 Hours of Service positions are in.

23 Pretty much every -- for random drug
24 testing, every craft is considered for
25 random drug testing. It's just the

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1 Hours of Service pool for random drug
2 testing is -- only for those that own
3 the position.

4 But electricians that do not own
5 Hours of Service positions, they're in
6 another pool.

7 MR. SANCHEZ: Okay. And is that a
8 recent -- the "MEC" position?

9 MS. SWICICKI: Correct.

10 MR. SANCHEZ: And that's a recent
11 addition to the hours of testing or the
12 regulations by the FRA?

13 MS. SWICICKI: It was with -- yes.

14 MR. SANCHEZ: And can you -- do you
15 know when that came into effect?

16 MS. SWICICKI: It could be, I
17 believe, like, 2018, 2019 it came in
18 effect.

19 MR. SANCHEZ: Okay. I think -- I
20 believe, actually, it was 2021, 2022.
21 So, it's fairly recent.

22 MS. SWICICKI: Okay.

23 MR. SANCHEZ: So, is it fair to say
24 that before it came into effect, there
25 was a classification of employees that

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1 were classified as safety-sensitive that
2 weren't subject to random testing?

3 MS. SWICICKI: Correct.

4 MR. SANCHEZ: Okay. And do you know
5 if Mr. Drew was considered -- fell into
6 that classification at the time of his
7 employment with this incident?

8 MS. SWICICKI: I wouldn't know that
9 right now.

10 MR. SANCHEZ: Could you find out?

11 MS. SWICICKI: I know that he didn't
12 own an Hours of Service position. I
13 would have to find out if he was --
14 would be included in the mechanical
15 pool.

16 MR. SANCHEZ: Okay. So -- and
17 that's fine. I think that's important
18 that we read it into the record. I just
19 want to clarify the question.

20 Can you find out if -- yeah, exactly
21 -- and you need to find out when he was
22 taken out of service for this event and
23 when the mechanical addition became
24 effective.

25 MR. MAGGIORE: Hold on. Just real

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1 quick on that subject --

2 MR. SANCHEZ: Mm-hmm.

3 MR. MAGGIORE: -- during the last
4 trial date, you asked Mr. Yodice that
5 question. He supplied Union Exhibit 6,
6 which was the listing of the employees
7 in the random pool.

8 Mr. Drew was not in that listing, I
9 believe. If you'd like to take a recess
10 real quick and confirm --

11 MR. SANCHEZ: We can do that -- I
12 mean, yeah --

13 MR. MAGGIORE: I just want to
14 clarify for the record because I believe
15 that was raised last time.

16 MR. SANCHEZ: It was -- it was --

17 MR. MAGGIORE: Okay.

18 MR. SANCHEZ: -- but I want to make
19 sure.

20 MR. MAGGIORE: So -- all right. The
21 time is 10:28 a.m. We'll take a brief
22 recess so Ms. Swicicki can see whether
23 or not Mr. Drew was in the random
24 testing pool at the time of this
25 incident, which was June 7, 2022.

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1 MR. SANCHEZ: Yes.

2 MR. MAGGIORE: All right. We're off
3 record.

4 (Whereupon, a brief recess was
5 taken.)

6 MR. MAGGIORE: All right. The time
7 is 10:38 a.m. We're back on the record.

8 Prior to taking a recess,
9 Mr. Sanchez was asking Ms. Swicicki
10 whether or not Mr. Drew was in the
11 random testing pool at the -- in
12 June 2022.

13 Ms. Swicicki, have you had an
14 opportunity to review your records? Can
15 you please answer Mr. Sanchez's
16 question?

17 MS. SWICICKI: Yes, he was not in
18 the mechanical pool for that timeframe.

19 MR. SANCHEZ: So, at the time of his
20 return-to-work physical, the reason the
21 Carrier tested him -- gave him a
22 toxicological test -- was based on
23 company policy?

24 MS. SWICICKI: Correct.

25 MR. SANCHEZ: Okay. And can you

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1 tell me the last time Mr. Drew was
2 designated as a covered or regulated
3 employee?

4 MS. SWICICKI: He is -- Mr. Drew is
5 considered a safety-sensitive employee.

6 MR. SANCHEZ: No, designated as a
7 covered or regulated employee.

8 You know, it's funny. Maybe for the
9 record, just for clarification, when I
10 say "covered or regulated", I mean
11 someone who owns an Hours of Service job
12 that falls under the FRA regulations for
13 random testing. So, maybe I'm saying it
14 wrong. That's how -- I mean, that's how
15 we understand it.

16 I call it a covered or regulated
17 employee, not safety-sensitive.

18 MS. SWICICKI: I understand. So,
19 it's more --

20 MR. MAGGIORE: I'm sorry, just to
21 clarify for the record.

22 MR. SANCHEZ: Sure.

23 MR. MAGGIORE: There -- for the
24 title of "electricians" --

25 MR. SANCHEZ: Yes.

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1 MR. MAGGIORE: -- there are some
2 that are covered under Hours of Service,
3 i.e., "regulated", as you're referring
4 to --

5 MR. SANCHEZ: Yes.

6 MR. MAGGIORE: -- and there are some
7 that are not, correct?

8 MS. SWICICKI: Correct.

9 MR. DREW: Yes.

10 MR. SANCHEZ: Yes.

11 MR. MAGGIORE: Okay. And Mr. Drew
12 is not under Hours of Service?

13 MS. SWICICKI: Correct.

14 MR. MAGGIORE: He's not -- okay.

15 MS. SWICICKI: He does not own an
16 Hours of Service job, so, therefore, he
17 would not be under covered -- the
18 regulated service employees.

19 MR. SANCHEZ: So, because he doesn't
20 own a covered job and he's not under a
21 -- doesn't own an Hours of Service job,
22 under what circumstances can the Carrier
23 give Mr. Drew a toxicological test?

24 MS. SWICICKI: Because Mr. Drew is
25 under -- if you go on page 3 of 23,

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1 "Safety-Sensitive Employees":

2 "Though regulated service employees
3 are designated as "safety-sensitive"
4 under 49 CFR, Part 219, and Long Island
5 Rail Road authority, and commercial
6 drivers are designated as
7 "safety-sensitive" under 49 CFR, Part
8 382 and Long Island Rail Road authority,
9 for the purpose of this policy, the
10 safety-sensitive employees
11 classification refers to those employees
12 whose job title/duties, Long Island Rail
13 Road has designated as safety-sensitive
14 under Long Island Rail Road authority,
15 which does include regulated service
16 employees or commercial motor-vehicle
17 drivers who are classified separately".

18 So, he would be listed under there.

19 MR. SANCHEZ: Okay. So, he's -- I
20 mean, I guess -- and you correct me if
21 I'm wrong -- to sum it up, Mr. Drew is
22 considered safety-sensitive by the Long
23 Island Rail Road, but he's not
24 considered safety-sensitive by the FRA.

25 MS. SWICICKI: Correct.

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1 MR. SANCHEZ: Okay. And because
2 Mr. Drew is considered -- not considered
3 safety-sensitive by the FRA, he's not
4 required to submit to random testing
5 while he's working?

6 MS. SWICICKI: Correct.

7 MR. SANCHEZ: Can the Carrier
8 submit -- can the Carrier compel
9 Mr. Drew, because they've determined
10 he's safety-sensitive, to take a random
11 test during working hours?

12 MS. SWICICKI: No.

13 MR. SANCHEZ: Under any
14 circumstance?

15 MS. SWICICKI: To perform a random
16 drug test?

17 MR. SANCHEZ: Yes.

18 MS. SWICICKI: Within his location
19 and position, right -- what he was
20 working at -- no.

21 MR. SANCHEZ: Okay. So, are you
22 sure -- I'll back-up.

23 So, the Carrier can't submit
24 Mr. Drew -- they can't make him submit
25 to a random test unless -- and stop me

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1 if I'm wrong -- is reasonable cause?

2 MS. SWICICKI: Correct.

3 MR. SANCHEZ: Suspicion?

4 MS. SWICICKI: Suspicion.

5 MR. SANCHEZ: Post-accident?

6 MS. SWICICKI: (Nodding.)

7 MR. SANCHEZ: So, unless there's a
8 triggering event --

9 MS. SWICICKI: And it's also if
10 you're out for more than 30 days --
11 calendar days --

12 MR. SANCHEZ: A triggering event --
13 yes.

14 MS. SWICICKI: -- so that's
15 return-to-duty.

16 MR. SANCHEZ: Okay. But that's not
17 a random?

18 MS. SWICICKI: Correct.

19 MR. SANCHEZ: Okay. So, I'm just
20 talking random.

21 So, unless there's a triggering
22 event, Mr. Drew is not subject to random
23 testing as a safety-sensitive employee
24 during working hours?

25 MS. SWICICKI: From his job title --

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1 MR. SANCHEZ: Yes --

2 MS. SWICICKI: -- yes --

3 MR. SANCHEZ: -- as an employee.

4 MS. SWICICKI: -- and his current
5 location of where he worked at the AC
6 shop, correct.

7 MR. SANCHEZ: Okay. Now, I want to
8 talk about the return-to-work toxicology
9 test.

10 So, the return-to-work toxicology,
11 is that based on the belief that
12 employees are under the influence of a
13 prohibited substance?

14 MS. SWICICKI: No, it's -- as per
15 the policy, it's just they have to -- if
16 they're absent from work for any reason
17 for 30 calendar days, they would be
18 subject to drug and alcohol testing.

19 MR. SANCHEZ: Okay. So, it's
20 30 days if they're out sick?

21 MS. SWICICKI: 30 days if they're
22 out sick, vacation --

23 MR. SANCHEZ: Vacation, leave of
24 absence?

25 MS. SWICICKI: Yeah.

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1 MR. SANCHEZ: So, there's no cause;
2 it's a time.

3 So, if an employee is out for
4 29 days, would he be subject to a
5 return-to-work toxicological test?

6 MS. SWICICKI: No.

7 MR. SANCHEZ: Okay.

8 MS. SWICICKI: It's -- and it's also
9 30 calendar days, so it's including
10 relief days.

11 MR. SANCHEZ: Okay. So,
12 notwithstanding testing for suspension,
13 reasonable cause, post-accident, the
14 Carrier can only test Mr. Drew on a
15 return-to-work physical; is that
16 correct?

17 MS. SWICICKI: Correct.

18 MR. SANCHEZ: Okay. So, the Carrier
19 can only test him when he's actually not
20 working?

21 MS. SWICICKI: He would need this
22 test before coming -- being returned
23 back to work.

24 MR. SANCHEZ: Okay. So, the Carrier
25 can only test him when he's actually not

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1 working?

2 MS. SWICICKI: For the
3 return-to-duty test, yes.

4 MR. SANCHEZ: Or any toxicological,
5 other than suspicion, random, or
6 post-accident?

7 MS. SWICICKI: I'm sorry, can you
8 just explain that question one last
9 time?

10 MR. SANCHEZ: So, the Carrier can
11 test Mr. Drew under certain
12 circumstances -- suspicion, right --
13 suspicion, post-accident, and probable
14 cause -- and the only other time they
15 can test Mr. Drew with a toxicological
16 test is when he's not working during a
17 return-to-work physical?

18 MS. SWICICKI: Correct.

19 MR. SANCHEZ: So, while he's
20 working, unless there's a triggering
21 event, the Carrier can't test him?

22 MS. SWICICKI: Correct.

23 MR. SANCHEZ: Do you have any input
24 in the formation of MED-005, the company
25 policy?

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30

1 When these policies are amended, do
2 they look for any feedback from the
3 departments?

4 MS. SWICICKI: No.

5 MR. SANCHEZ: Okay. So, do you know
6 why the Carrier's policy doesn't include
7 a random test for non-regulated
8 employees deemed safety-sensitive?

9 MS. SWICICKI: No, I can't answer
10 that.

11 MR. SANCHEZ: Okay. Do you know who
12 would be able to answer that?

13 MS. SWICICKI: It could be HR --
14 Human Resources and Labor Relations.

15 MR. SANCHEZ: I'm going to hand
16 you -- I'm going to hand you one and ask
17 you to take a look at that. (Handing.)

18 MS. SWICICKI: Okay. (Perusing.)

19 MR. SANCHEZ: Do you recognize that
20 letter?

21 MS. SWICICKI: Yes, I do.

22 MR. SANCHEZ: Okay. I'd like to
23 move that into evidence as Union
24 Exhibit 7.

25 MR. MAGGIORE: I note for the record

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1 that Union Exhibit 7 is a three-page
2 document.

3 (Whereupon, Organization Exhibit 7
4 was marked.)

5 MR. SANCHEZ: Were you the charging
6 officer on Union Exhibit 7?

7 MS. SWICICKI: Yes, I was.

8 MR. SANCHEZ: And why are you
9 designated as the charging officer?

10 MS. SWICICKI: Because I oversee and
11 adhere to all corporate departmental
12 policies within Maintenance of Equipment
13 Department.

14 MR. SANCHEZ: Okay. And did you
15 take Mr. Dolginko out of service for
16 this offense?

17 MS. SWICICKI: No, I did not. I had
18 Jimmy McGrath, who is the designee, to
19 take Mr. Dolginko out since I was on
20 vacation that day.

21 MR. SANCHEZ: Okay. Can you go to,
22 I guess, page 2 of 3 on Union Exhibit 7?

23 MS. SWICICKI: (Perusing.)

24 MR. SANCHEZ: It's -- could you
25 read, "Dear Mr. Dolginko" -- the letter,

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1 please?

2 MS. SWICICKI: Sure. "Dear
3 Mr. Dolginko, this will inform you that
4 you were hereby removed from service on
5 December 17, 2021 at 11:17 a.m. by
6 Manager - M of E Manpower Resource
7 Management, J. McGrath, for "Violation
8 of the Corporate Alcohol and Substance
9 Abuse Policy".

10 You will be notified if you will be
11 charged, and if so, of the specific
12 trial charge, the time, date, and
13 location of your trial".

14 MR. SANCHEZ: Okay. Can Mr. McGrath
15 take Mr. Dolginko out of service --

16 MS. SWICICKI: Yes.

17 MR. SANCHEZ: -- does he have the
18 authority -- okay -- thank you.

19 Can you read the charges on Union
20 Exhibit 7 against Mr. Dolginko?

21 MS. SWICICKI: Sure. It's, "Conduct
22 Unbecoming an Employee, Violation of the
23 Corporate Alcohol and Substance Abuse
24 Policy, Section IV, "Prohibited
25 Conduct", (D), which states in pertinent

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1 part:

2 "D", the detection of a prohibited
3 substance resulting from any required
4 toxicological test is a violation of
5 this Policy.

6 In that, on December 13, 2021, you
7 reported to the Long Island Rail Road
8 Medical Facility in Mineola, New York,
9 where you submitted a urine specimen as
10 part of a Return-to-Duty drug test. On
11 December 17, 2021, the Department
12 received the results of that test, which
13 tested positive for marijuana".

14 MR. SANCHEZ: Okay.

15 MS. SWICICKI: "You may produce
16 witnesses on your behalf, without
17 expense to the company. You and your
18 representative may cross-examine
19 witnesses. You will be expected to be
20 present throughout the entire
21 proceeding".

22 MR. SANCHEZ: Okay. I'm going to
23 ask you to hold onto that exhibit and
24 I'm going to give you what has been
25 identified as -- I believe it's Carrier

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1 1.

2 MR. MAGGIORE: The Notice of Trial?

3 MR. SANCHEZ: Notice of Trial.

4 MR. MAGGIORE: Okay.

5 MS. SWICICKI: I have one.

6 MR. SANCHEZ: Okay. And are those
7 the same charges as the ones against
8 Mr. Drew?

9 MS. SWICICKI: (Perusing.) Yes.

10 MR. SANCHEZ: Okay. And you stated
11 earlier that you are familiar with the
12 Collective Bargaining Agreement as part
13 of your responsibilities; is that
14 correct?

15 MS. SWICICKI: Yes.

16 MR. SANCHEZ: And can you tell me
17 how many trials you've been to -- been a
18 part of -- for violation of the Company
19 policy -- this Company policy, MED-005?

20 MS. SWICICKI: I've been -- I would
21 say a handful of these -- of violations
22 of the MED-005.

23 MR. SANCHEZ: Okay. And how many
24 trials for non-regulated employees
25 deemed safety-sensitive by the Carrier

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1 have you been involved with, with this
2 organization?

3 Do you need me to repeat the
4 question? I know it's a lot.

5 MS. SWICICKI: How many trials have
6 I been --

7 MR. SANCHEZ: How many trials for
8 non-regulated employees, such as
9 Mr. Drew, who were deemed
10 safety-sensitive by the Carrier, have
11 you been involved with, with this
12 organization?

13 MS. SWICICKI: Regarding MED-005?

14 MR. SANCHEZ: Mm-hmm.

15 MS. SWICICKI: I believe this is the
16 only one for trial.

17 MR. SANCHEZ: So, this is the first
18 one?

19 MS. SWICICKI: I believe so, yes.

20 MR. SANCHEZ: Do you want to check?

21 If you want, we can take a recess if
22 she wants to confirm.

23 MR. MAGGIORE: I mean, if you want
24 to just answer in the affirmative, we'll
25 believe --

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1 MS. SWICICKI: Yeah.

2 MR. MAGGIORE: If you believe this
3 is the first one --

4 MS. SWICICKI: I believe this is the
5 first one.

6 MR. SANCHEZ: Okay -- all right.

7 (Whereupon, a discussion was held
8 off the record.)

9 MR. SANCHEZ: So, I'm going to hand
10 Ms. Swicicki Rule 58 and ask you if you
11 recognize the exhibit. (Handing.)

12 Rule 53 -- I apologize.

13 MS. SWICICKI: (Perusing.) Yes.

14 MR. SANCHEZ: I'd like to move that
15 into evidence as Union Exhibit 8.

16 MR. MAGGIORE: Okay.

17 (Whereupon, Organization Exhibit 8
18 was marked.)

19 MR. SANCHEZ: And are you familiar
20 with Rule 53?

21 MS. SWICICKI: I'm familiar with it,
22 yes.

23 MR. SANCHEZ: Okay. And can you
24 read Rule 53(a)?

25 MS. SWICICKI: Sure. "Employees

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1 will not be suspended, nor dismissed
2 from service without a fair and
3 impartial trial".

4 MR. SANCHEZ: And would you agree
5 that that language is not ambiguous,
6 "A"?

7 MS. SWICICKI: Regarding this trial?

8 MR. SANCHEZ: Well, just the rule.
9 It says, "Employees will not be
10 suspended, nor dismissed without -- from
11 service without a fair and impartial
12 trial".

13 Would you agree that that language
14 is not ambiguous?

15 MS. SWICICKI: Yes.

16 MR. SANCHEZ: Was Mr. Dolginko
17 suspended after a fair and impartial
18 trial?

19 MS. SWICICKI: No, not after.

20 MR. SANCHEZ: So, he was suspended
21 before -- without a fair and impartial
22 trial?

23 MS. SWICICKI: Yes.

24 MR. SANCHEZ: Okay. Can you read
25 "B", please?

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1 MS. SWICICKI: "When a major offense
2 has been committed, an employee
3 suspected by the management to be guilty
4 thereof may be held out of service
5 pending such trial and decision, only if
6 their retention in service could be
7 detrimental to themselves, another
8 person, or the Carrier".

9 MR. SANCHEZ: Okay. Just "B".

10 MS. SWICICKI: Okay.

11 MR. SANCHEZ: And would you agree
12 that "B" gives you certain circumstances
13 when employees can be held out of
14 service without a trial -- without a
15 fair and impartial trial?

16 MS. SWICICKI: Yes.

17 MR. SANCHEZ: Okay. And what are
18 they?

19 MS. SWICICKI: So, the following
20 types of offenses are --

21 MR. SANCHEZ: No, I'm sorry -- no,
22 for "B". It says, "B", which you just
23 testified to, gives you circumstances
24 where employees can be taken out of
25 service without a trial.

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1 Would you agree?

2 MS. SWICICKI: Yes, they can be held
3 out for a major offense -- it has been
4 committed.

5 MR. SANCHEZ: Okay. So, there's two
6 circumstances -- and stop me if you
7 disagree -- "B" gives you two
8 circumstances where an employee can be
9 taken out of service by management.

10 So, they have to be considered
11 guilty, correct?

12 MS. SWICICKI: Mm-hmm.

13 MR. SANCHEZ: And only if their
14 retention in service could be
15 detrimental to themselves, another
16 person, or the Carrier?

17 MS. SWICICKI: Correct.

18 MR. SANCHEZ: So, you have to
19 satisfy both, correct?

20 MS. SWICICKI: And then underneath
21 it, it gives you the following types of
22 offenses.

23 MR. SANCHEZ: I know, I'm going to
24 get there.

25 MR. MAGGIORE: Hold on. One at a

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1 time.

2 MR. SANCHEZ: Oh, okay. I'll get to
3 -- I'll get there --

4 MS. SWICICKI: Okay.

5 MR. SANCHEZ: -- but I'm asking
6 about "B" right now.

7 MS. SWICICKI: For "B" -- okay.

8 MR. SANCHEZ: Yes.

9 MS. SWICICKI: Okay. So, yes, you
10 are correct.

11 MR. SANCHEZ: So, you have to
12 satisfy -- they have to be guilty of the
13 offense?

14 MS. SWICICKI: Correct.

15 MR. SANCHEZ: And that their
16 retention in service has to be
17 detrimental to themselves, another
18 person, or the Carrier before you can
19 take them out without violating Rule 53;
20 would you agree?

21 MS. SWICICKI: Yes.

22 MR. SANCHEZ: Okay. And in
23 Mr. Dolginko's case, did you believe he
24 was guilty?

25 MS. SWICICKI: Yes, from the email

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1 from the Medical Department, yes.

2 MR. SANCHEZ: Okay. And did you
3 believe that his retention in service
4 could be detrimental to Mr. Dolginko,
5 another person, or the Carrier?

