AWARD NO. 19
CASE NO. 21

PUBLIC LAW BOARD NO. 4874

PARTIES ) UNITED TRANSPORTATION UNION (C&T)
TO )
DISPUTE ) NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)



STATEMENT OF CLAIM:

"Claim of H. A. Rankin because he was held from service after completing his return to work physical. Claiming compensation for November 14, 15, 16 and 17, 1988." (System Docket No. NEC-UTU(C&T)-SD-182)

FINDINGS:

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

The issue here in dispute concerns a determination as to whether the Claimant had been wrongfully denied a timely return to active service account being required to take a return to duty physical examination which included a drug screen, and having to await the results of such drug screen test.

On November 14, 1988 the Claimant, who had been off duty account being sick since September 8, 1988, notified the Carrier that he was ready to return to active service.

The Organization says that the Claimant presented a form of medical documentation about his physical condition, and was provided a company physical on that same date, namely, November 14, 1988, but, for reasons not stated in the record, the Claimant was not provided a drug screen at such time, or a test which the Carrier now requires as a part of its return-to-duty examination policy. It asserts that the Claimant was instead directed to report for the drug screen test on the following day (November 15, 1988) at the Mercy Eastwick Medical Center in Philadelphia, PA.

The Carrier says that the Claimant was required to take both a return-to-duty physical and drug screen on November 15, 1988 at the Medical Center. It points to a form which had been completed by the medical examiner on such date which shows the Claimant to have met the medical standards pending drug and alcohol screen results.

It is undisputed that the Claimant submitted to a drug screen as directed on November 15, 1988, and that he was notified by the Carrier on November 16, 1988 that he had successfully passed the drug screen test. The Carrier says that it notified the Claimant

of the test result at 3:15 p.m.; the Claimant maintains that it was not until on or about 5:00 p.m. In either event, there is no dispute that the Claimant marked up for duty at 6:12 p.m. that same date, November 16, 1988, exercising his seniority to the extra board for assistant passenger conductors at Philadelphia, PA.

On December 13, 1988 the Claimant submitted penalty time claims for a basic day's pay for November 14, 15, 16 and 17, 1988, on the basis that he lost earnings on each of those dates account being required to await the results of the return to duty physical and drug test.

Basically, it is the position of the Organization that the Carrier has unilaterally changed the terms and conditions of the contract without negotiation in violation of the Railway Labor Act. It submits that the established past practice was for an employee to return to duty after 30 days, pending a doctor's note or a physical examination, without a drug screen. The Organization thus argues that the Carrier does not have the right to withhold an employee from service pending the results of a drug test administered in conjunction with a return-to-duty physical.

It says that the Claimant produced medical evidence of his fitness to be returned to duty on November 14, 1988, but that the Carrier's medical staff was not available for the drug screen, which necessitated a drug screen at Mercy Eastwick Hospital on the following day, November 15, 1988. Further, the Organization argues that since the results of the drug screen were not forwarded to the Carrier until November 16, 1988, that this caused the Claimant to loose the opportunity to work on November 17, 1988. In this regard, the Organization argues that two days is an unreasonable amount of time to await the results of a drug screen, offering that the EMIT, or Enzyme Multiplied Immunoassay Technique, drug screen test which the Claimant had taken should require no more than 30 minutes to process.

In support of its contention that the drug screen process should not have caused the Claimant to lose compensation, the Organization directs attention to the Question and Answer No. 22 relating to the FRA final rule on control of alcohol and drug use in railroad operations, albeit this was not an FRA-related drug screen:

> "22. Q. If the employee is removed from service at the time a urine test is conducted and is not returned to service until after the test result comes back, is the employee entitled to back pay?
>
> A. The employee will not necessarily be out of service during this interval. The railroad will determine whether to remove the employee from service based on the same factors that governed prior to the effective date of the rule. For instance, did the employee violate other rules? Is there sufficient information to

> make a Rule G charge or to order a medical or EAP evaluation? The testing process itself will not cause employees to lose compensated time. In any event, all disputes related to pay or benefits will remain subject to Section 3 of the Railway Labor Act." (Emphasis Added by the Organization.)

In this same connection, the Organization has made the unrebutted statement that "there was nothing even remotely involved in the instant case which would indicate the Claimant was in violation of Rule G or any other rule for that matter."

The Carrier argues that it has the right to establish and enforce medical standards, including drug screens as part of a return-to-duty physical to determine an employee's fitness for service. It thus maintains that the Claimant was properly required to take a drug screen pursuant to its Procedures Manual (Pers-19, Sec. V), which reads in part here pertinent as follows:

> "V. Return to Work and Periodic Physicals
>
> A. Policy: Except as specifically provided in an applicable labor agreement, all employees returning to work after an absence, for any reason other than vacation, of 30 days or more will be tested by urine sample for drug presence as a part of a return-to work physical. All required periodic physicals and physicals to determine fitness for duty will also include a test for the presence of drugs."

