AWARD NO. 56
Case No. 60

Organization File No.
Carrier File No. OC-UTU-SD-247

PUBLIC LAW BOARD NO. 5323

PARTIES) UNITED TRANSPORTATION UNION
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TO)
)
DISPUTE) NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF CLAIM:

G. R. Creech claiming the earnings he lost as a result of being withheld from service beginning on Thursday, March 18, 1993 through Monday, March 22, 1993.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated October 6, 1992, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

After an extended medical leave of absence, Claimant was released to return to service by his personal physician on March 17, 1993. Prior to returning to work, Carrier required him to submit to a physical examination, which included a drug test. This examination was conducted on March 18, 1993. Claimant was not informed that he had been approved to mark up until March 22, 1993. The Organization asserts he was unduly withheld from service and seeks compensation for the time he lost.

The crux of the Organization's claim is that Carrier could have administered a simple drug test that would have yielded almost immediate results. It relies upon the findings of Public Law Board No. 4874, between these parties, in Award No. 19 (Case No. 21). In that case, which also dealt with a return-to-work examination, the Board held:

> 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.
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> 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.
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> 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 of 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.

Additionally, the Organization cites Question and Answer No. 22 of the FRA Rules on drug testing, reading as follows:

> 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?
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> 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)

The Organization also notes that Conrail has modified its policy regarding drug testing of employees returning to work after furlough. According to a June 30, 1993 letter, Conrail now allows employees to return to work as soon as they are determined to be medically qualified, even though the results of their drug tests are still pending. The letter indicates this change was due to "a very low rate of illegal substance positives found as a result of return from furlough drug tests. . . ."

Carrier insists Award No. 19 of Public Law Board No. 4874 is not applicable in this case. At the time of the claim involved in that Award, the Carrier asserts EMIT tests were administered by industrial nurses in Philadelphia, where that claim arose. Carrier notes the claim herein arose at Pendleton, Oregon, where the Carrier had not employed nurses. Furthermore, Carrier states it no longer uses industrial nurses for drug testing at any location. It avers that all urine samples are tested at independent, private laboratories certified by NIDA.

First, with respect to the Organization's citation of Question and Answer 22 of the FRA Rules, we find that they do not have application in this case. The testing done in the instant dispute was not

performed pursuant to FRA Rules. This was done as part of a return-to-work physical examination of an employee who was on a medical leave of absence. As such, Claimant was considered medically disqualified until it was demonstrated he met the Carrier's medical standards. His release by his personal physician was not sufficient. It is well-established that Carrier has the right to conduct its own examination of an employee under Claimant's circumstances. Rule 29(c) must govern in this case. That Rule provides:

> An employee who has accepted medical disqualification or who was found to be properly disqualified by a neutral physician may, if there has been a change in his medical condition as evidenced by a report of his personal physician, request a reexamination. There will be no claim for time lost in such case, unless the Corporation refuses to grant the reexamination or there is unreasonable delay in applying the terms of this paragraph.

By taking a medical leave of absence, Claimant, in effect, had accepted medical disqualification. His release from his personal physician was the basis for the Carrier conducting a reexamination. The only issue, then, is whether there was an unreasonable delay in processing Claimant's return to service. This was the issue addressed by Public Law Board No. 4874 in Award No. 19.

We agree with the Findings in Award No. 19 to some extent. First, we agree that Carrier has the right to require employees to submit to drug tests when they return from a medical leave of absence. We also agree that Carrier has the right to withhold such employees from service pending receipt of the results of the drug tests. This Board lacks the authority to command Carrier to adopt Conrail's practice of allowing employees to return to work pending the results of the drug test. It is not even within the province of this Board to say whether such a policy would be desireable or

prudent. Most significantly, we also agree that Carrier has an obligation to process drug tests as expeditiously as possible to prevent any unnecessary loss of earnings by the employee. At issue in this dispute is the standard to be applied in measuring whether Carrier acted expeditiously.

Carrier is not obligated to have its own facilities for drug testing wherever it has employees. A greater interest is served by protecting the employee from questionable testing. The Carrier's decision to use independent laboratories that are certified by NIDA is a reasonable decision. In this way, both the Carrier and its employees have the assurance that testing standards are being met and quality control measures are being taken. Using an independent laboratory, however, does not relieve the Carrier of its obligation to allow the employee to return to service as soon as possible. This standard was set by Public Law Board No. 4874 when, in Award No. 19, it determined that Carrier has a responsibility "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."[1] With the use of overnight delivery services and telefacsimile communications, there should be no reason why test results are not available the next day, in most cases. Because Carrier has crews going on duty seven days a week, it should not be allowed to withhold an employee from service simply because of the weekend when it is found that the drug test is negative. We might decide differently if the Carrier had demonstrated it could not, after a reasonable effort, find an acceptable laboratory with seven day a week service. But that is not the case herein.

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[1]In addition to a delay in making the results of the drug test available, Award No. 19 also involved a situation where the drug test was administered one day after the employee's physical examination. That issue is not present in this case as Claimant took his drug test at the same time as his physical.

Accordingly, we conclude it was unreasonable for the Carrier to withhold Claimant from service from the time he took his physical and drug test on Thursday, March 18, 1993, until Monday, March 22, 1993. As for a remedy, we find that Claimant would not have been able to work assignment CHT-2, departing Pendleton at 8:55 am on March 18, 1993, but should have been ready to work the assignment departing on March 20, 1993. Accordingly, we direct that he be compensated the earnings of that round trip assignment.

It should be noted that this Board is not establishing an absolute rule that test results must be available the following day in all cases. There are a number of variables that must be considered. For instance, the availability of overnight delivery is critical. Depending upon when and where the test is performed, second day delivery may be the best available. Because these are defenses available to the Carrier, it is the Carrier that has the burden of proving them.

AWARD: Claim sustained in accordance with Findings above. Carrier is directed to comply with this Award within forty-five days.

Barry E. Simon
Chairman and Neutral Member

Richard F. Palmer
Carrier Member

Larry R. Davis
Employee Member

Date: February 23, 1995
Arlington Heights, Illinois