6 MS. SWICICKI: If you're under the
7 influence of marijuana, then, yes, to
8 yourself and to others.

9 MR. SANCHEZ: So, the Carrier,
10 before they took Mr. Dolginko out of
11 service, determined that he was guilty
12 of the offense and that his retention
13 could be detrimental to himself because
14 he was -- I'm sorry, I don't want to put
15 words in your mouth.

16 MS. SWICICKI: No, that's fine.

17 For -- because he tested positive
18 for marijuana, so it could be
19 detrimental to himself and to others.

20 MR. SANCHEZ: Do you know if he was
21 impaired at the time he was taken out of
22 service?

23 MS. SWICICKI: I did not see him at
24 the time.

25 MR. SANCHEZ: Okay.

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1 MR. MAGGIORE: Mr. Sanchez, I think
2 we have an issue here because if Mr.
3 Dolginko wanted to exercise his right to
4 go to trial, all these questions
5 should've been asked at that time.

6 We're here for a trial for Mr. Drew.
7 I understand you want to enter this as
8 evidence to explain the Carrier's
9 actions in terms of how these cases are
10 handled, but in terms of the specifics
11 of Mr. Dolginko's case, I am just going
12 to ask that you refrain from asking Ms.
13 Swicicki questions on that.

14 MR. SANCHEZ: Well -- okay. And for
15 the record, I'd like to say that, as
16 Mr. Drew's designated representative,
17 I'm entitled to produce -- summon any
18 person to produce any evidence to enable
19 me to defend Mr. Drew against the
20 charges.

21 This is our evidence or
22 presentation, so --

23 MR. MAGGIORE: Absolutely. But I --
24 my only -- again, my concern is that an
25 employee, when they're charged, has the

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1 right to a trial. If you want to ask --
2 if Mr. Dolginko wanted to go to trial,
3 these are all relevant questions to ask
4 during a trial for Mr. Dolginko.

5 I allowed you to enter his Notice of
6 Trial cause I understand you want to
7 defend your member and make the point --
8 or make a point -- or try and make a
9 point regarding how these cases are
10 handled. I'm allowing that.

11 But, again. Specifics about his
12 case, I'm asking you, please, refrain
13 from asking questions about that because
14 if you wanted to, then you could've had
15 a trial for his case -- or he could have
16 had a trial.

17 MR. SANCHEZ: And I'll respond, on
18 the record, that the relevance -- I
19 don't have to explain relevance here.

20 MR. MAGGIORE: Yeah, you do.

21 MR. SANCHEZ: That's for the
22 reviewing officer.

23 What I put in this -- Ms. Swicicki
24 is connected to all these exhibits
25 because she was the charging official.

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1 So, it shows a pattern and this is -- we
2 establish relevance.

3 So, I'm going to continue to go down
4 this road till I'm done. I have other
5 employees and this is a trial. You're
6 right. If Mr. Dolginko was afforded a
7 trial, we would've done a trial, if he
8 wanted a trial, right here.

9 I'm now representing Mr. Drew, so
10 there's no mistake. This is Mr. Drew's
11 trial, not Mr. Dolginko's trial.

12 MR. MAGGIORE: Okay. You can
13 continue with your questioning.

14 MR. SANCHEZ: Thank you.

15 Okay. Ms. Swicicki, could you
16 continue reading Rule 53 and you can
17 start with, "The following types of
18 offenses".

19 MS. SWICICKI: "The following types
20 of offenses justify pre-investigation
21 suspension when there is sufficient
22 reason to believe the employee is guilty
23 of the offense and that he or she might
24 commit the offense again if not withheld
25 from service".

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1 MR. SANCHEZ: Okay. And I'm going
2 to stop you there -- and I'll read the
3 following offenses.

4 So, first one, "theft".

5 Was Mr. Dolginko guilty of theft?

6 MS. SWICICKI: No.

7 MR. SANCHEZ: Okay. Two, "unsafe
8 practices".

9 Was Mr. Dolginko guilty of an unsafe
10 practice?

11 MS. SWICICKI: No.

12 MR. SANCHEZ: Three, "serious
13 insubordination".

14 Was Mr. Dolginko guilty of serious
15 insubordination?

16 MS. SWICICKI: No.

17 MR. SANCHEZ: Number four,
18 "threatening or abusive conduct".

19 Was Mr. Dolginko guilty of
20 threatening or abusive conduct?

21 MS. SWICICKI: No.

22 MR. SANCHEZ: Five, "fighting on
23 duty or on Carrier property".

24 Was Mr. Dolginko guilty of fighting?

25 MS. SWICICKI: No.

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1 MR. SANCHEZ: Okay. Number six,
2 "under the influence of alcohol or
3 narcotics while on duty".

4 Was Mr. Dolginko guilty of being
5 under the influence of alcohol or
6 narcotics while on duty?

7 MS. SWICICKI: He was guilty of it
8 for his return-to-duty.

9 MR. SANCHEZ: That's not my
10 question --

11 MS. SWICICKI: But not on duty.

12 MR. SANCHEZ: Okay. So, he was --
13 so, the answer is no?

14 MS. SWICICKI: No.

15 MR. SANCHEZ: And seven, "rape,
16 assault, or other serious criminal
17 activities".

18 Was Mr. Dolginko guilty of rape,
19 assault, or other serious criminal
20 activities?

21 MS. SWICICKI: No.

22 MR. SANCHEZ: So, when Mr. Dolginko
23 was taken out of service, the Carrier
24 violated Rule 53?

25 MS. SWICICKI: He was also being

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1 marked paid using his sick-time, as well
2 being paid by the Carrier -- his
3 sick-time. So, we --

4 MR. SANCHEZ: So, when Mr. Dolginko
5 was taken out of service -- when
6 Mr. Dolginko was taken out of service by
7 the Carrier, did his compensation cease?

8 MS. SWICICKI: Mr. Dolginko or
9 Mr. Drew?

10 MR. SANCHEZ: Mr. Dolginko.

11 MS. SWICICKI: We're talking about
12 Mr. Drew, so I don't have Mr. Dolginko's
13 information.

14 MR. SANCHEZ: Okay. So, it's
15 company policy when an employee is taken
16 out of service for a violation such as
17 detection of -- for prohibited substance
18 and they're taken out of service, does
19 their compensation stop?

20 MS. SWICICKI: Correct, yes.

21 MR. SANCHEZ: So, they don't get
22 paid anymore?

23 MS. SWICICKI: No.

24 MR. SANCHEZ: Can they -- and
25 sick-time?

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1 MS. SWICICKI: No.

2 MR. SANCHEZ: Vacation?

3 MS. SWICICKI: No.

4 MR. SANCHEZ: Personal?

5 MS. SWICICKI: No, they'll be marked
6 out of service/unpaid.

7 MR. SANCHEZ: Okay. So, when
8 Mr. Dolginko was taken out of service
9 for the offense, his compensation
10 stopped?

11 MS. SWICICKI: Mr. Drew, yes.

12 MR. SANCHEZ: Mr. Dolginko.

13 MS. SWICICKI: I don't have
14 Mr. Dolginko's information in front of
15 me.

16 MR. SANCHEZ: Would Mr. Dolginko be
17 treated differently for this offense
18 than Mr. Drew?

19 MS. SWICICKI: No.

20 MR. SANCHEZ: Okay. Thank you.

21 So, Mr. Dolginko took his
22 return-to-work physical on December 13th
23 and the results came back on December
24 17th, four days later.

25 Is that correct?

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1 MS. SWICICKI: (Perusing.)

2 MR. SANCHEZ: I believe you can look
3 at the Union Exhibit 7.

4 MS. SWICICKI: So, he went on the
5 13th and the 17th, the Department
6 received the test results, yes.

7 MR. SANCHEZ: And do you recall what
8 Mr. Dolginko's status was from
9 December 13th through January 3rd?

10 MS. SWICICKI: No.

11 MR. SANCHEZ: Okay. Would you be
12 surprised -- he was on vacation and he
13 went from DS to vacation; he was never
14 in service or on the property.

15 Okay. I'm going to -- (handing).

16 MR. MAGGIORE: This is -- you want
17 to enter this as an exhibit?

18 MR. SANCHEZ: Yes -- yes.

19 MR. MAGGIORE: This is -- I note for
20 the record that Mr. Sanchez has handed
21 me -- it's a two-sided document. It's
22 two pages. It says, "Notice of Trial",
23 has the name "R. Dombek" on it.

24 I'll mark it as Carrier -- I'm sorry
25 -- Organization Exhibit 9.

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1 (Whereupon, Organization Exhibit 9
2 was marked.)

3 MR. SANCHEZ: I'm going to ask Ms.
4 Swicicki if you can take a look at that
5 and if you recognize that document.
6 (Handing.)

7 MS. SWICICKI: (Perusing.) Yes, I
8 do.

9 MR. SANCHEZ: And can you tell me
10 what that document is?

11 MS. SWICICKI: It was an employee
12 who tested positive for marijuana and it
13 is a Notice of Trial.

14 MR. SANCHEZ: And was that employee
15 taken out of service?

16 MS. SWICICKI: Yes, he had to be
17 taken out of service.

18 MR. SANCHEZ: And were you the
19 employee -- were you the manager who
20 took him out of service?

21 MS. SWICICKI: I do not recall.

22 MR. SANCHEZ: Okay. Are you the
23 charging official?

24 MS. SWICICKI: Yes, I'm the charging
25 official for this Notice of Trial.

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1 MR. SANCHEZ: Okay. I'll ask you
2 the same questions. I'm going to refer
3 back to Rule 53.

4 So, I'm going to ask you to read "A"
5 again, please.

6 MS. SWICICKI: "Employees will not
7 be suspended, nor dismissed from service
8 without a fair and impartial trial".

9 MR. SANCHEZ: And was Mr. Dombek
10 afforded a fair and impartial trial
11 before he was removed from service?

12 MS. SWICICKI: No.

13 MR. SANCHEZ: I'd ask you to read
14 "B".

15 MS. SWICICKI: "When a major offense
16 has been committed, an employee
17 suspected by the management to be guilty
18 thereof may be held out of service
19 pending such trial and decision, only if
20 their retention in service could be
21 detrimental to themselves, another
22 person, or the Carrier".

23 MR. SANCHEZ: Okay. And so -- and
24 we've already established that this --
25 "B" gives the Carrier two circumstances

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1 where an employee can be taken out of
2 service without a fair and impartial
3 trial.

4 Did the Carrier meet those burdens
5 with Mr. Dombek?

6 MS. SWICICKI: Yes.

7 MR. SANCHEZ: So, he's guilty of the
8 offense?

9 MS. SWICICKI: Correct.

10 MR. SANCHEZ: And why did the
11 carrier believe the employee was guilty
12 of the offense?

13 MS. SWICICKI: The employee tested
14 positive for marijuana, so it could be
15 detrimental to himself and to others.

16 MR. SANCHEZ: Okay.

17 MS. SWICICKI: And this is also
18 Mr. Dombek's second case testing
19 positive for marijuana.

20 MR. SANCHEZ: (Handing.)

21 MR. MAGGIORE: Mr. Sanchez has
22 handed me another document. It's a
23 one-page document. Notice of Trial with
24 the name "Reszka" on it, R-E-S-Z-K-A.

25 This will be Organization

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1 Exhibit 10. (Handing.)

2 (Whereupon, Organization Exhibit 10
3 was marked.)

4 MR. MAGGIORE: A copy has been
5 provided to Ms. Swicicki.

6 MR. SANCHEZ: Ms. Swicicki, I'd ask
7 you if you could look at that document
8 and tell me if you recognize it.

9 MS. SWICICKI: (Perusing.) I do.

10 MR. SANCHEZ: And can you read the
11 charge, please?

12 MS. SWICICKI: "Conduct Unbecoming
13 an Employee of the Long Island Rail
14 Road, Violation of the Corporate Alcohol
15 and Substance Abuse Policy".

16 "Prohibited conduct which provides
17 in pertinent part:

18 "A", all employees are prohibited
19 from, number "3", illegally
20 manufacturing, distributing, selling,
21 dispensing, possessing, or using any
22 illegally obtained controlled substance
23 on or off duty.

24 In that on January 2, 2021, you
25 reported to the Long Island Rail Road

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1 Medical Facility in Mineola, New York
2 where you submitted to a random drug
3 test. On January 8, 2021, the
4 Department received the results of that
5 test, which were positive for marijuana.

6 You may, if you so desire, be
7 accompanied by one or more persons of
8 your own choosing, who are accredited
9 representatives of your Organization, to
10 represent you without expense to the
11 Company.

12 You may produce witnesses on your
13 behalf, without expense to the Company.

14 You and/or your representative may
15 cross-examine witnesses.

16 You will be expected to be present
17 throughout the entire proceeding".

18 MR. SANCHEZ: Okay. Now, I'm going
19 to ask you to go back to Union Exhibit
20 8, which is Rule 53, and I'll read and
21 you can answer "yes" or "no".

22 MS. SWICICKI: Okay. (Perusing.)

23 MR. SANCHEZ: It says "A",
24 "Employees will not be suspended or
25 dismissed from service without a fair

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1 and impartial trial".

2 Was Mr. Reszka afforded a fair and
3 impartial trial before he was removed
4 from service?

5 MS. SWICICKI: No.

6 MR. SANCHEZ: "B", "When a major
7 offense has been committed by an
8 employee suspected by management to be
9 guilty thereof, therefore, may be held
10 out of service pending such trial and
11 decision only if the retention in
12 service could be detrimental to
13 themselves or another person".

14 So, was Mr. Reszka's retention --
15 did the Carrier believe him to be guilty
16 of the offense.

17 MS. SWICICKI: Yes.

18 MR. SANCHEZ: And that belief was
19 based on --

20 MS. SWICICKI: Him testing positive
21 for marijuana while reporting to Medical
22 for a random drug test. He owned an
23 Hours of Service position and it's
24 detrimental to himself and another
25 person while being an electrician.

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1 MR. SANCHEZ: And how is it
2 detrimental to himself or another
3 electrician?

4 MS. SWICICKI: He tested positive
5 for marijuana and -- a controlled
6 substance -- and, therefore, to work as
7 an electrician, that could be
8 detrimental to himself. He could get
9 hurt or hurt others while performing his
10 duties.

11 MR. SANCHEZ: Okay. I'd ask you to
12 read from Union Exhibit 10.

13 Right underneath the charge it says,
14 "In that on January 2, 2021" -- if you
15 could read that portion and stop at the
16 end where it says "marijuana".

17 MS. SWICICKI: Okay. "In that on
18 January 2, 2021, you reported to the
19 Long Island Rail Road Medical Facility
20 in Mineola, New York where you submitted
21 to a random drug test. On January 8,
22 2021, the Department received the
23 results of that test, which were
24 positive for marijuana".

25 MR. SANCHEZ: Okay. So, Mr. Reszka

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1 took the test on January 2nd.

2 MS. SWICICKI: Correct.

3 MR. SANCHEZ: And that was a -- that
4 was a --

5 MS. SWICICKI: Random drug test.

6 MR. SANCHEZ: -- random drug test.

7 MS. SWICICKI: Yes.

8 MR. SANCHEZ: And do you what his --
9 was he returned to service after he took
10 that random drug test?

11 MS. SWICICKI: Yes.

12 MR. SANCHEZ: So, he was returned
13 back to service.

14 So, from the 2nd to the 6th -- till
15 the results came -- I'm sorry -- from
16 the 2nd to the 8th, six days had
17 passed --

18 MS. SWICICKI: Yes.

19 MR. SANCHEZ: -- and to the best of
20 your knowledge, during those six days,
21 were there any complaints about his
22 performance?

23 MS. SWICICKI: Not that I'm aware
24 of.

25 MR. SANCHEZ: Any complaints that he

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1 seemed to be impaired?

2 MS. SWICICKI: Not that I'm aware
3 of.

4 MR. SANCHEZ: Any complaints that he
5 had any unsafe acts?

6 MS. SWICICKI: Not that I'm aware
7 of.

8 MR. SANCHEZ: Had there been a
9 complaint that he had committed an
10 unsafe act or he seemed impaired, would
11 you have been made aware of those?

12 MS. SWICICKI: Yes, cause there
13 would've been charges.

14 MR. SANCHEZ: Okay. So, then he
15 wasn't. Even though you're not aware,
16 the answer is -- and stop me if I'm
17 wrong -- he wasn't impaired.

18 There were no complaints of him
19 being impaired, committing any unsafe
20 acts, or any workplace malfeasance; is
21 that correct?

22 MS. SWICICKI: Correct.

23 MR. SANCHEZ: Okay. (Handing.)

24 MR. MAGGIORE: Mr. Sanchez has
25 handed me another document. It's one

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1 page. It says "Notice of Trial",
2 contains the name "P. Pena".

3 I'm marking this as Organization
4 Exhibit 11 and providing a copy to Ms.
5 Swicicki. (Handing.)

6 (Whereupon, Organization Exhibit 11
7 was marked.)

8 MS. SWICICKI: (Perusing.)

9 MR. SANCHEZ: Ms. Swicicki, do you
10 recognize this document?

11 MS. SWICICKI: Yes.

12 MR. SANCHEZ: And can you tell me
13 what it is?

14 MS. SWICICKI: It's a Notice of
15 Trial for Mr. Pena.

16 MR. SANCHEZ: Okay. And is it the
17 same Notice of Trial -- or same offense
18 that Mr. Drew is charged with?

19 MS. SWICICKI: This one is the same
20 one as Mr. Reszka because he failed a
21 random drug test and tested positive for
22 marijuana.

23 MR. SANCHEZ: Okay. But the charge
24 is -- so, it's not the same charge?

25 MS. SWICICKI: I apologize.

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1 It's the -- Conduct Unbecoming an
2 Employee in Violation of the Corporate
3 Alcohol and Substance Abuse Policy" --
4 yes.

5 MR. SANCHEZ: Okay. And I'm going
6 to ask the same questions.

7 Was Mr. Pena afforded a fair and
8 impartial trial before he was removed
9 from service?

10 MS. SWICICKI: No.

11 MR. SANCHEZ: Was he suspected by
12 management to be guilty of the offense?

13 MS. SWICICKI: Yes.

14 MR. SANCHEZ: And was his retention
15 in service detrimental to the Carrier,
16 or himself, another person -- and if so,
17 how is that determined?

18 MS. SWICICKI: Yes, due to being
19 tested for -- testing positive for
20 marijuana.

21 MR. SANCHEZ: Was it marijuana or
22 marijuana metabolites? I'm sorry, I'll
23 strike that question.

24 So, I would like you to read the
25 same under "A". It says, "In that on

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1 July 12th".

2 MS. SWICICKI: "In that on July 12,
3 2019, you reported to the Long Island
4 Rail Road Medical Facility in Mineola,
5 New York where you submitted a urine
6 specimen as part of a random drug test.
7 On July 16, 2019, the Department
8 received the results of that test, which
9 were positive for marijuana".

10 MR. SANCHEZ: Okay. So, on
11 July 12th he came in and he gave the
12 sample -- Mr. Pena -- and that sample
13 tested positive for marijuana, and on
14 the 16th, he was notified, I guess.

15 So, for those four days, are you
16 aware of any complaints of his
17 performance?

18 MS. SWICICKI: No.

19 MR. SANCHEZ: Unsafe acts?

20 MS. SWICICKI: No.

21 MR. SANCHEZ: Any malfeasance on the
22 job?

23 MS. SWICICKI: No.

24 MR. SANCHEZ: Okay. And had he been
25 impaired or exhibited symptoms of being

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1 impaired, it would've come to your
2 attention?

3 MS. SWICICKI: Correct.

4 MR. SANCHEZ: Okay. Do you know why
5 the Carrier submits employees to a
6 toxicological test on a return-to-work
7 physical?

8 MS. SWICICKI: It's stated in the
9 policy. It's as per them being out 30
10 calendar days, they would have to.

11 MR. SANCHEZ: Okay. But what's the
12 -- do you know what the objective of the
13 toxicological test is?

14 MS. SWICICKI: No.

15 MR. SANCHEZ: You don't know what
16 the objective of giving someone a
17 toxicological test is?

18 MS. SWICICKI: Well, to make sure
19 that they're safe to return back to
20 work.

21 MR. SANCHEZ: That they're not
22 impaired by a prohibited substance?

23 MS. SWICICKI: Correct.

24 MR. SANCHEZ: And do you know why
25 the Carrier doesn't give an alcohol test

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1 to the employees while they're there?

2 MS. SWICICKI: They do drug and
3 alcohol testing.

4 MR. SANCHEZ: On a return-to-work
5 physical?

6 MS. SWICICKI: In the policy, it
7 states, "subject to drug and/or alcohol
8 testing".

9 MR. SANCHEZ: Okay. In Mr. Drew's
10 case, for -- okay.

11 MR. MAGGIORE: You asked this
12 question of Mr. Yodice, just as a
13 reminder, and he responded that drug
14 testing is done for return-to-work, not
15 alcohol.

16 MR. SANCHEZ: I know, but I'm asking
17 Ms. Swicicki if she knows why.

18 MR. MAGGIORE: Okay. Fair enough.
19 I'm just stating for the record that was
20 his -- you asked the same question to
21 the person who is in charge of the
22 Medical Department and he responded.

23 MS. SWICICKI: I am unsure.

24 MR. SANCHEZ: Okay. Actually, could
25 we have a moment?

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1 MR. MAGGIORE: Sure. The time is
2 11:15 a.m. We're going to take a brief
3 recess.

4 We're off record.

5 (Whereupon, a brief recess was
6 taken.)

7 MR. MAGGIORE: All right. The time
8 is 11:25 a.m. We're back on the record.

9 Before the Organization requested a
10 recess, Mr. Sanchez was questioning Ms.
11 Swicicki regarding Organization
12 Exhibit 11.

13 Mr. Sanchez, do you have any other
14 questions?

15 MR. SANCHEZ: No, I don't -- not for
16 Union Exhibit 11.

17 MR. MAGGIORE: Okay.

18 MR. SANCHEZ: I'm going to hand you
19 -- this is 12. (Handing.)

20 MR. MAGGIORE: Mr. Sanchez has
21 handed me a document -- a one-page
22 document email, subject line, "Message
23 from MTA Safety & Security regarding
24 marijuana use".

