

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11630
Docket No. 11254
89-2-86-2-71

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen of the United States and Canada
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

1. That the Indiana Harbor Belt Railroad Company violated the current working Agreement, specifically an Understanding Relating to Physical Examinations of Employees subject to the Shop Crafts' Agreement, which was signed January 1, 1943 and Rule No. 22 when they forced Carman Daniel E. Smith to take a physical examination and a drug screening test after a two week absence from work account of illness.

Mr. Smith passed the physical examination and reported for work and did work his regular hours on July 2 and 3, 1985, was off duty July 4, 1985 for the holiday, and came back July 5, 1985 and worked up until 2:50 p.m. at which time he was removed from service. Mr. Smith was held out of service for a period of eight (8) work days from July 8, 1985 through July 17, 1985.

2. That the Indiana Harbor Belt Railroad Company be ordered to compensate Carman Daniel E. Smith eight (8) hours' pay at the pro rata rate for each of the following dates, July 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, 1985 account of their arbitrary and capricious actions, their abuse of managerial discretion, and the violations of the Agreement.

FINDINGS:

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

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

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

Parties to said dispute waived right of appearance at hearing thereon.

The significant events leading to this claim arose on July 1, 1985 when the Claimant, who had been absent for two weeks, took a Carrier ordered physical examination. The Claimant then reported for duty and worked on July 2 and 3, was off on July 4, and worked until approximately 2:00 P.M. on July 5, 1985. At that time, the Carrier notified him that results of laboratory

tests administered on July 1, 1985 showed that he had tested positive for amphetamines and he was removed from service. On July 12, 1985, the Claimant notified the Carrier that he had had a test administered which showed negative. The Carrier, however, requested that the Claimant take another examination at the clinic that it had earlier used for these purposes. The Claimant, however, refused a test at the time; however, he did take it on July 17, 1985 as previously scheduled by the Carrier. This latest test proved negative and he was released for duty on July 17, 1985 by the Carrier's physician.

At the outset, the Board observes that a number of matters have been raised in the submissions which were not brought to the surface on the property. Accordingly, these will not be considered in our deliberations.

Turning to the record developed on the property, the issue is whether the Carrier complied with Rule 22 which reads:

"Rule 22
ABSENT FROM WORK

An employee unavoidably detained from work on account of illness or for other good and sufficient cause shall notify his foreman not later than the close of the first day's absence, if possible.

Before returning to work he shall give his foreman not less than 2 hours' notice before the quitting time of his previous regularly assigned shift."

and the

"UNDERSTANDING RELATING TO
Physical Examinations of Employees
subject to the
Shop Crafts' Agreement

PREAMBLE

The parties hereto have agreed that there are circumstances under which any employee should be willing to submit himself to a re-examination of his physical condition to the end that it may be ascertained if he is able to perform his duties with safety to himself and his fellow-employees. The carrier affirms an interest in the physical well-being of its employees, realizing that employees in good physical condition will generally work more safely and efficiently. The employees agree to this premise but desire to protect themselves against possible abuse of the physical re-examination privilege. The carrier agrees also that

so-called fishing expeditions and abuse of the privilege are improper and will not be permitted. The physical re-examination privilege should be utilized only for the purpose of ascertaining the true physical condition of the employee and its effect, if any, upon his ability to perform the duties required of him with safety to himself and his fellow workmen and to promote on the part of the employee a desire to protect and improve his physical condition.

ARTICLES OF AGREEMENT

Article 1.

After entering service no employee will be required to submit himself for physical re-examination (excluding vision and hearing re-examinations, which are not affected hereby), except as hereinafter provided.

Article 2.

When the representative of the employees or the foreman or other supervisor has reason to believe that an employee's physical condition at any time while in service is such that he is becoming unsafe and liable to cause injury to himself or fellow employees, he may be directed to take a complete physical examination.