The Carrier directs the Board's attention to a number of awards of past boards which have upheld the right and authority of a carrier to conduct physical examinations, set medical standards, determine the physical fitness of their employees, and establish reasonable rules related thereto. It calls particular attention to Award No. 21 of SBA No. 1020 (Referee Benn), which involved a dispute on the property with the Amtrak Service Workers Council as related to, among other things, the propriety of the Carrier requiring its employees to submit to drug screens as part of a return-to-duty physical examination, and which award found the Carrier decision to test employees in such a manner to have been a reasonable determination falling under the umbrella of its authority to set medical standards and make fitness and ability determinations.

In regard to its handling of the Claimant, the Carrier says that it was not "established" until about 3:15 p.m. on November 16, 1988 that the Claimant had passed the drug screen test and that it immediately notified the Claimant of the results and that he thereafter marked up on the extra board at 6:12 p.m. on that same date.

The Carrier maintains that the period of time from the date of

the physical examination until the date it received the drug screen test results and informed the Claimant of same was not an unreasonable amount of time. In this regard, it says that it had no control over the period of time it took the medical facility to receive the results of the required drug screen, albeit the Carrier urges that the time it took the medical facility to perform the drug screen and advise it of the results was likewise not an unreasonable amount of time.

In addition, the Carrier argues that the Claimant was aware that he was required to take a return-to-duty physical prior to his return to active service and that nothing prevented him from contacting the transportation department and scheduling his physical examination in advance of November 14, 1988. It says that had he done so, and the Carrier medical facility in Philadelphia not have been available to perform the EMIT drug screen test that arrangements could have been made to take such test at another Carrier medical facility in New York or Wilmington. Thus, the Carrier asserts that the Claimant's loss of earning for the dates in question were the result of his own actions and not those of the Carrier.

In consideration and study of the arguments of the parties, the Board finds no reason to conclude other than as did SBA No. 1020 in its Award No. 5 on the property, supra, that the requirement that employees returning to duty must submit to a drug screen as part of the return-to-duty physical examination to be a policy not prohibited by the Agreement or a violation of established past practice.

At the same time, as stated in Award No. 5 of SBA No. 1020, this Board likewise believes that the "authority exercised by the Carrier and the consequences flowing from that exercise of authority through implementation of the drug testing program are immense." One of the Carrier responsibilities, in the opinion of the Board, is to take action in designing and administering a program that will not unreasonably delay the return of an employee to service as the result of being required to submit to a drug screen.

In the case at hand, we believe that it was unreasonable for the Carrier not to have provided for a drug screen if in fact he was given a physical by a company physician on the date that he first sought to return, November 14, 1988. In this regard, it is noted in review of Award No. 5 of SBA 1020 that in that case one of the Carrier's industrial nurses had administered an EMIT drug screen on one particular date, and on another date, had conducted two EMIT tests on the grievant in that case, the first test at 9:15 a.m. and the second at 9:55 a.m. account the first test having showed a positive presence for an illegal substance. Therefore, it is evident, as the Organization has stated, that the EMIT drug screen process could be concluded within 30 minutes.

Further, even it was necessary that the Claimant report to the

medical center for the return-to-duty physical examination and drug screen, it would seem to the Board that the medical examiner could have included consideration of the results of the EMIT drug screen and have marked that section of the the Carrier form which states, "does meet medical standards," rather than having marked the form to show that the Claimant "does meet medical standards pending drug & alcohol screen results." Such action would have permitted the Claimant's more timely return to service.

The EMIT drug screen, or that test which the Carrier submits the Claimant was required to take as a part of the return-to-duty examination, is an immunoassay test that has been reportedly designed to be an inexpensive screening method for either onsite or laboratory use. It is a test, as indicated above, that can be readily administered and evaluated by an industrial nurse, and does not require evaluation by a laboratory technician. Thus, it would seem that the processing of an EMIT drug screen should not require, as here, some 24 hours for a decision to be released on the results of such a test. Certainly, if the Claimant's EMIT test had showed positive for the presence of an illegal drug substance, then a delay in making a determination on the test might well have been necessary so as to permit time to conduct a confirmation test. However, this latter circumstance was not present in the case at hand.

In view of the above considerations, the Board concludes that the Claimant had been unreasonably withheld from service. He is entitled to be compensated for three of the four days claimed. We make this determination on the basis that even if the Claimant had been returned to service on November 14, 1988, there is nothing of record to show that he would have stood for service on that date, and, further, that if the Claimant had not in fact been examined by a company physician on November 14, 1988, it would not have been unreasonable for such examination to have been scheduled the day after the Claimant had notified the Carrier of his desire to be returned to service.

AWARD:

Claim sustained to the extent set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member

R. F. Palmer
Carrier Member

C. Bryant
Organization Member

Philadelphia, PA
April 29, 1991