25 I'm showing this to Ms. Swicicki --

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1 I'm giving Ms. Swicicki a copy rather.
2 (Handing.)

3 I will mark this as Organization
4 Exhibit 12.

5 (Whereupon, Organization Exhibit 12
6 was marked.)

7 MS. SWICICKI: (Perusing.)

8 MR. SANCHEZ: Ms. Swicicki, do you
9 recognize the document that has been
10 identified as Union Exhibit 12?

11 MS. SWICICKI: No, I don't.

12 MR. SANCHEZ: You don't --

13 MS. SWICICKI: I don't recall seeing
14 this before.

15 MR. SANCHEZ: Okay. You don't
16 recall -- okay. Earlier you testified
17 that if policy -- part of your job
18 function is payroll, administrative, and
19 all corporate and departmental policies.

20 Would this be considered -- you can
21 take a look at it -- would this fall
22 under departmental policy --

23 MR. MAGGIORE: We'll give Ms.
24 Swicicki an opportunity to review the
25 document first.

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1 MR. SANCHEZ: Sure.

2 MS. SWICICKI: Thank you.

3 MR. SANCHEZ: Okay.

4 MS. SWICICKI: (Perusing.) Okay.

5 MR. SANCHEZ: Okay. So, now that
6 you've had a chance to review the
7 document, does it look familiar?

8 MS. SWICICKI: I am not aware of
9 this.

10 MR. SANCHEZ: Okay. So, you've
11 never seen this document prior to the
12 introduction at this trial?

13 MS. SWICICKI: Correct.

14 MR. SANCHEZ: Okay. Can you read
15 the top where it says "From", "Sent",
16 "To", and "Subject", please?

17 MS. SWICICKI: "From, MTA Employee
18 Communications".

19 MR. SANCHEZ: Okay. Can you stop
20 for a minute -- I'm sorry.

21 Would you receive any emails from
22 MTA Communications in your current
23 position?

24 MS. SWICICKI: Yes.

25 MR. SANCHEZ: Okay. And the date,

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1 please, when it was sent.

2 MS. SWICICKI: Monday, May 23, 2022,
3 4:28 p.m.

4 MR. SANCHEZ: Okay. So, May -- so,
5 almost a year -- 11 months. So, this
6 was sent 11 months ago and you testified
7 that this is the first time you've seen
8 it, correct?

9 MS. SWICICKI: Correct.

10 MR. SANCHEZ: Okay. And "To"?

11 MS. SWICICKI: "MTA Employee
12 Communications".

13 MR. SANCHEZ: And would that -- your
14 job encompass MTA Employee
15 Communications -- would you be copied on
16 these types of --

17 MS. SWICICKI: I believe I would.

18 MR. SANCHEZ: Okay. And the
19 subject, finally.

20 MS. SWICICKI: "Message from MTA
21 Safety & Security regarding marijuana
22 use".

23 MR. SANCHEZ: Okay. And since this
24 -- you've never seen this document, I'll
25 just ask you, are you familiar with

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1 Patrick Warren?

2 MS. SWICICKI: Yes.

3 MR. SANCHEZ: And who is Mr. Warren?

4 MS. SWICICKI: MTA Chief Safety &
5 Security Officer.

6 MR. SANCHEZ: And is he a
7 policy-maker in his position, if you're
8 aware?

9 MS. SWICICKI: I am unsure of his
10 position and his responsibilities.

11 MR. SANCHEZ: Okay. Is he senior
12 staff?

13 MS. SWICICKI: I am unsure.

14 MR. SANCHEZ: Okay. Do you know if
15 he works in Jamaica on the Long Island
16 Rail Road or in MTA Headquarters?

17 MS. SWICICKI: I don't know where he
18 works.

19 MR. SANCHEZ: Okay. So -- but the
20 position of MTA Chief Safety & Security
21 Officer is new to you?

22 MS. SWICICKI: I've seen it before,
23 but I don't know everyone that works on
24 the railroad.

25 MR. SANCHEZ: Okay. Well, neither

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1 do I, but Patrick Warren, MTA Safety --
2 I'm sure this guy is an important guy.

3 MS. SWICICKI: Okay.

4 MR. SANCHEZ: I have no further
5 questions with Union Exhibit --

6 MR. MAGGIORE: 12.

7 MR. SANCHEZ: -- 12.

8 Okay. Is it your understanding that
9 it's the Carrier's position that the use
10 of recreational marijuana is prohibited
11 off-duty for all employees?

12 MS. SWICICKI: Yes.

13 MR. SANCHEZ: Okay. And does that
14 include individuals who are not deemed
15 safety-sensitive?

16 MS. SWICICKI: Yes.

17 MR. SANCHEZ: Okay. So, this
18 policy -- so, the Rail Road's policy, as
19 you understand it, is any employee of
20 the Long Island Rail Road is prohibited
21 from using recreational marijuana
22 off-duty?

23 MS. SWICICKI: Correct. The policy
24 states it's an alcohol and drug free
25 workplace.

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1 MR. SANCHEZ: Well, I'm talking
2 off-duty.

3 MS. SWICICKI: Correct -- okay.
4 Off-duty, yes.

5 MR. SANCHEZ: I'm going to ask you
6 to look at Carrier 1 again.

7 MR. MAGGIORE: The Notice of Trial?

8 MR. SANCHEZ: It's the original
9 trial charges -- yeah.

10 MS. SWICICKI: Okay. (Perusing.)

11 MR. SANCHEZ: Are you familiar with
12 that document; do you recognize Carrier
13 1?

14 MS. SWICICKI: The Notice of Trial,
15 yes.

16 MR. SANCHEZ: And can you read
17 Carrier 1?

18 MS. SWICICKI: Sure. It's, "Conduct
19 Unbecoming an Employee, Violation of the
20 Corporate Alcohol and Substance Abuse
21 Policy, Prohibited Conduct, "D", which
22 states in pertinent part:

23 "D", that detection of a prohibited
24 substance resulting from any required
25 toxicological test is a violation of

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1 this policy.

2 In that on June 7, 2022, he reported
3 to the Long Island Rail Road Medical
4 Facility in Mineola, New York where you
5 submitted a urine specimen as part of a
6 return-to-duty drug test. On June 13,
7 2022, the Department was informed that
8 you tested positive for marijuana.

9 MR. SANCHEZ: Okay. And you were
10 the charging officer, correct?

11 MS. SWICICKI: Correct.

12 MR. SANCHEZ: And how did you
13 determine the offense that was
14 committed?

15 MS. SWICICKI: It was due to him
16 reporting to medical for a
17 return-to-duty drug test.

18 MR. SANCHEZ: Okay. I'm going to
19 give you what has been -- actually, you
20 have it -- Carrier 9.

21 Everybody and their mother is on it
22 -- (perusing) -- yeah, you're on there.

23 MS. SWICICKI: (Perusing.)

24 (Whereupon, a discussion was held
25 off the record.)

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1 MR. SANCHEZ: So, Carrier Exhibit 9
2 -- can you tell me what Carrier
3 Exhibit 9 is, if you recognize it?

4 MS. SWICICKI: Yes, I do. It's an
5 email from Christopher Yodice from the
6 Medical Department, "Positive Drug Test
7 Result" is the subject.

8 Do you want me to start -- read from
9 the bottom?

10 MR. SANCHEZ: Yes, please.

11 MS. SWICICKI: Sure.

12 MR. SANCHEZ: I guess -- yeah.

13 MS. SWICICKI: Okay. So, the email
14 was sent on Monday, June 13, 2022, 12:55
15 p.m. and it says, "Good afternoon.
16 Electrician, Darren Drew, 50112/1023302
17 has tested for marijuana on a
18 return-to-duty drug test conducted on
19 June 7, 2022.

20 This test was conducted under Long
21 Island Rail Road authority. The
22 employee has requested a split sample.
23 I will forward the results of this once
24 they are received. The Department has
25 been notified and will be taking the

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1 employee out of service. Thank you,
2 Chris".

3 MR. SANCHEZ: And what was the
4 prohibited substance detected?

5 MS. SWICICKI: Marijuana.

6 MR. SANCHEZ: Okay. And who
7 determines that it's a prohibited
8 substance?

9 MS. SWICICKI: It's in the corporate
10 policy -- the Alcohol and Substance
11 Abuse Policy.

12 MR. SANCHEZ: So, the Long Island
13 Rail Road determines that it's a
14 prohibited substance?

15 MS. SWICICKI: There's a Long Island
16 Rail Road and then a Federal list, what
17 is prohibited. It's a Federal and Long
18 Island Rail Road drug panel.

19 MR. SANCHEZ: And is that the same
20 drug panel for covered employees --
21 Hours of Service employees and employees
22 that are not covered under Hours of
23 Service?

24 MS. SWICICKI: Marijuana, yes, it's
25 under both.

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1 MR. SANCHEZ: Okay. And is Mr. Drew
2 covered under Federal Authority?

3 MS. SWICICKI: No.

4 MR. SANCHEZ: And I'm going to refer
5 you back to Carrier 1 where it says --
6 could you read "D" one more time,
7 please?

8 MS. SWICICKI: "The detection of a
9 prohibited substance resulting from any
10 required toxicological test is a
11 violation of this policy".

12 MR. SANCHEZ: And could you tell me
13 who determines what toxicological tests
14 are required in this case?

15 MS. SWICICKI: What -- I'm sorry,
16 can you --

17 MR. SANCHEZ: Can you tell me who
18 determines what toxicological tests are
19 required in this case?

20 MS. SWICICKI: So, for this, it's
21 his return-to-duty as per the Drug and
22 Alcohol Policy, and that's what he was
23 being tested for.

24 MR. SANCHEZ: So, that's under Rail
25 Road authority?

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1 MS. SWICICKI: The return-to-duty,
2 yes.

3 MR. SANCHEZ: The toxicological was
4 also under Rail Road authority?

5 MS. SWICICKI: Yes.

6 MR. SANCHEZ: Okay. Is the charge
7 correct?

8 MS. SWICICKI: Yes.

9 MR. SANCHEZ: Okay. And do you know
10 the difference between marijuana and
11 marijuana metabolites?

12 MS. SWICICKI: No.

13 MR. SANCHEZ: All right. I'm going
14 to explain it in layman's terms. It has
15 already been entered into the record,
16 but --

17 MR. MAGGIORE: Yeah, you asked this
18 of Mr. Yodice --

19 Mr. MR. SANCHEZ: But I'm asking
20 Corrine if she knows the difference --
21 Ms. Swicicki -- I'm sorry.

22 MS. SWICICKI: It's okay.

23 MR. SANCHEZ: Marijuana metabolites
24 is what's left in your system after the
25 ingestion of marijuana.

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1 So, THC is the part of marijuana
2 that gets you -- that gets you high,
3 right, and once that's metabolized, you
4 have marijuana metabolites and that
5 stays in your system, but that doesn't
6 cause impairment. That's the
7 difference.

8 Okay. I'm going to hand you what
9 has been -- it hasn't been identified
10 yet -- I'm sorry.

11 I'm going to -- I guess I'll give
12 you what has been identified as Carrier
13 Exhibit 16.

14 MR. MAGGIORE: Can I just take a
15 second?

16 MR. SANCHEZ: Sure.

17 MR. MAGGIORE: (Perusing.) This is
18 Carrier Exhibit 13.

19 MR. SANCHEZ: It's 13? Maybe that's
20 -- I don't know what that is.

21 MR. MAGGIORE: Hold on. Let me just
22 double-check this. (Perusing.)

23 MR. SANCHEZ: Yeah, it looks like
24 16. (Indicating.)

25 MR. MAGGIORE: This doesn't match.

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1 This is -- looks like -- the donor ID is
2 different on this one. It says it's a
3 different person's lab.

4 MR. SANCHEZ: What do you have, 13?

5 MR. MAGGIORE: I'll show you -- on
6 Carrier Exhibit 13, the donor ID is
7 1023302. The donor ID on that is
8 different.

9 MR. SANCHEZ: Wait a minute -- did
10 you just hand me mine back?

11 MR. COLOMBO: Hold on. (Perusing.)

12 MR. SANCHEZ: So, it has already
13 been entered in as Carrier Exhibit 13?

14 MR. MAGGIORE: Are you referring to
15 the Quest Diagnostic Lab Report for
16 Mr. Drew?

17 MR. SANCHEZ: Yes.

18 MR. MAGGIORE: Yes, that's 13 --
19 that's Carrier Exhibit 13.

20 MR. SANCHEZ: What is this? Let me
21 see yours, Drew.

22 MR. DREW: (Handing.)

23 MR. SANCHEZ: (Perusing.)

24 Okay -- all right. I'd ask you -- I
25 guess I'd ask you to take a look at

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1 Carrier Exhibit 13, please.

2 MS. SWICICKI: (Perusing.)

3 MR. SANCHEZ: Let me see that one --
4 it doesn't matter for the question.

5 (Perusing.)

6 And do you recognize this document,
7 Ms. Swicicki?

8 MS. SWICICKI: No.

9 MR. SANCHEZ: Do you want to take a
10 moment to look at it?

11 MS. SWICICKI: (Perusing.) Okay.

12 MR. SANCHEZ: Okay. So, this is the
13 result from Mr. Darren Drew's test.

14 MS. SWICICKI: Okay.

15 MR. SANCHEZ: Okay. So, it has
16 already been entered in as Union Exhibit
17 -- Carrier Exhibit 13.

18 MR. MAGGIORE: I just want to
19 clarify for the record that this is the
20 result of his primary specimen test.

21 MR. SANCHEZ: Okay.

22 MR. MAGGIORE: There were two tests
23 done on his urine sample. I just want
24 to make that clear for the record.

25 MR. SANCHEZ: Okay.

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1 MR. COLOMBO: I'm sorry, you said
2 this was --

3 MR. SANCHEZ: That was the primary,
4 yes.

5 MR. MAGGIORE: Primary -- primary
6 specimen.

7 MR. SANCHEZ: And do you know, Ms.
8 Swicicki, if this was the genesis of the
9 discipline imposed on Mr. Drew?

10 MS. SWICICKI: I'm sorry, can you
11 just repeat that?

12 MR. SANCHEZ: The genesis of the
13 discipline -- so, basically it's because
14 of the results on this document, is that
15 what started the disciplinary process
16 for Mr. Drew?

17 MS. SWICICKI: Yes.

18 MR. SANCHEZ: Okay. And can you
19 point out where Mr. Drew tested positive
20 for marijuana?

21 MS. SWICICKI: Point out when he
22 tested --

23 MR. SANCHEZ: No, where. I said,
24 this is the genesis of the discipline.

25 I'm asking you if you can point out

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1 where he tested positive for marijuana.

2 MS. SWICICKI: On this Quest --

3 MR. SANCHEZ: Yes.

4 MS. SWICICKI: Oh, okay. It states
5 marijuana -- how do you --

6 MR. COLOMBO: Metabolites.

7 MS. SWICICKI: Metabolites.

8 MR. SANCHEZ: Okay. Well -- but I'm
9 looking at marijuana.

10 Anywhere there, does it say that
11 Mr. Drew tested positive for marijuana?

12 MS. SWICICKI: Not just marijuana
13 alone, no.

14 MR. SANCHEZ: Okay. So, is the
15 Carrier Exhibit 1 accurate -- and I'll
16 ask you to look again at Carrier 1.

17 MS. SWICICKI: I have it.

18 MR. SANCHEZ: Oh, you have it.

19 MS. SWICICKI: Yeah, thank you.

20 (Perusing.)

21 Well, it's correct as what we were
22 notified in, that he tested positive for
23 marijuana.

24 MR. SANCHEZ: So -- but he tested
25 positive for marijuana metabolites; is

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1 that correct?

2 MS. SWICICKI: Yes.

3 MR. SANCHEZ: Okay. And he was
4 charged with testing positive for
5 marijuana, correct?

6 MS. SWICICKI: Correct.

7 MR. SANCHEZ: So, the charge is
8 incorrect, correct?

9 MS. SWICICKI: It doesn't state
10 "metabolites".

11 MR. SANCHEZ: I know. That's what
12 makes it incorrect.

13 MS. SWICICKI: Okay.

14 MR. SANCHEZ: So, he was not charged
15 properly, correct?

16 MS. SWICICKI: (Perusing.)

17 MR. SANCHEZ: I guess I can ask
18 another follow-up question.

19 If the initial test results were the
20 genesis of his discipline and he tested
21 for marijuana metabolites, shouldn't he
22 have been disciplined for testing
23 positive for marijuana metabolites and
24 not marijuana?

25 MS. SWICICKI: I understand you

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1 explained the differences between the
2 two, but I cannot --

3 MR. SANCHEZ: No, I mean, that's --

4 MR. MAGGIORE: Let her answer,
5 please.

6 MS. SWICICKI: -- I cannot attest to
7 what was -- you know, it stated tested
8 positive for marijuana, so -- and this
9 is what -- the Medical Department deemed
10 it as marijuana.

11 MR. SANCHEZ: Okay.

12 MS. SWICICKI: So, I would still
13 state it was -- charges are accurate.

14 MR. SANCHEZ: Okay. So, Carrier
15 Exhibit 13, in your possession, which
16 has already been determined to be the
17 initial results of his toxicological
18 test, state marijuana metabolites tested
19 positive.

20 It's the Carrier's position that
21 although he tested positive only for
22 marijuana metabolites, we're able to
23 charge him with a positive test for
24 marijuana.

25 Is that correct?

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1 MS. SWICICKI: Yes.

2 MR. SANCHEZ: Okay. I'm going to
3 give you a document and ask you if you
4 recognize it, Ms. Swicicki. (Handing.)

5 MS. SWICICKI: (Perusing.) Yes.

6 MR. SANCHEZ: Okay. And can you
7 tell me what it --

8 MR. MAGGIORE: One second. Let's
9 just mark it into the record.

10 MR. SANCHEZ: Yeah, I like to move
11 it into the record as Union 13.

12 MR. MAGGIORE: It's a one-page
13 document. It states "Notice of Trial",
14 contains the name "Joe Birnbaum".

15 We'll mark it into the record as
16 Organization Exhibit number 13.

17 (Whereupon, Organization Exhibit 13
18 was marked.)

19 MR. SANCHEZ: All right. Ms.
20 Swicicki, do you recognize document --
21 Union Exhibit 13?

22 MS. SWICICKI: Yes, I do.

23 MR. SANCHEZ: All right. Can you
24 read it into the record, please?

25 MS. SWICICKI: Sure. "Conduct

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1 Unbecoming an Employee, Violation of the
2 Corporate Alcohol and Substance Abuse
3 Policy, Marijuana Metabolite in Urine.

4 In that on March 8, 2018, you
5 reported to the Long Island Rail Road
6 Medical Facility in Mineola, New York
7 where you submitted a urine specimen as
8 part of an FRA Hours of Service random
9 drug test. On March 16, 2018, the
10 Department received the results of that
11 test, which was positive for marijuana
12 metabolite".

13 MR. SANCHEZ: Okay. And was
14 Mr. Birnbaum charged with positive for
15 marijuana or marijuana metabolites?

16 MS. SWICICKI: As per the Notice of
17 Trial, it states marijuana metabolite.

18 MR. SANCHEZ: Okay. And was that
19 test conducted under Federal authority?

20 MS. SWICICKI: This test was because
21 it was a random drug test.

22 MR. SANCHEZ: FRA Hours of Service,
23 correct --

24 MS. SWICICKI: Correct.

25 MR. SANCHEZ: Yeah, so -- and in

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1 2018 was recreational marijuana legal?

2 MS. SWICICKI: No.

3 MR. SANCHEZ: Okay. And is it a
4 prohibited substance under Federal
5 Regulations.

6 MS. SWICICKI: Yes.

7 MR. SANCHEZ: And Mr. Birnbaum at
8 the time, fell under Federal
9 authorization because of his position;
10 is that correct?

11 MS. SWICICKI: Yes.

12 MR. SANCHEZ: Okay. And so
13 Mr. Birnbaum was a regulated covered
14 employee, unlike Mr. Drew, correct?

15 MS. SWICICKI: Yes, he was being
16 sent to Medical for a random drug test,
17 not a return-to-duty.

18 MR. SANCHEZ: Okay. Because the
19 Carrier can't send Mr. Drew -- or can't
20 subject Mr. Drew to a random, correct?

21 MS. SWICICKI: Correct.

22 MR. SANCHEZ: Okay. Can we take a
23 minute?

24 MR. MAGGIORE: Yes, the time is
25 approximately 11:46 a.m. We're going to

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1 take a brief recess.

2 (Whereupon, a brief recess was
3 taken.)

4 MR. MAGGIORE: The time is
5 11:55 a.m. We're back on the record.

6 Mr. Sanchez, do you have any other
7 questions for Ms. Swicicki?

8 MR. SANCHEZ: Yes.

9 Ms. Swicicki, I'm going to ask you
10 to look at what has been identified as
11 Union Exhibit 8, please.

12 MR. MAGGIORE: (Indicating.)

13 MR. SANCHEZ: Just to have it in
14 front of you actually.

15 MS. SWICICKI: Thank you. I don't
16 have numbers on mine.

17 MR. SANCHEZ: Yeah, I'm sorry -- and
18 if you could have Carrier Exhibit 1,
19 which is the charge, in front of you at
20 the same time.

21 MS. SWICICKI: (Perusing.)

22 MR. SANCHEZ: So, can you tell me
23 what Carrier Exhibit is?

24 MS. SWICICKI: Notice of Trial for
25 Darren Drew.

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1 MR. SANCHEZ: Okay. And were you
2 the charging official?