In cases arising under this agreement, the employee involved may first be examined by a doctor of his own choice at his own expense and shall promptly thereafter present to the carrier and his local committee a written report from the doctor showing in detail the findings as to the employee's physical condition. If the report of such doctor is satisfactory to the carrier, the employee shall be permitted to continue at work, but if the carrier is not satisfied with such report then the employee shall be required to take an examination by the carrier's doctor who shall also prepare a written report showing in detail the findings as to the employee's physical condition and a copy of this report shall be given to the employee or his representative. Thereafter, if necessary, the procedure outlined in Article 4 hereof will be observed.

Article 3.

An employee who presents himself for duty following a severe illness, injury, furlough or leave of

absence may be required to pass a physical examination before resuming duty under the procedure outlined in Article 2 hereof.

Article 4.

In cases where the employee is examined first by his own doctor and later by the carrier's doctor and the reports of the doctors do not agree as to the employee's condition, arrangements may be made for his examination by a third and disinterested doctor. If possible, the selection of the third doctor shall be made by the two doctors, but in the event of failure to agree upon a third doctor, the selection shall be made by the employee or his representative and the designated representative of the carrier.

An opinion concurred in by two of the three doctors shall be conclusive and binding on all parties.

The fee of the third doctor shall be fixed by the two doctors and borne equally by the employee and the carrier. Any attending expenses shall be similarly divided.

Article 5.

Whenever it is necessary under Article 4 hereof to select a third and disinterested doctor he shall be given a copy of the report made by the carrier's doctor and the employee's doctor which reports shall include the actual findings of such doctors, in detail, as to the employee's physical condition.

Article 6.

Where an employee has been disqualified for active service hereunder he shall be granted a leave of absence by the carrier and thereafter may, within reasonable intervals, request re-examinations when he has reason to believe he has recovered sufficiently to resume work.

Article 7.

This agreement shall become effective on January 1, 1943, and continue in effect subject to the thirty-day notice of desire of either party to revise or terminate it.

NOTE: Any car cleaner, who has not been required to take a physical examination upon entrance into the service, will be subject to such a physical examination, if and when he is promoted out of the ranks of car cleaners."

Clearly, it is not arguable that the Carrier has the right to require physical examinations, subject to whatever process has been established. In this case, the aforementioned requirements have been legitimately established. Whether or not a drug screen may be a part of such a physical examination is not before this Board.

Turning then to the published process, we agree with the Carrier that Rule 22 was not violated since it does not address the matter of a return-to-work physical examination. However, we conclude that the Carrier did not comply with its "Understanding Relating to Physical Examinations of Employees" (the "Understanding"), mainly for the reasons that follow.

The Understanding places certain constraints on the Carrier because Article I states: "After entering service no employee will be required to submit himself for physical re-examination ... except as hereinafter provided." Article 3 then states that following a "severe illness," injury, etc., the employee may be required to pass a physical examination before resuming duty. In the case at hand, no substantive evidence was presented on the property by the Carrier that the conditions of Article 3 were present with respect to the Claimant. As a matter of fact, he was allowed to resume duty on July 17, 1985. Therefore, on its face, the Carrier itself did not consider the provision applicable because it allowed him to return to duty before taking a physical examination.

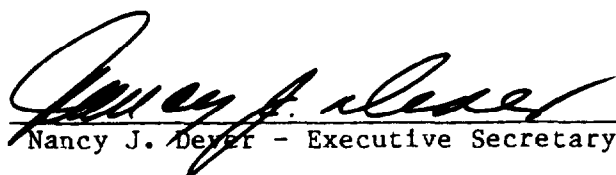
For the above reasons, we sustain the claim. Our ruling here is based on the evidence developed on the property in this particular case. Provided that it has valid indication that an employee's condition poses a likelihood of impaired job performance that could seriously affect him, fellow employees or the public, this Award does not restrict the Carrier's requirement of a physical examination. Its action, however, must be consistent with the Understanding and the appropriate collective bargaining Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1989.

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