3 MS. SWICICKI: Yes.

4 MR. SANCHEZ: Okay. And was Mr.
5 Drew taken out of service with this
6 Notice?

7 MS. SWICICKI: Not with this Notice.

8 MR. SANCHEZ: Okay.

9 MS. SWICICKI: He was taken out
10 prior to it.

11 MR. SANCHEZ: Okay. And was he
12 taken out of service without a fair and
13 impartial trial under Rule 53?

14 MS. SWICICKI: He was taken out
15 before a fair and impartial trial.

16 MR. SANCHEZ: So, he was taken out
17 of service without a fair and impartial
18 trial?

19 MS. SWICICKI: Correct.

20 MR. SANCHEZ: Okay. And did
21 Mr. Drew commit theft?

22 MS. SWICICKI: No.

23 MR. SANCHEZ: An unsafe practice?

24 MS. SWICICKI: No.

25 MR. SANCHEZ: Serious

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1 insubordination?

2 MS. SWICICKI: No.

3 MR. SANCHEZ: Threatening or abusive
4 conduct?

5 MS. SWICICKI: No.

6 MR. SANCHEZ: Fighting on duty or on
7 Carrier property?

8 MS. SWICICKI: No.

9 MR. SANCHEZ: Was he under the
10 influence of alcohol or narcotics while
11 on duty?

12 MS. SWICICKI: Not on duty, no.

13 MR. SANCHEZ: Okay. So -- I'm
14 sorry, can you -- so -- I'm sorry, can
15 you elaborate on that?

16 He was not -- the question is, was
17 he under the influence of alcohol or
18 narcotics while he --

19 MS. SWICICKI: Well, he was out
20 using his own sick leave trying to
21 return to work and there's where he
22 tested positive.

23 So, you can say he was being paid
24 his sick time from the Long Island Rail
25 Road while being on duty and testing

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1 positive.

2 MR. SANCHEZ: Okay. So, your
3 answer -- so, an employee who is out on
4 sick time is considered on duty?

5 MS. SWICICKI: No.

6 MR. SANCHEZ: Okay. Well, isn't
7 that what you just said?

8 MS. SWICICKI: Yes --

9 MR. SANCHEZ: Okay.

10 MS. SWICICKI: -- but he was not on
11 duty.

12 MR. SANCHEZ: Okay. So, when it
13 says number "6", under the influence of
14 alcohol or narcotics while on duty, was
15 Mr. Drew under the influence of alcohol
16 or narcotics while on duty?

17 MS. SWICICKI: No.

18 MR. SANCHEZ: And he did commit a
19 rape, assault, or other serious criminal
20 activities?

21 MS. SWICICKI: No.

22 MR. SANCHEZ: So, the Carrier took
23 him out of service although -- the
24 Carrier took him out of service without
25 a pre-investigation -- I'm sorry.

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1 The Carrier took him out of service
2 without sufficient reason to believe
3 that he was guilty of the offenses
4 below?

5 MS. SWICICKI: They took him out of
6 service, you could say, retention in
7 service could be detrimental to
8 themselves or another person for being
9 positive -- for testing positive for
10 marijuana.

11 MR. SANCHEZ: Okay. And that -- but
12 that was determined without a fair and
13 impartial trial?

14 MS. SWICICKI: Yes, he didn't have a
15 trial.

16 MR. SANCHEZ: Okay. So, the Carrier
17 made that determination unilaterally
18 based on the information they received
19 from Medical?

20 MS. SWICICKI: Yes.

21 MR. SANCHEZ: Okay. Was he offered
22 a trial waiver to the best of your
23 knowledge?

24 MS. SWICICKI: I believe so, yes.

25 MR. SANCHEZ: And do you know when

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1 he was offered a trial waiver?

2 MS. SWICICKI: No, I don't.

3 MR. SANCHEZ: Okay. If he had
4 signed a trial waiver, could the Union
5 have filed a grievance under Rule 53?

6 MS. SWICICKI: If he signed a
7 waiver?

8 MR. SANCHEZ: Mm-hmm.

9 MS. SWICICKI: No.

10 MR. SANCHEZ: Okay. So, if he
11 signed a waiver, he'd have no recourse;
12 he would admit guilt and there would be
13 no --

14 MS. SWICICKI: Correct.

15 MR. SANCHEZ: Okay -- okay. You
16 testified that MED-005 applies to all
17 employees, which is the drug and alcohol
18 policy.

19 MS. SWICICKI: Yes.

20 MR. SANCHEZ: Is that correct, all
21 employees?

22 MS. SWICICKI: It's correct.

23 MR. SANCHEZ: Okay. So, employees
24 who are not under Hours of Service and
25 who are not deemed safety-sensitive by

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1 the Carrier -- right -- are they subject
2 to return-to-work toxicological tests
3 after a 30-day absence?

4 MS. SWICICKI: I'm sorry, can you
5 just repeat that?

6 MR. SANCHEZ: Okay. So, I'm just --
7 there are employees -- you would agree,
8 that the Carrier has employees who are
9 not under Hours of Service --

10 MS. SWICICKI: Correct.

11 MR. SANCHEZ: -- and who are not
12 deemed safety-sensitive employed here?

13 MS. SWICICKI: Mm-hmm.

14 MR. SANCHEZ: Okay. So, are those
15 employees subject to a return-to-work
16 toxicological test after a 30-day
17 absence?

18 MS. SWICICKI: Those that are not
19 deemed safety-sensitive are not required
20 to perform a return-to-duty test.

21 MR. SANCHEZ: Okay. So, I'll say --
22 that's a little confusing.

23 So, the policy, even though it says
24 "all employees", not all employees fall
25 under this policy; there's a section of

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1 employees who work for the Rail Road
2 that don't have to take a return-to-work
3 toxicological test because they've been
4 out for 30 days or more?

5 MS. SWICICKI: Correct.

6 MR. SANCHEZ: Okay. And who would
7 those employees be?

8 MS. SWICICKI: Non-safety-sensitive
9 employees.

10 MR. SANCHEZ: Okay. Can you give me
11 an example?

12 MS. SWICICKI: Sure. Central
13 Manpower is a clerical staff. They're
14 non-safety.

15 MR. SANCHEZ: Okay. Are you
16 considered a non-safety-sensitive
17 employee?

18 MS. SWICICKI: Yes, I'm considered.

19 MR. SANCHEZ: You're considered a
20 non-safety-sensitive employee?

21 MS. SWICICKI: Yes.

22 MR. SANCHEZ: Okay. So, if you were
23 out for 30 days, you wouldn't have to --
24 you wouldn't be subjected to a
25 return-to-work toxicological test?

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1 MS. SWICICKI: Correct.

2 MR. SANCHEZ: Okay. Do you know if
3 under the current policy, medical
4 marijuana prescribed by a treating
5 physician would be a violation?

6 MS. SWICICKI: As per the policy,
7 it's still under -- it's just listed as
8 "marijuana".

9 So, it is still considered -- listed
10 under their drug panel as not being
11 allowed.

12 MR. SANCHEZ: Okay. So, medical
13 marijuana that's prescribed by a
14 treating physician would still violate
15 the policy?

16 MS. SWICICKI: Yes.

17 MR. SANCHEZ: And would it be a
18 violation of the policy for non-covered,
19 non-Hours of Service employees too?

20 MS. SWICICKI: Yes.

21 MR. SANCHEZ: Would it be a
22 violation for employees deemed not
23 safety-sensitive --

24 MS. SWICICKI: Yes.

25 MR. SANCHEZ: -- such as manpower?

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1 MS. SWICICKI: Correct, cause
2 there's still reasonable cause or
3 suspicion.

4 MR. SANCHEZ: Okay -- okay. Mr.
5 Drew took his -- if you look at Carrier
6 1, Mr. Drew took his return-to-work
7 physical on June 7th and he tested
8 positive for marijuana metabolites --
9 and metabolites don't cause impairment
10 -- and that's science, not an opinion --
11 he returned to work on the 8th.

12 So, that was -- I'm sorry -- he took
13 it on the 7th and he was notified on the
14 13th, but on the 8th he returned to
15 service; is that correct?

16 MS. SWICICKI: Just give me a
17 second. I have to look.

18 MR. SANCHEZ: Sure.

19 MS. SWICICKI: (Perusing.) Correct,
20 he returned on June 8th.

21 MR. SANCHEZ: Okay. And from
22 June 8th, when he returned to service,
23 to June 13th when he was taken out of
24 service for the violation of the policy,
25 were there any complaints that he was

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1 impaired?

2 MS. SWICICKI: No.

3 MR. SANCHEZ: Were there any
4 complaints of any reckless action --
5 unsafe actions?

6 MS. SWICICKI: No.

7 MR. SANCHEZ: Were there any
8 complaints about Mr. Drew that you're
9 aware of?

10 MS. SWICICKI: No.

11 MR. SANCHEZ: Okay. And do you know
12 if the Carrier tested him on the 8th to
13 see if he was positive for any
14 prohibited substance while he was
15 actually back to work?

16 MS. SWICICKI: No.

17 MR. SANCHEZ: Okay. And when
18 Mr. Drew took the test on June 7th, what
19 was his status?

20 MS. SWICICKI: Give me one second.
21 (Perusing.) He was marked sick/unpaid.

22 MR. SANCHEZ: Okay. So, it's
23 sick/unpaid.

24 So, he wasn't -- he wasn't on
25 Carrier's time, so he wasn't actually in

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1 service.

2 MS. SWICICKI: Correct. He was
3 using his sick time and exhausted all of
4 it, so, therefore, he was out
5 sick/unpaid.

6 MR. SANCHEZ: So, when you're out
7 sick and unpaid, you're not under the
8 Carrier's employ, correct?

9 MS. SWICICKI: No, he is. He's
10 still subject to calls at home. He's
11 still under the Carrier, it's just he's
12 not being paid for the day.

13 MR. SANCHEZ: Is he expected to come
14 in -- can the Carrier call him when he's
15 out sick to perform service?

16 MS. SWICICKI: No.

17 MR. SANCHEZ: Okay. I have no
18 further questions at this time.

19 MR. MAGGIORE: Okay. Ms. Swicicki,
20 I just have a couple of follow-up
21 questions based on some of the exhibits
22 that the Organization has entered into
23 the record.

24 I'd just like to bring your
25 attention to Organization Exhibit 8,

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1 which is Rule 53.

2 MS. SWICICKI: Okay.

3 MR. MAGGIORE: The second paragraph
4 of Rule 53(b) states, "The following
5 types of offenses justify
6 pre-investigation suspension when there
7 is sufficient reason to believe the
8 employee is guilty of the offense and
9 that he/she may commit the offense again
10 if not withheld from service".

11 The first words in that sentence
12 were, "The following types of offense".

13 So, in your experience, in terms of
14 in your current role, have employees
15 been removed from service, other than
16 for the reasons stated there in that
17 section in 53(b).

18 MS. SWICICKI: Yes.

19 MR. MAGGIORE: Can you provide some
20 examples, you know, if you can recall
21 any off the top of your head?

22 MS. SWICICKI: That have been taken
23 out of service, not for this?

24 MR. MAGGIORE: That were not one of
25 these reasons specifically stated.

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1 MS. SWICICKI: Well, for example,
2 these cases where they tested positive
3 while doing return-to-duty drug tests.

4 MR. MAGGIORE: Okay. Are there any
5 other reasons you can think of off the
6 top of your head -- and if you can't,
7 don't feel obliged to answer?

8 MS. SWICICKI: No, no other reasons
9 right now.

10 MR. MAGGIORE: Okay. So, the
11 application of this language, based on
12 your experience, that these are examples
13 and that these are not limited to
14 specifically these causes in terms of
15 taking the employee out of service,
16 correct?

17 MS. SWICICKI: Correct.

18 MR. MAGGIORE: And that's -- the
19 Carrier has consistently applied that
20 idea?

21 MS. SWICICKI: Yes.

22 MR. MAGGIORE: So, the Organization
23 submitted several Notices of Trial,
24 Organization 9, 10, 11, and 13 in
25 particular.

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1 All three of them state that the
2 employee in question tested positive for
3 marijuana, or in the case of Exhibit 13,
4 marijuana metabolite.

5 In all those cases, are you aware if
6 the employees were removed from service?

7 MS. SWICICKI: Yes, they were.

8 MR. MAGGIORE: Is it standard
9 practice for the Carrier to remove
10 employees from service if they test
11 positive for a prohibited substance?

12 MS. SWICICKI: Yes.

13 MR. MAGGIORE: And that decision is
14 made prior to a trial, correct?

15 MS. SWICICKI: Correct.

16 MR. MAGGIORE: And what is the
17 purpose of doing that?

18 MS. SWICICKI: This is due to them
19 violating the drug and alcohol policy,
20 so that they're -- there's no -- it's a
21 safety issue for themselves and others,
22 and to make sure that they're out of
23 service and not working in a
24 safety-sensitive position.

25 MR. MAGGIORE: Okay. So, I'd like

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1 to draw your attention to Carrier
2 Exhibit 1, the Notice of Trial for
3 Mr. Drew.

4 MS. SWICICKI: (Perusing.)

5 MR. MAGGIORE: The Trial Notice
6 states that he tested positive for
7 marijuana.

8 Was he removed from service?

9 MS. SWICICKI: Yes, he was.

10 MR. MAGGIORE: So, did the Carrier
11 treat Mr. Drew any differently than any
12 other employee that tested positive?

13 MS. SWICICKI: No, they did not.

14 MR. MAGGIORE: I'd like to draw your
15 attention to Organization Exhibit 12,
16 which is the email from Patrick Warren.

17 The second paragraph of this email,
18 I'll read into the record.

19 "While the MTA continues to closely
20 follow --" --

21 MR. SANCHEZ: I'm going to object.

22 MR. MAGGIORE: I'm reading your --
23 object on what basis?

24 MR. SANCHEZ: I'm going to object on
25 the basis that when we presented Union

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1 Exhibit 12 to Ms. Swicicki, she had no
2 knowledge of it. So, now you're asking
3 her for an interpretation of a document
4 that she has seen for the first time
5 today.

6 So, anything she may say --

7 MR. MAGGIORE: You don't know what I
8 -- I haven't even asked a question yet.
9 You don't know what I'm going to ask.

10 So, allow me --

11 MR. SANCHEZ: I'm psychic.

12 MR. MAGGIORE: You're psychic?

13 MR. SANCHEZ: I'm psychic.

14 MR. MAGGIORE: Well --

15 MR. SANCHEZ: That's my objection
16 for the record. You can ask the
17 question.

18 MR. MAGGIORE: Fair enough. I note
19 your objection for the record, however,
20 this is an exhibit that was entered by
21 the Organization, and as Trial Officer,
22 I have a right to examine it.

23 I would like to ask the witness, who
24 you recalled, a question about the
25 exhibit that you entered into the

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1 record.

2 MR. SANCHEZ: That she could not
3 answer, so go ahead.

4 MR. MAGGIORE: So, I'll read the
5 second paragraph into the record.

6 "While the MTA continues to closely
7 follow all developments concerning the
8 new laws, the MTA's substance abuse
9 policy currently remain unchanged. If
10 any updates to the MTA drug testing
11 program or substance abuse policies are
12 required, they will be communicated to
13 everyone as soon as possible".

14 So, my question is, are you aware,
15 since May of 2022, of any changes to the
16 drug and alcohol policy?

17 MS. SWICICKI: No, there are none.

18 MR. MAGGIORE: Okay. So, I'd also
19 like to read another sentence from this
20 into the record, just to clarify.

21 Fourth paragraph, last sentence,
22 "Therefore, individuals in jobs and/or
23 performing functions covered by these
24 regulations may not use marijuana in any
25 form, even outside of the workplace

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1 while off duty".

2 Are you aware of any changes to
3 Carrier policy which allow employees to
4 use marijuana off duty?

5 MS. SWICICKI: No.

6 MR. MAGGIORE: I believe Mr. Sanchez
7 asked this, but I just want to confirm.
8 If I'm repeating myself, I apologize.

9 Are all electricians deemed
10 safety-sensitive by the Carrier?

11 MS. SWICICKI: Yes, they are.

12 MR. MAGGIORE: That's by the
13 Carrier, correct?

14 MS. SWICICKI: Correct.

15 MR. MAGGIORE: All right. And
16 that's a designation that the Carrier
17 has -- do you know how long the Carrier
18 has made that designation of
19 electricians?

20 MS. SWICICKI: It has been an
21 established practice that we recognize
22 electricians as safety-sensitive
23 employees and the Department has enacted
24 it -- this for a very long time.

25 MR. MAGGIORE: Okay -- all right. I

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1 don't have any other questions.

2 Mr. Sanchez, do you have any
3 questions?

4 MR. SANCHEZ: Yes, actually a
5 follow-up to Union Exhibit 12.

6 So -- and I'll read the second part
7 for Ms. Swicicki and I'll ask a couple
8 of questions. You can agree or
9 disagree.

10 It says, "Regardless of the new
11 laws, employees of MTA and its agencies
12 --" -- which are Long Island Rail Road,
13 correct?

14 MS. SWICICKI: Correct.

15 MR. SANCHEZ: Okay. "-- as well as
16 consultants and contractors retained by
17 the MTA or its agencies, may not perform
18 work for the MTA, including, but not
19 limited to, operation of vehicles and
20 equipment while impaired by marijuana.

21 Additionally, the use of marijuana
22 in any form during an employee's,
23 consultant's, and/or contractor's work
24 shift, and possession of marijuana in
25 any form at any MTA or agency facility,

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1 work site, or office is strictly
2 prohibited".

3 Does it talk about recreational
4 marijuana here or does this say that you
5 can't be impaired while working or have
6 marijuana in your possession; is that
7 what this sentence or this paragraph
8 relays?

9 MS. SWICICKI: Can you repeat the
10 question one more time?

11 MR. SANCHEZ: Sure. I'll read it
12 again.

13 Its says, "Regardless of the new
14 laws, employees of the MTA and its
15 agencies, as well as consultants and
16 contractors retained by the MTA or its
17 agencies, may not perform work -- may
18 not perform work for the MTA, including,
19 but not limited to the operation of
20 vehicles and equipment while impaired by
21 marijuana".

22 So, you can't come to work impaired
23 -- right -- that's what that says,
24 agree?

25 MS. SWICICKI: Agree.

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1 MR. SANCHEZ: And it says,
2 "Additionally, the use of marijuana in
3 any form during an employee's,
4 consultant's, and/or contractor's work
5 shift and possession of marijuana in any
6 form at any MTA or agency facility, work
7 site, or office is strictly prohibited".

8 So, what that says -- and if you
9 agree -- that you can't have marijuana
10 in your possession and you can't use it
11 during your work shift; is that correct?

12 MS. SWICICKI: Correct.

13 MR. SANCHEZ: Okay. And then down
14 below it says, "The new law does not
15 affect the federal regulations that
16 apply to those covered under the United
17 States Department of DOT".

18 Is Mr. Drew covered under the
19 Department of Transportation?

20 MS. SWICICKI: No.

21 MR. SANCHEZ: The Federal Transit
22 Administration, the FTA?

23 MS. SWICICKI: No.

24 MR. SANCHEZ: The Federal Motor
25 Carrier Safety Administration, FMCSA?

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1 MS. SWICICKI: No.

2 MR. SANCHEZ: And/or the Federal
3 Railroad Administration, FRA,
4 Regulations?

5 MS. SWICICKI: No.

6 MR. SANCHEZ: And it's says,
7 "Therefore, individuals in jobs and/or
8 performing functions covered by
9 these --" -- and those are the ones I
10 just asked you about that Mr. Drew is
11 not covered by -- "may not use marijuana
12 in any form, even outside of the
13 workplace while off duty".

14 So, that says -- and stop me if I'm
15 wrong -- if you're covered by any one of
16 these federal requirements, you can't
17 use marijuana off duty, even outside
18 your duty workplace, correct?

19 MS. SWICICKI: Correct.

20 MR. SANCHEZ: If Mr. Drew is not
21 covered by any of these, and if he chose
22 to partake in marijuana, would that be a
23 violation?

24 MS. SWICICKI: Yes, because if you
25 look at the second paragraph, it states,

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1 "The MTA substance abuse policy
2 currently remains unchanged. If any
3 updates to the MTA's drug testing
4 program or substance abuse policies are
5 required, they will be communicated to
6 everyone as soon as possible".

7 So, for the drug and alcohol testing
8 -- the MED-005 --

9 MR. SANCHEZ: 005.

10 MS. SWICICKI: -- is still in effect
11 with no changes.

12 MR. SANCHEZ: So, if that's true --
13 right -- why -- and I guess if you know
14 this, it's a question -- why would
15 Mr. Patrick Warren add all this other
16 stuff?

17 Wouldn't he just say, Everything is
18 status quo", as opposed to identifying
19 DOT -- this, that, that, that, that --
20 and say, specifically, "even outside",
21 when it has already been prohibited for
22 employees working for the Rail Road?

23 MS. SWICICKI: That would be a great
24 question for him.

25 MR. SANCHEZ: Okay. So, I would

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1 have to ask Mr. Patrick Warren -- okay.

2 I want to go back to Mr. Maggiore's
3 questions about the trials that we put
4 into exhibits and he said did they all
5 sign waivers.

6 Is that correct?

7 MR. MAGGIORE: I did not say that --
8 I didn't say "signed waives".

9 MR. SANCHEZ: I'll ask -- okay.
10 I'll withdraw the question.

11 Did all those employees sign waivers
12 to the best of your knowledge?

13 MS. SWICICKI: Not all of them.

14 MR. SANCHEZ: Okay. You testified
15 earlier that this is your first case
16 with this organization for a drug and
17 alcohol violation, correct?

18 MS. SWICICKI: For a trial, yes.

19 MR. SANCHEZ: For a trial, yes.

20 And is that because Mr. Drew didn't
21 sign a waiver?

22 MS. SWICICKI: Correct.

23 MR. SANCHEZ: So, this is the first
24 time the Carrier has ever had to defend
25 its position at a trial?

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1 MS. SWICICKI: For a drug and
2 alcohol --

3 MR. SANCHEZ: Yes.

4 MS. SWICICKI: -- yes.

5 MR. SANCHEZ: Okay.

6 MR. MAGGIORE: Your question was
7 regarding your organization, correct?

8 MR. SANCHEZ: Correct, because I'm
9 representing Mr. Drew.

10 MR. MAGGIORE: Okay. I understand,
11 but there's other organizations that
12 have similar charges and I just want to
13 make clear for the record you're only
14 referring to the charges for your
15 members, right?

16 MR. SANCHEZ: Yeah, what happens
17 with the other organizations are
18 irrelevant.

19 MR. MAGGIORE: Yeah, I just wanted
20 to clarify.

21 MR. SANCHEZ: Yeah -- okay. I have
22 no further questions at this time.

23 MR. MAGGIORE: Okay. The time is
24 approximately 12:17 p.m. We're going to
25 take a brief recess.

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1 Ms. Swicicki, I just ask that you
2 not discuss anything regarding this
3 trial while it's still ongoing.

4 MS. SWICICKI: Okay.

5 MR. MAGGIORE: Also, you're subject
6 to recall for further questions, if
7 needed.

8 So, as I said, the time is 12:17
9 p.m. We're going to take a brief recess
10 to allow the Organization to gather any
11 witnesses it may have.

12 (Whereupon, a brief recess was
13 taken.)

14 MR. MAGGIORE: Okay. The time is
15 1:16 p.m. and we are back on the record.

16 Mr. Sanchez, do you have any
17 witnesses you'd like to call at this
18 time?

19 MR. SANCHEZ: Yes, Jeff Klein --
20 Jeffrey Klein.

21 MR. MAGGIORE: Okay. Before you
22 begin questioning Mr. Klein, can you
23 please identify yourself for the record
24 with your full name and IBM number?

25 MR. KLEIN: My name is Jeffrey A.

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1 Klein. My IBM number is 29254.

2 MR. MAGGIORE: Okay. Mr. Sanchez,
3 you can begin.

4 MR. SANCHEZ: Okay -- all right.
5 Mr. Klein, can you tell how long you've
6 worked for the Long Island Rail Road.

7 MR. KLEIN: Presently, I'm in my
8 26th year of employment.

9 MR. SANCHEZ: Okay. And what is
10 your current position?

11 MR. KLEIN: As far as -- I'm an
12 electrician in Department 86, which is
13 the air conditioning department. It
14 happens to be the same department that
15 Mr. Drew is in.

16 MR. SANCHEZ: Okay. And to the best
17 of your knowledge, are you familiar with
18 Federal Requirements for Hours of
19 Service?

20 MR. KLEIN: Absolutely.

21 MR. SANCHEZ: Yeah -- and are
22 currently covered under an Hour of
23 Service position in your current
24 position?

25 MR. KLEIN: No -- no, I'm not.

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1 MR. SANCHEZ: And why aren't you
2 covered?

3 MR. KLEIN: Because the position
4 that I own is not a requirement under
5 the FRA under the CFR to be an Hours of
6 Service job.

7 MR. SANCHEZ: Okay. So, with -- the
8 FRA just included another classification
9 under the Hours of Service, "MEC", and
10 you don't fall under that MEC?

11 MR. KLEIN: The MEC qualification --

12 MR. SANCHEZ: Yes.

13 MR. KLEIN: -- no because the MEC
14 qualification only pertains to
15 mechanical employees who perform
16 inspections that are required under the
17 CFR -- federally required inspections.

18 Our department does not perform any
19 of that work.

20 MR. SANCHEZ: Okay. And you earlier
21 said that you're in the same department
22 as the grievant, Mr. Drew.

23 So, if you're not covered under
24 Hours of Service requirements, neither
25 is Mr. Drew in that position?

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1 MR. KLEIN: That's correct --

2 MR. SANCHEZ: Okay.

3 MR. KLEIN: -- and the mechanical as
4 well, he doesn't fall under that either.

5 MR. SANCHEZ: Okay.

6 MR. KLEIN: He doesn't perform any
7 federally regulated inspections --
8 required inspections.

9 MR. SANCHEZ: Okay. And can you be
10 randomly drug tested?

11 MR. KLEIN: No.

12 MR. SANCHEZ: Okay. So, can
13 Mr. Drew be randomly drug tested?

14 MR. KLEIN: No.

15 MR. SANCHEZ: Okay -- under this new
16 MEC qualification?

17 MR. KLEIN: No.

18 MR. SANCHEZ: Okay -- all right. Do
19 you currently hold a position with IBEW,
20 Local Union 589?

21 MR. KLEIN: Yes.

22 MR. SANCHEZ: And what position do
23 you currently hold?

24 MR. KLEIN: Currently, I hold Lead
25 Local Chairman's position.

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1 Prior to that, I was the President
2 of the Local for nearly 10 years. Prior
3 to my presidency, I was an Executive
4 Board Member for five years. Prior to
5 that, I was a shop steward.

6 So, altogether, it's close to
7 20 years I've been involved with the
8 Union and advocating.

9 MR. SANCHEZ: Okay. What are some
10 of your responsibilities under your
11 position that you currently own?

12 MR. KLEIN: My Union position --

13 MR. SANCHEZ: Yes --

14 MR. KLEIN: -- or my Rail Road
15 position?

16 MR. SANCHEZ: -- Union position.

17 MR. KLEIN: Well, to enforce the
18 contract. I mean, that's paramount.
19 You know, to ensure the rules are
20 followed that were negotiated, to ensure
21 the Company is following any policies or
22 laws -- state laws, federal laws.

23 MR. SANCHEZ: Okay. And are trials
24 part of your responsibility?

25 MR. KLEIN: Yes.

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1 MR. SANCHEZ: Okay. And have they
2 always been part of your responsibility?

3 MR. KLEIN: Well, with 20 years
4 experience, I can't --

5 MR. SANCHEZ: That's true.

6 MR. KLEIN: -- no, no. I mean, in
7 the beginning, no.

8 But certainly as a few years went
9 by, I started becoming active in the
10 actual trials and once I became
11 President, any of the reps that were
12 assigned to handle -- that conducted the
13 actual trials, I oversaw -- I advised.
14 I sat in on several of them, so --

15 MR. SANCHEZ: Okay. And you've
16 conducted trials -- you've conducted
17 trials, personally?

18 MR. KLEIN: Yes -- yes.

19 MR. SANCHEZ: And can you give me --
20 I'd just like a ballpark number of how
21 many trials you've conducted, if you
22 can.

23 MR. KLEIN: I would say probably a
24 couple of dozen I would say.

25 MR. SANCHEZ: Okay. And have you

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1 ever conducted a trial for a member who
2 violated the drug and alcohol policy for
3 marijuana?

4 MR. KLEIN: Conducted a trial?

5 MR. SANCHEZ: A trial.

6 MR. KLEIN: No, never a trial.

7 MR. SANCHEZ: Okay. And why didn't
8 you conduct any trials or why weren't
9 there any trials for violations of this
10 policy with marijuana?

11 MR. KLEIN: In all my experience
12 dealing with these -- with the alcohol
13 and drug policy violations, the -- our
14 members decided to accept a trial waiver
15 that was offered to them by the
16 Department as opposed to going to trial.

17 MR. SANCHEZ: And in your opinion,
18 why would they not go to trial?

19 MR. KLEIN: In my opinion?

20 MR. SANCHEZ: Yeah.

21 MR. KLEIN: In my experience from
22 dealing with a multitude of members, the
23 reason is, discussions with prior trial
24 officers, right -- with those
25 discussions regarding the waiver, what

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1 would happen if the waiver wasn't
2 signed, we were told -- it was
3 enumerated -- spelled out to us, in no
4 uncertain terms, that should our member
5 not accept the waiver, in terms of the
6 waiver, they would be found guilty and
7 they would be terminated.

8 MR. SANCHEZ: Okay. And this was
9 explained to us -- explained to you
10 before the trial?

11 MR. KLEIN: Yes --

12 MR. SANCHEZ: Okay.

13 MR. KLEIN: -- in conversations
14 before the trial, yeah.

15 MR. SANCHEZ: Okay. And what were
16 the terms of the waiver, do you recall?

17 MR. KLEIN: Initially, it was a
18 nine-month suspension. Once --
19 nine-month suspension.

20 The individual had to participate in
21 an employee assistance program, go to
22 counseling. They'd have to be cleared
23 through the substance abuse professional
24 from the counseling before they could
25 come back.

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1 That usually wasn't an issue cause
2 it was a nine-month suspension, so
3 usually the individuals got cleared to
4 come back. And then once they returned
5 to duty, they were subjected to
6 discretionary drug testing, so they
7 could be called in to be tested at any
8 time.

9 And they were also subjected to that
10 while they were out for their nine
11 months too -- they were subjected to
12 random drug testing.

13 MR. SANCHEZ: And as part of that
14 waiver, was it also a "last chance
15 waiver"?

16 MR. KLEIN: It was a last chance,
17 yes.

18 MR. SANCHEZ: Okay. And while they
19 were out, were they being paid?

20 MR. KLEIN: No, it was without
21 pay --

22 MR. SANCHEZ: Okay.

23 MR. KLEIN: -- and after a certain
24 period of time -- and it varied
25 depending on the insurance carrier --

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1 they would generally lose their health
2 benefits for between four to six months
3 as well.

4 MR. SANCHEZ: So, when the employees
5 who were out for -- earlier -- right --
6 I would say --

7 MR. KLEIN: Four to six weeks -- I'm
8 sorry.

9 MR. SANCHEZ: So, roughly two years
10 ago, it used to be a nine-month
11 suspension?

12 MR. KLEIN: Nine months --

13 MR. SANCHEZ: Okay. And they lost
14 their benefits after four to six months.

15 MR. KLEIN: Yes -- yeah, four to six
16 months.

17 MR. SANCHEZ: Okay. And if they had
18 families?

19 MR. KLEIN: Their families would
20 lose those benefits. They'd have to --
21 they'd have to pay for --

22 MR. SANCHEZ: Were they offered
23 COBRA?

24 MR. KLEIN: COBRA -- that was it --
25 yes, thank you.

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1 MR. SANCHEZ: So, the Carrier
2 suspended the employees without pay.

3 MR. KLEIN: Mm-hmm -- yes.

4 MR. SANCHEZ: They took away their
5 health benefits.

6 MR. KLEIN: Yes.

7 MR. SANCHEZ: And then they offered
8 them COBRA.

9 MR. KLEIN: Yes.

10 MR. SANCHEZ: Okay. Generally, when
11 employees choose trials over waivers, is
12 the penalty increased?

13 MR. KLEIN: Could you repeat that,
14 please?

15 MR. SANCHEZ: When employees choose
16 trials over trial waivers, are the
17 penalties increased?

18 MR. KLEIN: Yes.

19 MR. SANCHEZ: Okay. And do you know
20 why the penalties are increased?

21 MR. KLEIN: Well, I can speculate.

22 MR. SANCHEZ: Okay.

23 MR. KLEIN: It's to dis-incentivize
24 (sic) going to trial.

25 MR. SANCHEZ: I'm going to hand you

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1 that. (Handing.) Is that one or two --
2 (Whereupon, a discussion was held
3 off the record.)

4 MR. MAGGIORE: This is -- so, this
5 is a letter to the Union. It's a
6 one-page document dated September 6,
7 2019. It is in regards to Case number
8 3423-19.

9 (Whereupon, a discussion was held
10 off the record.)

11 MR. MAGGIORE: All right. So, it's
12 -- sorry, my apologies. It's a
13 three-page document. First page is
14 dated September 16, 2019; second page is
15 December 7, 2020. The third page is
16 June 30, 2022.

17 This will be entered as Organization
18 Exhibit 14.

19 MR. SANCHEZ: Okay.

20 (Whereupon, Organization Exhibit 14
21 was marked.)

22 MR. MAGGIORE: So, 14 will be a
23 three-page document.

24 MR. SANCHEZ: Okay. Mr. Klein, I am
25 going to ask you to take a look at what

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1 has been identified as Union Exhibit 14.
2 There's three pages to it.

3 Is that a familiar document?

4 MR. KLEIN: Yes.

5 MR. SANCHEZ: And as part of the
6 waiver, does the Carrier request
7 employees to waive their rights?

8 MR. KLEIN: Yes.

9 MR. SANCHEZ: And, specifically,
10 which rights are they asking the
11 employee to waive?

12 MR. KLEIN: Well, it would be Rule
13 53 under the controlling agreement,
14 which pertains to trials and hearings --
15 fair and impartial hearings.

16 MR. SANCHEZ: Okay. And in your
17 experience, how many employees have
18 signed a waiver under these
19 circumstances?

20 MR. KLEIN: Numerous ones. Under my
21 tenure, I don't have a definitive
22 number, but it's, I would say, dozens.

23 MR. SANCHEZ: Okay. In your tenure
24 -- in your 20 years' experience with the
25 Union handling these types of issues,

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1 how many employees have chosen not to
2 sign a waiver and go to trial?

3 MR. KLEIN: Other than Mr. Drew,
4 none.

5 MR. SANCHEZ: None. So, this is the
6 first time in 20 years that an employee
7 who has been charged by the Carrier has
8 actually invoked his contractual rights
9 to trial?

10 MR. KLEIN: For a violation of the
11 drug and alcohol policy --

12 MR. SANCHEZ: Yes.

13 MR. KLEIN: -- yes.

14 MR. SANCHEZ: Okay. So, once an
15 employee signs a waiver, because the
16 alternative is termination, is there
17 recourse on the Union to file a
18 grievance?

19 MR. KLEIN: Could you repeat that,
20 please?

21 MR. SANCHEZ: So, once the employee
22 signs a waiver, can the Union file a
23 grievance?

24 MR. KLEIN: No, cause essentially
25 the employee agreed to waive his rights

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1 and -- so, we have -- the Union, I
2 should say, has no recourse once those
3 rights are waived.

4 MR. SANCHEZ: And in your
5 discussions with numerous employees who
6 have been found guilty by the Carrier
7 for violating this policy, how many of
8 them have expressed frustration that
9 they had to sign a waiver as opposed to
10 going to trial?

11 MR. KLEIN: I would say 99 percent
12 of them.

13 MR. SANCHEZ: And what was their
14 frustration?

15 MR. KLEIN: They felt as though they
16 were stuck between a rock and a hard
17 place because they knew that if they
18 challenged -- if they challenged the
19 charges, they would be terminated, thus
20 subjecting them to the arbitration
21 process, which is our Rule 53, which
22 probably can take up to a year to get an
23 arbitration before they might get their
24 job back.

25 So, as opposed to going through that

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1 and taking that chance, they opted to
2 sign this waiver cause it was the safe
3 bet.

4 MR. SANCHEZ: Okay. And how long
5 does it generally take to get -- well,
6 I'm going to rephrase that question.

7 Employees that go to trial, how long
8 does the process usually take between
9 trial and getting to arbitration?

10 MR. KLEIN: In my experience --

11 MR. SANCHEZ: Yes.

12 MR. KLEIN: -- often in excess of a
13 year. Sometimes under a year, but
14 through the NMB, and funding, and all
15 the issues on a national level, it takes
16 an extensive amount of time.

17 MR. SANCHEZ: Okay. You said the
18 "NMB", so can -- during your tenure as
19 President, you've arbitrated cases,
20 correct?

21 MR. KLEIN: Yes.

22 MR. SANCHEZ: Right. And you've
23 arbitrated cases that didn't fall under
24 the Railway Labor Act with the other
25 organizations that this Union

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1 represents, correct?

2 MR. KLEIN: Yes.

3 MR. SANCHEZ: And those were
4 party-pay arbitrations?

5 MR. KLEIN: Yes.

6 MR. SANCHEZ: And can you tell me
7 the difference between a party-pay
8 arbitration, and the funding, and the
9 NMB and what's the difference in the
10 timeline?

11 MR. KLEIN: Well, because of the
12 funding, the arbitrations under the
13 National Labor Relations Act, they
14 happen right away. I mean, there's
15 literally days or a week goes by before
16 these proceedings take place.

17 Once again, regarding the National
18 Mediation Board and the Federal Funding,
19 it takes time. The funding is not
20 there. Often the funding comes
21 across -- is periodically throughout a
22 year. They'll get some one quarter and
23 some money the next quarter.

24 So it's -- the goal line keeps
25 moving throughout the year. So, you

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1 know, it's a long drawn-out process.

2 MR. SANCHEZ: Okay -- all right.
3 I'm going to hand you what has been
4 identified as Union Exhibit 8, which is
5 Rule 53. (Handing.)

6 MR. KLEIN: (Perusing.)

7 MR. SANCHEZ: And I'm going to ask
8 you if you're familiar with Rule 53 in
9 the Collective Bargaining Agreement?

10 MR. KLEIN: Yes.

11 MR. SANCHEZ: Okay. Can you tell me
12 what Rule 53 pertains to?

13 MR. KLEIN: Well, it pertains to
14 discipline and what's considered charges
15 that would allow the Carrier to suspend
16 an employee pre -- pre-trial to do an
17 investigation.

18 MR. SANCHEZ: Okay. And when you
19 read -- is Rule 53 optional as far as
20 the circumstances when -- I'll rephrase
21 that.

22 "A" -- Rule 53(a), could you read
23 that, please?

24 MR. KLEIN: "Employees will not be
25 suspended nor dismissed from service

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1 without a fair and impartial trial".

2 MR. SANCHEZ: Is that rule optional?

3 MR. KLEIN: No.

4 MR. SANCHEZ: Okay. And can you
5 read "B", please?

6 MR. KLEIN: "The following types of
7 offenses justify pre-investigation
8 suspension when there is sufficient
9 reason to believe the employee is guilty
10 of the offense and that he or she might
11 commit the offense again if not withheld
12 from service".

13 MR. SANCHEZ: And would you agree
14 that particular portion describes
15 circumstances where the Carrier can,
16 under certain circumstances, take
17 employees out of service without a
18 trial?

19 MR. KLEIN: Yes, the way that's
20 written, there are certain circumstances
21 when they can do that.

22 MR. SANCHEZ: And what are those two
23 circumstances?

24 MR. KLEIN: Well, if they commit an
25 act that they think is likely to be

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1 repeated again. It's -- the different
2 types of activities are listed there as
3 well.

4 It's theft, unsafe practices,
5 serious insubordination, threatening or
6 abusive conduct, fighting on duty, under
7 the influence of alcohol or narcotics
8 while on duty, rape, assault, and other
9 serious criminal activities.

10 So, they're itemized right there.

11 MR. SANCHEZ: Okay. So -- but
12 basically those -- an employee that
13 commits any one of those offenses can be
14 taken out without violating Rule 53; is
15 that correct?

16 MR. KLEIN: Yes.

17 MR. SANCHEZ: Okay. I'm going to
18 ask you to hold onto Union Exhibit 8 and
19 I'm going to give you a document. It's
20 a two-page document. It's going to be
21 identified as Union 15. (Handing.)

22 I'm going to ask that you take a
23 look at it.

24 MR. KLEIN: (Perusing.)

25 MR. MAGGIORE: Excuse me, how is

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1 this relevant to this trial? This is an
2 email -- this is an email involving an
3 employee that's not Darren Drew and from
4 a completely different department.

5 Can you please explain how this is
6 relevant to the trial?

7 MR. SANCHEZ: Give me one moment.

8 And once again, it's relevant to the
9 trial cause it goes to Rule 53. It's
10 relevant to the trial because it's
11 evidence that I'd like to submit to
12 support the defense of Darren Drew.

13 I don't have to prove relevance to
14 the trail officer.

15 MR. MAGGIORE: Yeah, you do.

16 MR. SANCHEZ: That's for the
17 reviewing officer.

18 MR. MAGGIORE: Yeah, in order for it
19 to be submitted into evidence, you do --
20 and you marked this as a Carrier exhibit
21 by the way.

22 MR. SANCHEZ: Did I?

23 MR. MAGGIORE: This is not a Carrier
24 exhibit.

25 MR. SANCHEZ: I'll take that back.

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1 (Whereupon, Organization Exhibit 15
2 was marked.)

3 MR. SANCHEZ: There you go. Now
4 it's a Union exhibit.

5 MR. MAGGIORE: I need a moment.
6 (Perusing.)

7 MR. SANCHEZ: You can look at it
8 while we -- (handing).

9 MR. KLEIN: (Perusing.)

10 MR. MAGGIORE: In the interest of
11 allowing the Organization to have a full
12 and fair defense of Mr. Drew, I will
13 allow this, but you need to explain how
14 this is relevant to this trial.

15 MR. SANCHEZ: Thank you for allowing
16 us to have a fair trial.

17 Mr. Klein, can you look at what has
18 been identified as Union Exhibit 15. It
19 has two pages to it.

20 MR. KLEIN: (Perusing.) Yes.

21 MR. SANCHEZ: Okay. Are you
22 familiar with this document?

23 MR. KLEIN: The document and the
24 incident, yes.

25 MR. SANCHEZ: All right. And can

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1 you read the first page of it, please --
2 oh, I'm sorry -- could you start from
3 the beginning? It will be the email and
4 can you go from the "From" -- who is it
5 from -- and the "Subject", all the way
6 down to "Natasha Massillon".

7 MR. KLEIN: Well, it's an email from
8 Natasha Massillon -- I don't know if I'm
9 getting her name right -- it's to Steven
10 Schmitt, Ricardo Sanchez, and Vincent
11 D'Agostino. CC'd on it is Chandra Sako
12 and Deborah Cuomo. It's regarding
13 Mr. Vincent Buonincontro being taken out
14 of service.

15 Would you like me to read the actual
16 email?

17 MR. SANCHEZ: Yes -- well, it says,
18 "Importance", and what does it say under
19 "Importance" -- or next to "Importance"?

20 MR. KLEIN: It says "High".

21 MR. SANCHEZ: Okay. And can you
22 read the email, please?

23 MR. KLEIN: "Good morning, as per
24 our discussion, please be advised that
25 at 10:25 a.m. on March 7, 2023, employee

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1 Vincent Buonincontro, 56962, has been
2 taken out of service without pay for
3 violation of Rule 53(b)(2), Unsafe
4 Practices.

5 Employee is no longer authorized to
6 be present on Long Island Rail Road
7 property for any reason, except to
8 attend a scheduled trial for which the
9 employee will have received written
10 notice, or if advised by Management.

11 Please note the notification has
12 been made to the Department as well".

13 MR. SANCHEZ: Okay. So, can you
14 read -- can you take a look at what has
15 been identified as Union Exhibit 15,
16 page 2.

17 MR. KLEIN: (Perusing.)

18 MR. SANCHEZ: And is that familiar
19 -- that document?

20 MR. KLEIN: Yes.

21 MR. SANCHEZ: And can you tell me
22 which -- under the synopsis, which
23 synopsis is in reference to this email?

24 MR. KLEIN: It would be number "2".

25 MR. SANCHEZ: And could you read

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1 number "2", please?

2 MR. KLEIN: "On March 2, 2023,
3 Corporate Safety was notified that a
4 close call occurred as westbound train
5 1905 was approaching Hicksville
6 Passenger Station. An employee was in
7 the foul of the track causing Engineer
8 to apply emergency braking to stop the
9 train. It was found that an Engineering
10 employee assessed the tracks that Divide
11 4 Interlocking without proper job
12 briefing or proper on-track protection".

13 MR. SANCHEZ: Okay. Now, based on
14 Union Exhibit 15, "1" and "2", I'd ask
15 you to look at Union Exhibit 8, Rule 53.

16 MR. KLEIN: (Perusing.)

17 MR. SANCHEZ: Now, Mr. Buonincontro
18 was taken out of service on March 7th,
19 correct?

20 MR. KLEIN: Yes.

21 MR. SANCHEZ: And do you know if he
22 was afforded a fair and impartial trial
23 before he was taken out of service?

24 MR. KLEIN: No.

25 MR. SANCHEZ: And did he commit a

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1 major offense?

2 MR. KLEIN: Yeah, he committed a
3 major -- a serious unsafe practice,
4 absolutely.

5 MR. SANCHEZ: Okay. So -- and
6 so where was -- where would that be
7 found on Rule 53, which number?

8 MR. KLEIN: That would be (b)(2).

9 MR. SANCHEZ: Okay. So, could you
10 read (b)(2) and -- okay. Can you read
11 (b)(2)?

12 MR. KLEIN: "The following types of
13 offenses justify pre-investigation
14 suspension when there's sufficient
15 reason to believe the employee is guilty
16 of the offense".

17 MR. SANCHEZ: Can I stop you there,
18 Mr. Klein?

19 MR. KLEIN: Yes, I'm sorry.

20 MR. SANCHEZ: Now, did they have
21 reasonable cause to believe that the
22 employee was guilty of the offense?

23 MR. KLEIN: Yes, they had the
24 employee performing the unsafe act on
25 video.

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1 MR. SANCHEZ: Okay. Can you
2 continue, please?

3 MR. KLEIN: "The following types of
4 offenses justify a pre-investigation
5 suspension when there is sufficient
6 reason to believe the employee is guilty
7 of the offense and that he or she might
8 commit the offense again if not withheld
9 from service".

10 MR. SANCHEZ: And can I hold you for
11 a second -- and was there reason to
12 believe that he would commit the offense
13 again if he was withheld from service?

14 MR. KLEIN: He actually did it twice
15 that night, so there was a reasonable
16 belief he'd do it again if he wasn't
17 held out of service.

18 MR. SANCHEZ: Could you continue,
19 please?

20 MR. KLEIN: What else would you like
21 me to read?

22 MR. SANCHEZ: (Perusing.)
23 Sufficient reason -- and which --
24 exactly which offense did he commit
25 under the next if you continue down?

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1 MR. KLEIN: Well, that would be
2 number "2", "Unsafe Practices". That
3 would be the one he violated.

4 MR. SANCHEZ: Okay. And do you
5 know -- in your opinion -- in your
6 professional opinion as a Union
7 official, did the Carrier violate Rule
8 53 when they took him out of service for
9 this violation?

10 MR. KLEIN: In this incident?

11 MR. SANCHEZ: In this particular --

12 MR. KLEIN: In this incident, there
13 was ample proof to demonstrate that, no,
14 they weren't violating the contract when
15 they removed him from service.

16 MR. SANCHEZ: And you testified that
17 that proof is based on videotapes of it
18 in action?

19 MR. KLEIN: Videotape, yes.

20 MR. SANCHEZ: Okay. So, there was
21 video proof of a major violation?

22 MR. KLEIN: Video proof, yes.

23 MR. SANCHEZ: Okay. Do you know if
24 he was taken out of service?

25 MR. KLEIN: No, he was not.

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1 MR. SANCHEZ: Okay. Do you know,
2 initially, if he was sent to Medical for
3 a toxicology -- a drug and alcohol test?

4 MR. MAGGIORE: Excuse me, the -- one
5 second. The -- you ask one question,
6 whether or not Buonincontro was taken
7 out of service. The document states he
8 was.

9 MR. SANCHEZ: I said "initially" --
10 I said "initially".

11 MR. MAGGIORE: It says, "As of
12 September --" -- oh -- "7th" -- okay.

13 MR. SANCHEZ: Okay. So, I'm sorry.
14 I'll ask you again, was he initially
15 taken out of service?

16 MR. KLEIN: Initially, no.

17 MR. SANCHEZ: Okay. Thank you. Was
18 he initially sent to Medical for drug
19 and alcohol tests?

20 MR. KLEIN: No.

21 MR. SANCHEZ: Under Company policy,
22 are you familiar with the Company's
23 policy -- drug and alcohol policy?

24 MR. KLEIN: Yes.

25 MR. SANCHEZ: Would the incident

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1 that night, or this incident, fall under
2 the parameters of a suspicion for the
3 purposes of a drug test?

4 MR. KLEIN: Suspicion or -- I think
5 more appropriate would reasonable cause
6 because of the unsafe act.

7 MR. SANCHEZ: Okay -- okay. And was
8 he eventually taken out of service?

9 MR. KLEIN: Yes.

10 MR. SANCHEZ: Okay. And is he a
11 covered employee under Federal
12 authority?

13 MR. KLEIN: He is a
14 maintenance-of-way worker, so he falls
15 under a fairly new regulation that, yes,
16 he's a regulated -- he falls under
17 random drug testing under Federal
18 guidelines, yes.

19 MR. SANCHEZ: Okay. And do you know
20 if he's provided with training
21 specifically to be -- training for
22 working on or near the tracks?

23 MR. KLEIN: Yes, they receive
24 training.

25 MR. SANCHEZ: Okay. And do you know

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1 the frequency of that training?

2 MR. KLEIN: If you're referring to
3 refreshers for --

4 MR. SANCHEZ: RWIC --

5 MR. KLEIN: Yeah -- for -- RWIC
6 training -- they receive refreshers.

7 MR. SANCHEZ: Yes -- and do you know
8 how often they receive refreshers?

9 MR. KLEIN: I believe it's every two
10 years -- one year.

11 MR. SANCHEZ: Yeah, I think it's
12 every one year.

13 Okay. I'm done with those exhibits.
14 (Handing.)

15 MR. MAGGIORE: I note for the record
16 that the Organization has handed me a
17 copy of a document. It's a three-page
18 document entitled "Adult Use Cannabis
19 and the Workplace", "New York Labor Law
20 201-D".

21 It will be entered into the record
22 as Organization Exhibit 16.

23 (Whereupon, Organization Exhibit 16
24 was marked.)

25 MR. SANCHEZ: Okay. Mr. Klein, I'm

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1 giving you a document that has been
2 identified as Union Exhibit 16.
3 (Handing.)

4 MR. KLEIN: (Perusing.)

5 MR. MAGGIORE: Sorry, I interrupted
6 you.

7 MR. SANCHEZ: That's okay.

8 Are you familiar with that document?

9 MR. KLEIN: Yes.

10 MR. SANCHEZ: And can you tell me
11 exactly what the document is or what it
12 pertains to?

13 MR. KLEIN: This is a document from
14 the New York State Department of Labor
15 and basically it's a frequently asked
16 questions reference, as well as it's
17 more or less -- it's a compliance --
18 compliance information.

19 I don't want to say a manual, but
20 it's giving compliance information
21 regarding New York Labor Law 201-D.

22 MR. SANCHEZ: And what is New York
23 Labor Law 201-D reference -- or is in
24 reference to?

25 MR. KLEIN: Well, it prohibits

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1 employers from discriminating against
2 employees for extracurricular -- or I
3 should say, recreational -- recreational
4 activities outside the workplace.

5 MR. SANCHEZ: Okay. And you've read
6 this document?

7 MR. KLEIN: Yes.

8 MR. SANCHEZ: And in your opinion,
9 does the Carrier have the ability to
10 prohibit the use of recreational
11 marijuana for employers -- employees who
12 are not covered under Hours of Service
13 or the Federal Government?

14 MR. KLEIN: Yes -- I mean, when you
15 read the legislation, it's clear that if
16 an employee does not fall under a
17 Federal regulation that prohibits them
18 from using controlled substances
19 recreationally and -- or marijuana,
20 which isn't controlled, but -- I lost my
21 train of thought for a moment.

22 MR. SANCHEZ: Take your time.

23 MR. KLEIN: Can you repeat the
24 question, again -- what was the
25 question?

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1 MR. SANCHEZ: The document, does it
2 prohibit the Long Island Rail Road from
3 -- can the Long Island Rail Road
4 prohibit the use of recreational
5 marijuana off hours for employees who
6 are not covered under an Hours of
7 Service job?

8 MR. KLEIN: No.

9 MR. SANCHEZ: Okay. And is that
10 based on your interpretation, or your
11 discussions with attorneys and lawyers,
12 that has been your experience?

13 MR. KLEIN: That has been through
14 numerous discussions with attorneys and
15 counsel -- legal counsel.

16 MR. SANCHEZ: Okay. Now, that's --
17 just to be clear, that's just for
18 employees who don't own an Hours of
19 Service job?

20 MR. KLEIN: Right -- that's what --
21 that's what I was alluding to earlier,
22 yes.

23 MR. SANCHEZ: Yeah -- so, for
24 employees, such as myself, I'm a covered
25 employee.

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1 MR. KLEIN: Yes.

2 MR. SANCHEZ: Am I restricted -- am
3 I restricted -- can the Carrier prohibit
4 the use of recreational marijuana in my
5 case, outside of work?

6 MR. KLEIN: Yes, cause it's
7 Federally -- it's Federally illegal.

8 MR. SANCHEZ: Okay. I'm done with
9 that document.

10 (Whereupon, a discussion was held
11 off the record.)

12 MR. SANCHEZ: (Handing.)

13 MR. MAGGIORE: The Organization has
14 submitted a --

15 MR. COLOMBO: It's 23 total pages.

16 MR. MAGGIORE: -- a 23-page document
17 entitled "U.S. Department of
18 Transportation", "Office of the
19 Secretary", "Office of Drug & Alcohol
20 Policy & Compliance".

21 This will be entered as Organization
22 Exhibit 17.

23 (Whereupon, Organization Exhibit 17
24 was marked.)

25 MR. SANCHEZ: Mr. Klein, I'm going

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1 to ask you to look at what has been
2 identified as Union Exhibit 17.
3 (Handing.)

4 MR. KLEIN: (Perusing.) Yes.

5 MR. SANCHEZ: And is that familiar?

6 MR. KLEIN: Yes.

7 MR. SANCHEZ: And can you tell me
8 what that exhibit -- what's this exhibit
9 in reference to?

10 MR. KLEIN: Well, it's from the
11 United States Department of
12 Transportation and it's a compliance
13 manual regarding drug and alcohol policy
14 and what -- this informs employees what
15 they need to know about Department of
16 Transportation and drug and alcohol
17 testing.

18 MR. SANCHEZ: Okay. And could you
19 go to page -- (perusing) -- page 6,
20 including the cover. It looks like
21 this. (Indicating.)

22 MR. KLEIN: (Perusing.) Can I see
23 it here -- what page number is it?

24 MR. SANCHEZ: It says page 1, but
25 it's page 6 of the exhibit.

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1 MR. KLEIN: Page 6 of the exhibit --
2 this one? (Indicating.)

3 MR. SANCHEZ: Yes.

4 MR. KLEIN: Okay.

5 MR. SANCHEZ: And it says, "Who is
6 subject to DOT testing". Could you read
7 that, please?

8 MR. KLEIN: "Anyone designated in
9 DOT regulations as a safety-sensitive
10 employee is subject to DOT drug
11 alcohol testing. What follows is an
12 overview of what jobs are defined as
13 safety-sensitive functions subject to
14 testing".

15 MR. SANCHEZ: Okay. So -- and then
16 what follows below are safety-sensitive
17 function jobs, defined as
18 safety-sensitive, correct?

19 MR. KLEIN: By the Department of
20 Transportation, yes.

21 MR. SANCHEZ: Yeah,
22 safety-sensitive.

23 And is the railroad on there?

24 MR. KLEIN: Yes.

25 MR. SANCHEZ: And can you read the

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1 safety-sensitive jobs on the railroad?

2 MR. KLEIN: It says for railroad,
3 "Federal Railroad Administration,
4 persons who perform duties subject to
5 the Hours of Service laws --" --

6 MR. SANCHEZ: I'm going to stop you,
7 Mr. Klein.

8 So, Hours of Service laws -- does
9 Mr. Drew perform any services covered
10 under Hours of Service?

11 MR. KLEIN: No.

12 MR. SANCHEZ: Okay. You can
13 continue.

14 MR. KLEIN: "Such as locomotive
15 engineers, trainmen conductors,
16 switchmen, locomotive hostlers/helpers,
17 utility employees, signalmen, operators,
18 and train dispatchers.

19 In addition, a person who performs a
20 maintenance-of-way/roadway worker
21 function --" --

22 MR. SANCHEZ: And I'm going to stop
23 you.

24 Does Mr. Drew perform any
25 maintenance-of-way, roadwork, or

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1 protection functions?

2 MR. KLEIN: No.

3 MR. SANCHEZ: Okay. You can
4 continue, please.

5 MR. KLEIN: "As defined in 49 CFR
6 Part 214, who are employees or
7 contractors of a railroad, have a
8 potential to foul the track, and perform
9 a regulated function such as inspection,
10 construction, maintenance or repair of a
11 railroad track, bridges, roadway,
12 signal, and communication systems,
13 electric traction systems, roadway
14 facilities or roadway maintenance
15 machinery on or near track, as well,
16 flagmen and watchmen/lookouts" -- that's
17 it -- and "See FRA Regulations at 49 CFR
18 Part 219".

19 MR. SANCHEZ: Okay. So, these are
20 all the jobs that are considered
21 safety-sensitive from the Federal
22 Government, correct?

23 MR. KLEIN: Yes.

24 MR. SANCHEZ: Okay. And can you go
25 to the next page, please -- the very

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1 next page.

2 MR. KLEIN: (Perusing.)

3 MR. SANCHEZ: And can you read -- it
4 says "Remember" on the top of the page.

5 MR. KLEIN: Yes.

6 MR. SANCHEZ: Now, the Carrier has
7 designated Mr. Drew and all electricians
8 as safety-sensitive because of their
9 job.

10 Could you read what it says under
11 "Remember"?

12 MR. KLEIN: "Remember, The tasks you
13 actually perform qualify you as a
14 safety-sensitive employee, not your job
15 title".

16 MR. SANCHEZ: I'm going to stop you
17 there.

18 So, is that why Mr. Drew and myself
19 are both considered electricians for
20 Long Island Rail Road, and I go, and I'm
21 safety-sensitive because of the job I
22 actually perform -- right -- and I go,
23 it's not because of his job title, as
24 the Carrier would dictate?

25 MR. KLEIN: That's correct.

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1 MR. SANCHEZ: Okay. I have no
2 further questions with this document.

3 (Whereupon, Organization Exhibit 18
4 was marked.)

5 MR. SANCHEZ: All right. Mr. Klein,
6 I'm going to give you a document that
7 has been identified as Union Exhibit 18.
8 (Handing.)

9 Are you familiar with this document?

10 MR. MAGGIORE: Hold on -- one
11 second. How many pages is this
12 document?

13 MR. SANCHEZ: It's 35 pages.

14 MR. COLOMBO: Total of 44.

15 MR. MAGGIORE: It's a total of 44.

16 MR. COLOMBO: Yeah.

17 MR. MAGGIORE: All right. The
18 Organization has submitted a 44-page
19 document entitled "Marijuana-Impaired
20 Driving, A Report to Congress".

21 This will be Organization Exhibit
22 18.

23 MR. SANCHEZ: All right. Mr. Klein,
24 I've given you what has been identified
25 as Union Exhibit 18.

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1 Is that a familiar document?

2 MR. KLEIN: Yes.

3 MR. SANCHEZ: And can you tell me
4 what that document details -- or what
5 the report says?

6 MR. KLEIN: It's United States
7 Department of Transportation -- it's a
8 report or a study on the impacts of
9 marijuana in the workplace.

10 MR. SANCHEZ: Okay. And I'll ask
11 you to go to page 10 on the bottom.

12 MR. KLEIN: (Perusing.)

13 MR. SANCHEZ: I'm sorry -- "Specimen
14 Collection" -- it's --

15 MR. KLEIN: (Perusing.) Page 10?

16 MR. SANCHEZ: Page 10.

17 MR. KLEIN: Yes.

18 MR. SANCHEZ: It says -- the first,
19 one, it says, blood, oral, sweat, hair,
20 urine.

21 Can you read "Blood Testing"?

22 MR. KLEIN: "Blood testing is
23 considered the "gold standard" for
24 testing for the presence of drugs in
25 impaired driving cases. However, as

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1 described in the background section to
2 this report, currently there is limited
3 ability to relate the amount of drug or
4 metabolite in blood to the presence and
5 amount of impairment. Collecting a
6 blood sample is an invasive procedure
7 typically requiring a search warrant and
8 a nurse or licensed phlebotomist".

9 MR. SANCHEZ: Okay. So, metabolites
10 in the blood, do they indicate
11 impairment?

12 MR. KLEIN: Metabolites -- no.

13 MR. SANCHEZ: Okay. I'd like you to
14 go to the bottom, "Urine Testing", which
15 is the methodology used on the Rail
16 Road.

17 Could you read that, please?

18 MR. KLEIN: "Urine Testing, The drug
19 testing methodology for urinalysis is
20 well established. Drugs and drug
21 metabolites are detectable in urine for
22 several days after the drug has been
23 used and sometimes for weeks. Urine
24 test results cannot be used to prove
25 that a driver was under the influence of

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1 the drug at the time of arrest or
2 testing. Detection of THC or other
3 cannabinoids in urine does not
4 necessarily reflect recent use."

5 MR. SANCHEZ: Okay. So, basically,
6 what they're saying is metabolites in
7 your system don't prove impairment
8 because they can stay in your body for,
9 it says, days and sometimes weeks.

10 Is that correct?

11 MR. KLEIN: Yes, metabolites don't
12 measure -- don't measure the level of
13 impairment.

14 MR. SANCHEZ: Okay. Is that your
15 opinion?

16 MR. KLEIN: No, that's a scientific
17 fact.

18 MR. SANCHEZ: Okay. I have no
19 further questions with this exhibit.

20 I just need a brief recess.

21 MR. MAGGIORE: All right. The time
22 is 1:57 p.m. We're going to take a
23 brief recess.

24 (Whereupon, a brief recess was
25 taken.)

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1 MR. MAGGIORE: All right. The time
2 is 2:05 p.m. and we are back on the
3 record.

4 Mr. Sanchez, do you have any other
5 questions for Mr. Klein?

6 MR. SANCHEZ: Yes, I do.

7 Mr. Klein, can you tell me the
8 difference between the safety-sensitive
9 designation from the Carrier and
10 safety-sensitive designation from the
11 FRA or the Federal Government?

12 MR. KLEIN: Yes, cause they're both
13 -- both agencies or entities have a --
14 there's a distinct difference between
15 the two.

16 The way the Department of
17 Transportation and the FRA defines
18 safety-sensitive employees is those
19 employees who perform regulated service
20 work, Hours of Service work,
21 maintenance-of-way workers, mechanical
22 employees that perform inspections.
23 That they define as safety-sensitive for
24 the purpose of drug testing.

25 The Long Island Rail Road considers

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1 safety-sensitive basically anybody who
2 can basically get injured on a job. So,
3 a custodian, the Long Island Rail Road
4 consider a safety-sensitive position
5 even though under -- the FRA does not
6 consider them one.

7 Even though they work for a
8 railroad, they're not performing the
9 functions that fit them in that certain
10 category that essentially permits random
11 drug testing.

12 MR. SANCHEZ: Okay. Just a few more
13 questions.

14 Did the Carrier violate Mr. Drew's
15 Constitutional Rights under the Fourth
16 Amendment and the Fourteenth Amendment?

17 MR. KLEIN: In my opinion --

18 MR. SANCHEZ: Yes.

19 MR. KLEIN: -- yes, the Fourth --
20 the Fourth Amendment, illegal search,
21 and seizure, and privacy -- and as far
22 as Fourteenth, his due process and his
23 -- his due process rights as well as --

24 MR. SANCHEZ: Is he entitled to
25 equal protection?

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1 MR. KLEIN: Equal protection --
2 thank you.

3 MR. SANCHEZ: Okay. And is this the
4 first time that they violated the
5 Constitutional Rights of employees for
6 drug testing and discipline?

7 MR. KLEIN: No.

8 MR. SANCHEZ: Okay. And can you
9 think of one, off the top of your
10 head -- another employee whose rights
11 were violated?

12 MR. KLEIN: That would be Ronald
13 Dolginko.

14 MR. SANCHEZ: And can you tell me
15 who Mr. Dolginko was and how his rights
16 were violated by the Carrier?

17 MR. KLEIN: Ronald Dolginko was an
18 electrician in the Hillside Car Shop.
19 He was returning to duty from a serious
20 illness and he was subjected to a
21 return-to-duty drug test, the same test
22 that Mr. Drew was subjected to.

23 He also tested positive for
24 marijuana metabolites.

25 MR. SANCHEZ: And do you know -- do

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1 you recall how many years of service Mr.
2 Dolginko had when he returned to
3 service?

4 MR. KLEIN: Mr. Dolginko had
5 approximately 26 years.

6 MR. SANCHEZ: Okay. And do you know
7 what Mr. Dolginko's current status is?

8 MR. KLEIN: He's currently retired.

9 MR. SANCHEZ: Okay. And is there
10 any action -- any court or legal action
11 that you're aware of because of the
12 violation?

13 MR. KLEIN: Yes, there's a civil
14 suit in process.

15 MR. SANCHEZ: And is there a Federal
16 lawsuit that you're aware of?

17 MR. KLEIN: That's a Federal
18 lawsuit, yes.

19 MR. SANCHEZ: Okay. So, this isn't
20 the first time -- and MTA is aware that
21 there's a Federal lawsuit for violation
22 of Constitutional Rights in reference to
23 drug testing and discipline?

24 MR. KLEIN: Yes.

25 MR. SANCHEZ: So, this wouldn't be

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1 the first -- so, now -- it wouldn't be
2 the first time that they've done it, so
3 it's willful now in your opinion?

4 MR. KLEIN: I would say yes.

5 MR. SANCHEZ: I have no further
6 questions.

7 (Whereupon, a discussion was held
8 off the record.)

9 MR. MAGGIORE: Mr. Klein --

10 MR. KLEIN: Yes.

11 MR. MAGGIORE: -- I'd like to show
12 you a copy of what has been entered into
13 the record as Carrier Exhibit 1.

14 This is the Notice of Trial, the
15 subject of the hearing. (Handing.)

16 Can you please read that document?

17 MR. KLEIN: (Perusing.)

18 MR. MAGGIORE: You don't need to
19 read it into the record. Just read it
20 for yourself.

21 MR. KLEIN: Oh, okay. (Perusing.)
22 Okay.

23 MR. MAGGIORE: Okay. According to
24 Carrier Exhibit 1, the Notice of Trial,
25 what type of drug test did Darren Drew

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1 submit a urine specimen for?

2 MR. KLEIN: He submitted as part of
3 a return-to-duty drug test.

4 MR. MAGGIORE: Does the Notice of
5 Trial state that Mr. Drew was impaired
6 at the time of this test?

7 MR. KLEIN: No.

8 MR. MAGGIORE: Is he being charged
9 with being impaired at the time of the
10 test?

11 MR. KLEIN: According to this
12 document, no.

13 MR. MAGGIORE: Okay. Do you have
14 any direct involvement with the incident
15 described in the Notice of Charge -- the
16 Notice of Trial -- sorry?

17 MR. KLEIN: Can you clarify "direct
18 involvement"?

19 MR. MAGGIORE: Were you present at
20 the Medical Facility on June 7th with
21 Mr. Drew?

22 MR. KLEIN: No.

23 MR. MAGGIORE: Were you involved in
24 the testing of his urine?

25 MR. KLEIN: No.

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1 MR. MAGGIORE: Did you receive any
2 lab results regarding the testing of his
3 urine?

4 MR. KLEIN: I believe I might've --
5 I might've seen the results afterwards,
6 but as far as definitive numbers, I
7 couldn't tell you.

8 MR. MAGGIORE: Okay. You didn't
9 order him for testing, did you?

10 MR. KLEIN: Did I order him?

11 MR. MAGGIORE: Yes.

12 MR. KLEIN: I don't have the
13 authority, no.

14 MR. MAGGIORE: Okay. Who has the
15 authority to order him for testing?

16 MR. KLEIN: Well, the Long Island
17 Rail Road has the authority to direct
18 for testing, yes.

19 MR. MAGGIORE: Understood.

20 So, Mr. Drew, as an electrician,
21 he's a safety-sensitive employee as
22 deemed by the Company, correct?

23 MR. KLEIN: According to the Long
24 Island Rail Road's definition of
25 safety-sensitive employee, he would fall

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1 under that definition, yes.

2 MR. MAGGIORE: Okay. Do all
3 electricians -- are all electricians
4 considered safety-sensitive as per the
5 Long Island Rail Road?

6 MR. KLEIN: To the best of my
7 knowledge, yes.

8 MR. MAGGIORE: Okay. You have quite
9 a number of years on the job.

10 Has that always been the case, that
11 electricians have always been considered
12 safety-sensitive?

13 MR. KLEIN: I would be misspeaking
14 if I said the term safety-sensitive has
15 existed for 26 years, so I couldn't
16 definitively say yes to that.

17 MR. MAGGIORE: Understood.
18 Going back to Organization
19 Exhibit 8, which was Rule 53.

20 MR. KLEIN: (Perusing.) Okay.

21 MR. MAGGIORE: You stated you've
22 been a Union rep for what --
23 approximately 20 years?

24 MR. KLEIN: Yes.

25 MR. MAGGIORE: Out of that time,

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1 approximately how long did you represent
2 employees when it came to disciplinary
3 matters, such as trial or entering into
4 waivers -- things of that sort?

5 MR. KLEIN: I would say out of the
6 20, I had involvement, I would say,
7 17 years of those -- out of the 20.

8 MR. MAGGIORE: Okay. During that
9 period of time, did the Carrier -- was
10 the common practice for the Carrier to
11 take employees out of service if they
12 violated the alcohol and substance abuse
13 policy?

14 MR. KLEIN: Typically, that's what
15 they did, yes.

16 MR. MAGGIORE: And then what would
17 happen after they took them out of
18 service?

19 MR. KLEIN: Well, typically --

20 MR. MAGGIORE: Typically.

21 MR. KLEIN: -- typically, there
22 would be a waiver -- a trial waiver
23 offered to the employee.

24 MR. MAGGIORE: Would they be given a
25 Trial Notice first notifying them of the

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1 charge?

2 MR. KLEIN: Yes.

3 MR. MAGGIORE: And then they would
4 sign a waiver -- sometimes --

5 MR. KLEIN: That would become part
6 of the discussion, yes.

7 MR. MAGGIORE: Okay. I just want to
8 turn your attention to Organization
9 Exhibit 14.

10 MR. KLEIN: (Perusing.) Is that
11 this one? (Indicating.)

12 MR. MAGGIORE: Yeah, that's 14.

13 MR. KLEIN: Okay.

14 MR. MAGGIORE: In particular the
15 last sentence in this letter -- the
16 letters are identical. The only
17 difference in these documents is the
18 three different employees signed on
19 different dates obviously.

20 The last line in this letter states,
21 "I herein expressly request that the
22 IBEW sign the trial waiver in this case,
23 as I feel it is in my best interest".

24 You've been involved in these cases.
25 Have you signed a trial waiver along

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1 with the employee?

2 MR. KLEIN: I believe I have.

3 MR. MAGGIORE: Okay. Do employees
4 voluntarily sign trial waivers?

5 MR. KLEIN: Voluntarily -- I mean,
6 in the strict sense of the word, no.

7 MR. MAGGIORE: How so?

8 MR. KLEIN: Because they're coerced
9 into it. They're threatened with either
10 termination or sign the waiver.

11 MR. MAGGIORE: Who threatens them?

12 MR. KLEIN: It's explicitly implied
13 through dialogue that the Union has with
14 the various trial officers over the
15 years and it has never been documented
16 on paper because it would essentially be
17 a pre-determination of guilt, which
18 nobody in their right mind would put in
19 writing.

20 MR. MAGGIORE: Okay. So, does the
21 Union voluntarily sign the waiver?

22 MR. KLEIN: Voluntarily -- I mean --
23 well, it's signed. I mean, no one is
24 holding a gun to the Union rep's head,
25 but certainly they're taking into

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1 consideration the predicament that their
2 Union member -- their brother is put
3 into.

4 So, yes, if the brother believes
5 it's in their best interest -- and
6 that's what's best for their family --
7 then, yes.

8 MR. MAGGIORE: Then you're typically
9 in agreement with the employee when
10 you sign -- you, as a representative,
11 you're signing the waiver as well
12 agreeing to the discipline that's stated
13 in the waiver, correct?

14 MR. KLEIN: We don't judge --
15 whatever the employee -- the employees
16 or the members, what they believe is in
17 their best interest, we don't judge.

18 MR. MAGGIORE: So, you just sign the
19 waiver if the employee agrees to sign
20 the waiver?

21 MR. KLEIN: We don't judge the
22 reason. If they feel it's in their best
23 interest and the best interest of their
24 family, yes, we would sign it, yes.

25 MR. MAGGIORE: I'd like to turn your

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1 attention to Organization Exhibit 15.

2 This is regarding employee Vincent
3 Buonincontro.

4 MR. KLEIN: (Perusing.) Yes.

5 MR. MAGGIORE: So, was
6 Mr. Buonincontro charged with a
7 violation of the alcohol and substance
8 abuse policy?

9 MR. KLEIN: No --

10 MR. MAGGIORE: No, he wasn't?

11 MR. KLEIN: -- not according to this
12 document, no.

13 MR. MAGGIORE: Okay. Was he sent
14 for testing, are you aware, after the
15 incident that's described?

16 MR. KLEIN: No, he wasn't.

17 MR. MAGGIORE: Okay. So -- I don't
18 mean to jump back and forth -- but
19 Organization Exhibit 8 --

20 MR. KLEIN: (Perusing.) Mm-hmm.

21 MR. MAGGIORE: So, Rule 53(b) has
22 been raised a couple of times.

23 Could you just read the first
24 sentence of that -- of "B".

25 MR. KLEIN: "The following types of

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1 offenses justify pre-investigation
2 suspension".

3 MR. MAGGIORE: That's fine.

4 MR. KLEIN: Okay.

5 MR. MAGGIORE: So, the first words
6 in that sentence are what?

7 MR. KLEIN: "The following types".

8 MR. MAGGIORE: "Types". So, does
9 that mean that anything after that is
10 explicitly the only reasons that someone
11 could be taken out of service or are
12 they given as examples, in your opinion?

13 MR. KLEIN: No, it's limited to the
14 scope of what's written here.

15 MR. MAGGIORE: Okay. Turning your
16 attention to Organization Exhibit 16,
17 this document. (Indicating.)

18 MR. KLEIN: (Perusing.)

19 MR. MAGGIORE: Do you know when
20 this -- the law referenced in this
21 document went into effect?

22 MR. KLEIN: I believe somewhere
23 around 2021.

24 MR. MAGGIORE: Okay.

25 MR. KLEIN: Somewhere in that

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1 timeframe, I think -- somewhere around
2 there.

3 MR. MAGGIORE: Okay. So, since the
4 law that's described in Organization
5 Exhibit 16 has been enacted, has the
6 Carrier changed its policy -- rather,
7 amended it's policy and removed
8 marijuana as a prohibited substance?

9 MR. KLEIN: To our knowledge?

10 MR. MAGGIORE: Yes.

11 MR. KLEIN: Just let me preface my
12 answer with this, is typically when
13 there's policy changes, they don't
14 notify us.

15 MR. MAGGIORE: Okay.

16 MR. KLEIN: They do not notify the
17 unions of a policy change. We're
18 left to -- we're left to find out the
19 hard way.

20 So, to the best of my knowledge
21 right now, they haven't changed their
22 marijuana policy.

23 MR. MAGGIORE: Okay. So, marijuana
24 is still a prohibited substance as per
25 Company policy?

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1 MR. KLEIN: I guess -- I'd be
2 speaking for the Company, but yeah.

3 MR. MAGGIORE: Well, Company policy.

4 MR. KLEIN: If that's what you want
5 me to say, yes.

6 MR. MAGGIORE: No -- okay. Turning
7 to Exhibit -- sorry -- your attention to
8 Organization Exhibit 17, it's titled
9 "U.S. Department of Transportation,
10 Office of the Secretary".

11 MR. KLEIN: (Perusing.) Is that
12 this one? (Indicating.)

13 MR. MAGGIORE: Yeah.

14 Is that policy a Federal policy or a
15 Carrier policy?

16 MR. KLEIN: This is Federal.

17 MR. MAGGIORE: Federal policy.

18 And Organization Exhibit 18, is that
19 Federal policy or a Company policy?

20 MR. KLEIN: Well, it's a Federal
21 report.

22 MR. MAGGIORE: Federal report --
23 sorry. It's a Federal report.

24 So, Mr. Sanchez asked you questions
25 regarding the legality of drug testing

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1 and violation of Constitutional Rights
2 or potential violation of.

3 If an employee's Constitutional
4 Rights have been violated, what is the
5 proper forum to remedy that violation?

6 MR. KLEIN: The proper forum to
7 remedy it?

8 MR. MAGGIORE: Yes, is it a
9 disciplinary hearing; is it a grievance
10 hearing? Is it a court -- what is your
11 opinion?

12 MR. KLEIN: Well, the disciplinary
13 portion is imperative because that sets
14 the record for any future litigation
15 outside -- outside the Rail Road
16 property.

17 MR. MAGGIORE: But if somebody's
18 Constitutional Rights are violated,
19 wouldn't a lawsuit be the proper method
20 of remedying that?

21 MR. KLEIN: Not without a proper
22 record, which is being established here.

23 MR. MAGGIORE: A record is created
24 in a court, is it not?

25 MR. KLEIN: It can be.

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1 MR. MAGGIORE: Okay. Does the
2 Carrier have the authority to make legal
3 rulings?

4 MR. KLEIN: Law?

5 MR. MAGGIORE: Yes, on issues of
6 law, does the carrier have that
7 authority?

8 MR. KLEIN: No.

9 MR. MAGGIORE: Okay -- all right. I
10 have no further questions.

11 Mr. Sanchez?

12 MR. SANCHEZ: I got a few.

13 MR. MAGGIORE: Okay.

14 MR. SANCHEZ: Okay. Where to start,
15 where to start.

16 I'll ask you to look at Carrier
17 Exhibit 1 and I'm going to give you what
18 has been identified also for comparison
19 as Union Exhibit 13. 1 is a Notice of
20 Trial.

21 So, I'm going to ask you, do you
22 recognize Carrier 1 and Union 13; are
23 they familiar documents?

24 MR. KLEIN: This is the one I was
25 referencing earlier. I had seen this,

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1 so yes.

2 MR. SANCHEZ: Okay. And can you
3 tell me -- and Carrier 1 is the Notice
4 of Trial. The Carrier's representative
5 stated that it doesn't say anywhere he
6 was impaired in the charge. That he
7 took -- it was a return-to-work
8 physical.

9 Can you point me -- and that he was
10 charged with positive for marijuana --
11 can you show me on Union Exhibit 13
12 where it shows he was positive for
13 marijuana?

14 MR. KLEIN: Well, it doesn't. It
15 shows he was positive for marijuana
16 metabolites.

17 MR. SANCHEZ: Okay. Now, I'm going
18 to ask you to look at what has been
19 identified as Union Exhibit 8, which is
20 Rule 53.

21 MR. KLEIN: (Perusing.)

22 MR. SANCHEZ: And I'll ask you if
23 you could direct me to the portion of
24 Rule 53 that allows the Rail Road to
25 take the grievant out of service for

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1 testing positive for marijuana.

2 MR. KLEIN: It's not there; it
3 doesn't exist.

4 MR. SANCHEZ: Oh, it doesn't exist.
5 Okay. I'll ask you to look at
6 Mr. -- what has been identified as Union
7 Exhibit 15, which is Mr. Buonincontro.

8 MR. KLEIN: (Perusing.) 15?

9 MR. SANCHEZ: That's it.

10 MR. KLEIN: Okay.

11 MR. SANCHEZ: All right. So,
12 Carrier's representative asked if
13 Mr. Buonincontro was sent to Medical for
14 a toxicology test after the incident and
15 was he?

16 MR. KLEIN: After the incident --

17 MR. SANCHEZ: Yes.

18 MR. KLEIN: -- no.

19 MR. SANCHEZ: And was that a
20 violation of Company policy?

21 MR. KLEIN: Yes.

22 MR. SANCHEZ: Okay. And is that
23 your opinion or is that based on your
24 understanding of the policy?

25 MR. KLEIN: My understanding of the

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1 policy, my understanding of the
2 danger -- how dangerous the job is, yes.

3 MR. SANCHEZ: Okay. And he was
4 taken out of service because --
5 specifically for that offense?

6 MR. KLEIN: Yes.

7 MR. SANCHEZ: And Rule 53(b)(2),
8 Unsafe Practice, was specifically
9 spelled out in the Notice of Trial.

10 MR. KLEIN: Yes.

11 MR. SANCHEZ: Okay. Did the
12 President of the Rail Road agree with
13 you that he should've been tested?

14 MR. KLEIN: Yes, we met with Cathy
15 Rinaldi, and Rob Free, and Kelli
16 Coughlin, and they were in agreement.
17 Individuals should've been taken out of
18 service.

19 MR. SANCHEZ: So, they were in
20 agreement that that was a violation of
21 the policy and that the Rail Road was
22 inconsistent in its handling; is that
23 correct?

24 MR. KLEIN: Yes, that's correct.

25 MR. SANCHEZ: Okay. I'm going to

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1 hand you what has been marked as Union
2 19 --

3 MR. MAGGIORE: Let me identify this
4 for the record.

5 MR. SANCHEZ: -- and ask you if you
6 could take a look at it. (Handing.)

7 MR. KLEIN: (Perusing.)

8 MR. MAGGIORE: Mr. Sanchez has
9 handed me a one-page document. It
10 appears to be an email.

11 I will let Mr. Sanchez describe what
12 the contents of this email are.

13 (Whereupon, Organization Exhibit 19
14 was marked.)

15 MR. SANCHEZ: All right. Mr. Klein,
16 is this document familiar to you -- this
17 email?

18 MR. KLEIN: This is the first time
19 I'm actually seeing this.

20 MR. SANCHEZ: Okay and can you read
21 it, please -- well, I'm going to go --
22 can you go -- can you say who is it
23 from?

24 MR. KLEIN: It is from Catherine
25 Rinaldi, Long Island Rail Road

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1 President.

2 MR. SANCHEZ: Okay. And who is it
3 to?

4 MR. KLEIN: It is to Ricardo
5 Sanchez, General Chairman of IBEW Local
6 589.

7 MR. SANCHEZ: And can you read the
8 email?

9 MR. KLEIN: "Good morning
10 Mr. Sanchez, thank you for contacting
11 me. I am also extremely concerned about
12 the incident involving the Third Railman
13 on March 2nd and the safety issues that
14 have been identified after reviewing the
15 circumstances of this event".

16 MR. SANCHEZ: And I'm going to stop
17 you -- and those -- the Third Railman
18 and incident President Rinaldi is
19 referring to is Mr. Buonincontro?

20 MR. KLEIN: Yes.

21 MR. SANCHEZ: Okay. You can
22 continue.

23 MR. KLEIN: "The incident could've
24 resulted in a tragedy for the employee,
25 his family, and the railroad, which is

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1 something I take very seriously as a
2 railroad professional and as a human
3 being. I was similarly troubled that
4 the employee was not subject to
5 toxicology testing after the incident
6 and I also share your frustration that
7 the employee was not removed from
8 service properly".

9 MR. SANCHEZ: Okay. That's all.
10 Thank you.

11 So, the President agrees that it was
12 a violation and he should've sent for a
13 drug and alcohol test?

14 MR. KLEIN: Yes.

15 MR. SANCHEZ: Okay. I'm going to
16 ask you to look at what has been
17 identified as Union Exhibit 14, which is
18 -- and I'll give you mine. It's all the
19 same. It's the trial waivers.

20 (Handing.)

21 MR. KLEIN: Okay.

22 MR. SANCHEZ: So, it says, "Dear Mr.
23 Sanchez, I have been afforded a trial
24 waiver by the Carrier in Discipline
25 Case" and in this -- they're different

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1 numbers.

2 "I understand that the Carrier
3 requires that the IBEW, my bargaining
4 agent, sign the trial waiver as it
5 represents a waiver of my rights under
6 Rule 53 of the Agreement".

7 Do you know why the Carrier -- just
8 number 53 -- Rule 53 is the only one he
9 has to waive?

10 MR. KLEIN: Well, that -- Rule 53
11 grants the employee the right to a fair
12 and impartial trial and a hearing.

13 MR. SANCHEZ: Okay. So, the Carrier
14 is offering -- they don't want to give
15 you a fair and impartial trial. They'll
16 give you a waiver if you waive your
17 rights to a fair and impartial trial.
18 That's what this is asking for.

19 MR. KLEIN: Yes.

20 MR. SANCHEZ: Okay. And as a Union
21 official, can you not sign a request?

22 If an employee comes to you -- a
23 member -- and says, "I want you to sign
24 away my rights", do you have the option,
25 as a Union official, to say, "No, we're

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1 going to trial"?

2 MR. KLEIN: No.

3 MR. SANCHEZ: Okay. Does the MTA
4 have the authority to prohibit
5 marijuana -- the use of marijuana?

6 MR. KLEIN: Does the MTA have the
7 right to prohibit --

8 MR. SANCHEZ: Have the authority --

9 MR. KLEIN: -- the authority --

10 MR. SANCHEZ: -- to prohibit the use
11 of marijuana?

12 MR. KLEIN: Outside the workplace or
13 inside the workplace?

14 MR. SANCHEZ: Do they have the
15 authority, and if they do, under what
16 circumstances?

17 MR. KLEIN: They would have the
18 authority if an individual was deemed to
19 be impaired by marijuana while working.

20 That would be reasonable suspicion
21 -- no different than alcohol, which is
22 also a legal substance outside the
23 workplace.

24 MR. SANCHEZ: So, is alcohol also
25 considered a prohibited substance by the

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1 Long Island Rail Road?

2 MR. KLEIN: Only if you're impaired
3 by it while you're working.

4 MR. SANCHEZ: But is it
5 considered -- okay. So, I'll back that
6 up.

7 So, is alcohol a legal substance --

8 MR. KLEIN: Yes.

9 MR. SANCHEZ: -- for adults over the
10 age of 21?

11 MR. KLEIN: Yes -- yes.

12 MR. SANCHEZ: Is recreational
13 marijuana a legal substance for
14 employees -- for adults over the age of
15 21?

16 MR. KLEIN: In the State of New
17 York, yes.

18 MR. SANCHEZ: Yes -- so, does the
19 Carrier have the right -- does the
20 Carrier's authority supersede New York
21 State to make marijuana a prohibited
22 substance duty for non-covered service
23 employees?

24 MR. KLEIN: No.

25 MR. SANCHEZ: Okay. Did the Carrier

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1 violate other employees' Constitutional
2 Rights, besides Mr. Dolginko, that
3 you're aware of?

4 MR. KLEIN: Well, I would say
5 every -- a majority of the individuals
6 that signed waivers and attested to
7 their innocence and -- yes, numerous
8 ones.

9 MR. SANCHEZ: Okay. We talk a lot
10 about policy and the Carrier is -- the
11 Carriers hang their hat on, they have
12 the authority because of their policy.

13 Are you familiar with a policy that
14 revolved around epilepsy that the
15 Carrier had?

16 MR. KLEIN: Yes.

17 MR. SANCHEZ: And are you familiar
18 with two individuals, Mr. Durandis
19 (phonetic) and Benny Rodriguez in this
20 particular scope?

21 MR. KLEIN: Very much so, yes.

22 MR. SANCHEZ: And could you tell me
23 about Mr. Rodriguez, Mr. Durandis, and
24 the Rail Road policy?

25 MR. KLEIN: Both gentlemen were

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1 suffering from epilepsy. Both gentlemen
2 had --

3 MR. SANCHEZ: I'm sorry, I'm going
4 to stop you. So, they were suffering
5 from epilepsy.

6 Did they disclose their epilepsy
7 condition to the Carrier prior to
8 employment?

9 MR. KLEIN: Yes.

10 MR. SANCHEZ: Okay. Thank you.

11 MR. KLEIN: You want me to continue?

12 MR. SANCHEZ: Yes, please.

13 MR. KLEIN: Both gentlemen were
14 epileptics known to the Company. Both
15 suffered seizures while they were on the
16 job and the Rail Road held them to a
17 standard -- a Department of
18 Transportation standard -- where they
19 could not return to work for one year.
20 So, they had to be seizure free.

21 That was their policy, but they're
22 following a DOT regulation, which had
23 nothing to do with them because they
24 weren't DOT regulated employees.

25 MR. SANCHEZ: And did the

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1 Organization try to resolve that dispute
2 for Mr. Durandis and Mr. Rodriguez?

3 MR. KLEIN: Yes.

4 MR. SANCHEZ: And, ultimately, was
5 the Organization successful on the
6 property handling it?

7 MR. KLEIN: Absolutely not.

8 MR. SANCHEZ: And what was the
9 rationale behind the Carrier's position?

10 MR. KLEIN: Their rationale was the
11 Department of Transportation regulation
12 that requires safety-sensitive employees
13 who suffer seizures must be seizure free
14 for a year -- and, really, that
15 regulation with safety-sensitive would
16 not pertain to the FAR -- not
17 railroad employees -- more truck driving
18 and things of that nature -- commercial
19 drivers.

20 That rule applies more to commercial
21 driving than safety-sensitive under the
22 FRA railroad rules.

23 MR. SANCHEZ: Okay.

24 MR. KLEIN: It might pertain -- I
25 don't know this for sure -- to engineers

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1 on the Long Island Rail Road, that they
2 have to be seizure free -- maybe that.

3 But outside of that, no.

4 MR. SANCHEZ: So, I just want to
5 summarize -- so, the Rail Road had a
6 policy that said if you suffered a
7 seizure from epilepsy, you were taken
8 out of service -- and now the contract
9 when that happens, doesn't the contract
10 state, you go to your doctor and you get
11 a doctor's note -- you can return with a
12 doctor's note, right?

13 MR. KLEIN: Yes.

14 MR. SANCHEZ: And either did Mr.
15 Durandis or Mr. Rodrigues do that?

16 MR. KLEIN: Yes.

17 MR. SANCHEZ: And did the Carrier
18 accept those doctors' notes?

19 MR. KLEIN: No.

20 MR. SANCHEZ: Okay. And doesn't the
21 contract also say that the Carrier
22 has -- if an employee under these
23 circumstances goes out because he had
24 epilepsy, you go to your doctor.

25 The doctor gives you a note, says

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1 medication -- whatever -- and he returns
2 you to the service of the Carrier --
3 right -- and the Carrier disagrees with
4 the diagnosis.

5 Does the Carrier have the ability to
6 get a second opinion?

7 MR. KLEIN: Well, yes -- yes.

8 MR. SANCHEZ: Okay. Cause they can
9 question the diagnosis of a doctor?

10 MR. KLEIN: Yes.

11 MR. SANCHEZ: Okay. Did that happen
12 in this case?

13 MR. KLEIN: My recollection -- I'm
14 not sure if it went to a board -- second
15 opinion -- I really don't recall.

16 MR. SANCHEZ: Okay -- that's okay.

17 So, what was the end result -- so
18 Mr. Durandis and Mr. Rodriguez, were
19 they out for a year; did they do the
20 full year?

21 MR. KLEIN: Yes, and despite our
22 attempts to ask for reasonable
23 accommodations and -- numerous attempts
24 to do that -- so, yes.

25 MR. SANCHEZ: So, they were held out

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1 of service for a year?

2 MR. KLEIN: Yes.

3 MR. SANCHEZ: And they eventually
4 returned back to the service of the
5 Carrier?

6 MR. KLEIN: Yes.

7 MR. SANCHEZ: And did the Carrier
8 ever change the policy?

9 MR. KLEIN: Yes.

10 MR. SANCHEZ: And can you tell me
11 why they changed the policy?

12 MR. KLEIN: Because lawsuits were
13 filed.

14 MR. SANCHEZ: So, the Carrier was
15 sued by these individuals and their
16 policy was changed?

17 MR. KLEIN: Yes -- yes.

18 MR. SANCHEZ: Okay. And were these
19 individuals made whole?

20 MR. KLEIN: Yes.

21 MR. SANCHEZ: So, that was an
22 example -- so, that's an example of the
23 Carrier's policy doesn't supersede state
24 law or the contract.

25 MR. KLEIN: That's correct. That's

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1 a good example, yes.

2 MR. SANCHEZ: Thank you. I have no
3 further questions.

4 MR. MAGGIORE: Okay. Thank you,
5 Mr. Klein. You are excused. You will
6 be recalled for any questions if needed.

7 Please do not discuss this matter
8 with anybody outside this room while the
9 trial is ongoing.

10 The time is approximately 2:35 p.m.
11 and we're going to take a brief recess
12 to allow the Organization's second
13 witness to exit the room.

14 We're off record.

15 (Whereupon, a brief recess was
16 taken.)

17 MR. MAGGIORE: All right. The time
18 is 2:52 p.m. We're back on the record.

19 Since the Organization does not have
20 any additional witnesses to provide
21 testimony, I'll move forward to your
22 testimony, Mr. Drew.

23 I'll direct questions to you and
24 subsequently the Organization will have
25 an opportunity to cross-examine you.

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1 Once again, for the record, can you
2 please state your name and IBM number?

3 MR. DREW: My name is Darren Drew,
4 50112.

5 MR. MAGGIORE: And once again, what
6 is your position with the Rail Road?

7 MR. DREW: Electrician.

8 MR. MAGGIORE: Okay. Did you report
9 to the Medical Department for a
10 return-to-work exam on June 7, 2022?

11 MR. DREW: Yes.

12 MR. MAGGIORE: Were you required to
13 provide a urine specimen for drug
14 testing as part of your return-to-work
15 exam?

16 MR. DREW: Yes.

17 MR. MAGGIORE: Okay. Mr. Drew, I'm
18 going to show you what has been marked
19 as Carrier Exhibit 10. (Handing.)

20 Can you please review this document
21 and tell me if you completed Section 5.

22 MR. DREW: (Perusing.) Yes.

23 MR. MAGGIORE: Okay. Is that your
24 name and signature?

25 MR. DREW: Yes.

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1 MR. MAGGIORE: Can you please read
2 the first sentence in Section 5?

3 MR. DREW: "I certify that I
4 provided my urine specimen to the
5 collector, that I have not adulterated
6 it in any manner. Each specimen bottle
7 used was sealed with a tamper evidence
8 seal in my presence and that the
9 information provided on this form and on
10 a label affixed to each specimen bottle
11 is correct".

12 MR. MAGGIORE: Thank you. After
13 your return-to-work exam on June 7,
14 2022, were you advised of the results of
15 your drug test?

16 MR. DREW: June 13th.

17 MR. MAGGIORE: Okay. What were the
18 results of the test?

19 MR. DREW: Mr. Mujtaba had called me
20 and told me that the test results had
21 came back positive.

22 MR. MAGGIORE: Positive for?

23 MR. DREW: For marijuana.

24 MR. MAGGIORE: Okay. What did you
25 do upon learning the results of the

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1 test?

2 MR. DREW: I was -- I was taken
3 aback because, like I told Dr. Mujtaba,
4 I said, "The test must be wrong", I
5 said, "because I did not smoke any
6 marijuana.

7 MR. MAGGIORE: Okay. Did you
8 discuss the test results with anybody --
9 scratch that -- sorry.

10 So, why do you believe the urine
11 specimen you provided on June 7th tested
12 positive for marijuana?

13 MR. DREW: As I told Mr. Mujtaba
14 also, I said, "It has to be maybe due to
15 the medication that I was on dealing
16 with my cancer situation".

17 MR. MAGGIORE: Okay. I am going to
18 show you what has been marked as
19 Organization Exhibit 2-A and 2-B.
20 (Handing.)

21 MR. DREW: (Perusing.)

22 MR. MAGGIORE: These are letters
23 that the Organization submitted on your
24 behalf from your doctor -- or doctors
25 rather. There are two different

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1 doctors.

2 These letters state that you were
3 prescribed ibuprofen, which "is listed
4 as a drug that could potentially cause a
5 false positive test for marijuana".

6 Do you have any medical
7 documentation, which definitively states
8 that the results of your June 7, 2022
9 drug test was due to a false positive?

10 MR. DREW: Definitive, no -- no.

11 MR. MAGGIORE: Okay. Mr. Drew, Dr.
12 Mujtaba testified that the GCMS test is
13 considered to be the gold standard for
14 drug testing since it is not susceptible
15 to false positives.

16 Dr. Mujtaba also submitted into
17 evidence lab results, which have been
18 marked as Carrier's Exhibits 13 and 16,
19 which were both performed at separate
20 labs. Both labs indicate a positive for
21 marijuana.

22 Why do you believe that those
23 results are incorrect?

24 MR. DREW: Because -- first of all,
25 the main reason -- like I told these two

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1 gentlemen -- my representatives -- I did
2 not smoke anything. If I had smoked
3 something, I would've probably signed
4 the waiver.

5 MR. MAGGIORE: Okay.

6 MR. DREW: I wouldn't put my family
7 through this. It's going on a year that
8 we haven't gotten paid -- I haven't
9 gotten paid.

10 So, therefore, once I contacted my
11 doctors and I told them what the
12 situation was and I asked them -- I
13 said, "Can any of the medication cause a
14 false positive", and my doctor said,
15 "Yes", and then he told me that
16 ibuprofen -- that's when I started doing
17 my homework on it and that's when I
18 brought it up to Dr. Mujtaba.

19 After that I also know from working
20 38 years in aviation -- the technical
21 field that I do -- I know nothing is 100
22 percent. I know those tests, regardless
23 of what's the gold standard, isn't
24 100 percent.

25 With that being said, I must be that

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1 one percent or that .1 percent.

2 MR. MAGGIORE: Okay. I have no more
3 questions for Mr. Drew.

4 Mr. Sanchez, would you like to
5 question Mr. Drew?

6 MR. SANCHEZ: Sure.

7 I don't if you answered this
8 question, but how long have you been an
9 employee of the Long Island Rail Road?

10 MR. DREW: This will be my 25th
11 year.

12 MR. SANCHEZ: Okay. And when did
13 you start?

14 MR. DREW: On the Rail Road?

15 MR. SANCHEZ: Mm-hmm.

16 MR. DREW: April '99.

17 MR. SANCHEZ: Okay. Carrier's
18 representative asked you if you had
19 definitive proof that your positive
20 finding was caused by ibuprofen and you
21 said no.

22 Has the Carrier produced any
23 definitive proof that it wasn't caused
24 by ibuprofen?

25 MR. DREW: No.

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1 MR. SANCHEZ: Okay. When was the
2 last time you took a toxicological test?

3 MR. DREW: June 7th.

4 MR. SANCHEZ: And that was your
5 return-to-work physical?

6 MR. DREW: Yes.

7 MR. SANCHEZ: Okay. And prior to
8 that June 7th return-to-work physical
9 toxicological test, do you recall the
10 last time you took a test before then --
11 a toxicological test?

12 MR. DREW: Right -- has to be when I
13 was hired.

14 MR. SANCHEZ: So, roughly, 25 --

15 MR. DREW: 25 years.

16 MR. SANCHEZ: -- 24, 25 years.

17 So, for 25 years, while you were
18 working as an electrician -- a
19 safety-sensitive electrician on the Rail
20 Road, you didn't take a drug test?

21 MR. DREW: No.

22 MR. SANCHEZ: Okay. I want you to
23 explain in your own words exactly what
24 happened and how you got here today.

25 MR. DREW: Well, over the last few

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1 years -- you know, I usually go take my
2 PSA test. A few years back -- I've
3 known for a little while my PSA result
4 started rising. My doctor told me, "You
5 need to go check -- see a urologist, you
6 know, to make sure".

7 So, up on that, the test -- my PSA
8 results kept getting higher and then it
9 got to a certain point where I had to do
10 something because usually, I said, "I do
11 the holistic way". I really don't care
12 too much for the medication and the side
13 effects from the medication.

14 So, then, you know, you start
15 thinking about your family. My doctor
16 started saying, "You have to think about
17 your kids. You have kids, a wife. You
18 need to do something". So, I said,
19 "Okay. I'll go and have them check it
20 out, see if it's cancerous".

21 So, I had the biopsy done and they
22 said it was an aggressive form, but
23 since -- cause of my age and my health,
24 they said that, you know, if I go and
25 take the chemo treatment for

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1 two years -- so I was on chemo for
2 two years, hormonal treatment for two
3 years.

4 MR. SANCHEZ: So -- I'm sorry. So,
5 you were on -- you were on chemo and
6 hormonal treatment?

7 MR. DREW: For two years.

8 MR. SANCHEZ: Okay.

9 MR. DREW: And last year when I went
10 out -- when I finally decided to go out
11 -- was four months of radiation --

12 MR. SANCHEZ: Okay.

13 MR. DREW: -- for the two months --
14 two months of straight radiation -- nine
15 weeks.

16 MR. SANCHEZ: So, when you went out,
17 you were out for over 30 days?

18 MR. DREW: Yes.

19 MR. SANCHEZ: And that's what
20 triggered --

21 MR. DREW: Yes, which I wasn't
22 anticipating on doing because I know the
23 history of the Rail Road and other
24 co-workers who said, "Look out for
25 Medical because they usually give you a

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1 hard time to get back to work".

2 MR. SANCHEZ: Okay.

3 MR. DREW: But due to the radiation,
4 it really --

5 MR. SANCHEZ: So, let me ask you,
6 when you went out, were you aware that
7 when you came back you would be subject
8 to a drug and alcohol test?

9 MR. DREW: Of course.

10 MR. SANCHEZ: And were you subject
11 to an alcohol test?

12 MR. DREW: No.

13 MR. SANCHEZ: Just a drug test?

14 MR. DREW: I found that out through
15 this whole process with the trial.

16 MR. SANCHEZ: So, but -- and that
17 particular day, you took a urinalysis
18 test, no alcohol?

19 MR. DREW: It was just a urinalysis.

20 MR. SANCHEZ: Okay. And how long
21 have you been held out of service?

22 MR. DREW: Almost coming up on a
23 year -- since June 13th.

24 MR. SANCHEZ: Okay. And when you
25 got a phone call on the 13th, I believe,

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1 to say that your results had tested
2 positive for marijuana metabolites, you
3 testified that you called -- you spoke
4 with the Carrier's MRO?

5 MR. DREW: Yes.

6 MR. SANCHEZ: And you gave them a
7 possible scenario of how that could
8 happen since you --

9 MR. DREW: How it would have to --
10 yes.

11 MR. SANCHEZ: Okay. And you
12 submitted these two documents, which is
13 Union 2-B -- 2-A and 2-B, right?

14 MR. DREW: Yes.

15 MR. SANCHEZ: And these are two
16 treating physicians that you saw?

17 MR. DREW: Yes.

18 MR. SANCHEZ: And did your
19 physicians -- when they provided this
20 letter to you, did you tell them why you
21 needed it?

22 MR. DREW: Yes.

23 MR. SANCHEZ: And these are two --

24 MR. DREW: Radiologist and
25 hematologist.

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1 MR. SANCHEZ: Yes, there's an
2 oncologist at Langone -- they both work
3 for New York Health Langone and that
4 location is in Mineola.

5 MR. DREW: Right around the corner
6 from the --

7 MR. SANCHEZ: From Medical.

8 MR. DREW: -- Medical.

9 MR. SANCHEZ: Okay. So, it's right
10 there.

11 So -- and these are two different
12 doctors --

13 MR. DREW: Yes --

14 MR. SANCHEZ: -- correct?

15 MR. DREW: -- yes.

16 MR. SANCHEZ: And both doctors, when
17 you asked them to provide a possible
18 explanation as to why you tested
19 positive marijuana metabolites, this is
20 the document they gave you?

21 MR. DREW: Yes.

22 MR. SANCHEZ: And Mr. Mujtaba, the
23 MRO, did he contact any of these
24 doctors?

25 MR. DREW: Every time I go back for

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1 check-ups and I ask them, has anybody
2 from the Rail Road contacted them, they
3 say, no.

4 MR. SANCHEZ: Okay. So, the
5 Carrier's MRO, who doesn't work for
6 Langone -- he works for the Long Island
7 Rail Road Medical -- decided that he
8 didn't have to corroborate these two
9 documents from your doctor --

10 MR. DREW: Yes.

11 MR. SANCHEZ: -- and took it upon
12 himself to make the determination; is
13 that correct?

14 MR. DREW: Yes.

15 MR. SANCHEZ: Okay. Did you
16 willingly submit to the drug and alcohol
17 test?

18 MR. DREW: The return-to-duty?

19 MR. SANCHEZ: Mm-hmm.

20 MR. DREW: Yes.

21 MR. SANCHEZ: Why?

22 MR. DREW: Because as far as I knew,
23 that's just -- that's procedure.

24 MR. SANCHEZ: So -- okay. So, it's
25 procedure -- so, was it your

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1 understanding that you didn't have a
2 choice?

3 MR. DREW: I mean, I guess you could
4 say yes.

5 MR. SANCHEZ: Yeah -- so, it's your
6 -- so, when they say -- and I just want
7 to be clear when I ask you if you
8 willingly consented -- you consented to
9 the return-to-work physical because if
10 you didn't consent, you would be taken
11 out of service; is that correct?

12 MR. DREW: I still would be out of
13 work.

14 MR. SANCHEZ: You'd be out of
15 service.

16 So, you consented --

17 MR. DREW: And I rushed to come back
18 to work because after a while,
19 financially, you need the money to take
20 care of your family.

21 MR. SANCHEZ: Sure. Okay. So, you
22 consented because the alternative was to
23 be held out of service?

24 MR. DREW: (Nodding.)

25 MR. SANCHEZ: Okay.

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1 MR. DREW: Yes.

2 MR. SANCHEZ: Okay. I have no
3 further questions.

4 MR. MAGGIORE: Okay. So, since
5 there are no additional witnesses or
6 documentation to enter into the record,
7 we're going to move to closing
8 statements.

9 Do you need a break first or --

10 MR. SANCHEZ: Can we -- yeah, I'm
11 going to need a -- actually, we're going
12 to reserve our closing statements --
13 we're going to do it in writing cause
14 there's so much. That's how we do ours.

15 MR. MAGGIORE: Are you going to
16 submit a --

17 MR. SANCHEZ: Yeah, we're going to
18 submit it because there's so much.

19 You know, unfortunately we have --

20 THE STENOGRAPHER: On the record,
21 all of this?

22 MR. MAGGIORE: Hold on one second.

23 The time is 3:05 p.m. We're going
24 to take a brief recess.

25 (Whereupon, a brief recess was

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1 taken.)

2 MR. MAGGIORE: Okay. The time is
3 3:07 p.m. We're back on the record.

4 The Union has requested to submit
5 its closing statement in writing. I
6 just would like to note for the record
7 that -- while closing statements are not
8 considered testimony, they will be
9 entered into the record as part of the
10 trial transcript. The assessing officer
11 will take them into consideration.

12 I will keep the record open until
13 next Friday, May 5th. The Union has
14 until May 5th to submit its closing
15 statement in writing at that point.

16 Before we end today, Mr. Drew, I
17 just have a couple of questions for you.

18 Were you allowed to answer all
19 questions in your own words?

20 MR. DREW: Yes.

21 MR. MAGGIORE: Were you allowed to
22 question witnesses?

23 MR. DREW: Yes.

24 MR. MAGGIORE: Were you allowed to
25 examine evidence?

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1 MR. DREW: Yes.

2 MR. MAGGIORE: Were you allowed to
3 submit evidence in your defense?

4 MR. DREW: Yes.

5 MR. MAGGIORE: Were you permitted to
6 have witnesses testify in your defense?

7 MR. DREW: Yes.

8 MR. MAGGIORE: Were you allowed to
9 make statements on your own behalf or
10 have your representative do so for you?

11 MR. DREW: Yes.

12 MR. MAGGIORE: Okay. In that case,
13 I'm going to close today's hearing.

14 As I previously stated, the record
15 will be kept open till next Friday for
16 the Union to submit a written closing.

17 The time is 3:09 p.m. and we are off
18 the record.

19 (Time noted: 3:09 p.m.)
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CERTIFICATION

I, JULIA M. SPEROS, a Notary Public
for and within the State of New York, do
hereby certify:

That the witness whose testimony as
herein set forth, was duly sworn by me;
and that the within transcript is a true
record of the testimony given by said
witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 27th day of April,
2023.



Julia M. Speros