

AWARD NO. 6

Case No. 6

Organization File No. 36-L/2 (911)

Carrier File No. 3-00529-002

PUBLIC LAW BOARD NO. 5968

PARTIES) UNITED TRANSPORTATION UNION
)
TO)
)
DISPUTE) SOO LINE RAILROAD COMPANY

STATEMENT OF CLAIM:

Appeal in behalf of St. Paul Switchman K. C. Frazier, nine (9) months of actual suspension, pay for lost time including time lost to attend investigation, any lost vacation benefits, and expungement from record of any reference to such discipline which was assessed by Mr. E. N. Peck as outlined in his letter dated January 13, 1995 concerning investigation held on January 6, 1995.

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 December 18, 1996, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On November 18, 1994, Claimant tested positive on a reasonable cause ¹drug and alcohol test. Claimant subsequently waived an investigation and submitted to the Rule G bypass program, which required him, *inter alia*, to submit to random drug and alcohol tests for a period of five years. On December 21, 1994, Claimant was directed to provide a urine sample pursuant to the bypass agreement. After waiting for Claimant to produce a urine specimen for two hours, the Carrier

determined his inability to produce a specimen would be considered a positive test. Claimant was thereafter directed to attend a formal investigation at which he was charged with failing to provide a urine sample as required.

Claimant's investigation was originally scheduled for December 30, 1994, and was conducted *in absentia* when he failed to either report or request a postponement. After the investigation was concluded, however, Claimant called the hearing officer, who agreed to reconvene the hearing on January 6, 1995. Following the investigation, Claimant was assessed a nine month suspension.

The Organization has protested that the Carrier failed to give Claimant an adequate amount of time to produce a urine specimen. Claimant arrived at the testing facility at 7:25 am. Forty-five minutes later, Claimant informed the technician that he could not urinate because he had emptied his bladder prior to coming to work. He was then given another one hour and twenty minutes to produce a sample. During this time, Claimant was given 24 ounces of water to drink. The test was terminated at 9:30 am. At one point during this interval, Claimant offered to take a blood test, but his offer was declined by the Carrier. According to the Organization, Claimant should have been given two hours to produce a sample, with the time limit commencing when he told the technician he could not urinate. The Organization cites FRA regulations in support of its position.

Carrier denies the FRA regulations are applicable in this case because it does not involve an FRA authorized drug test. Rather, says the Carrier, Claimant was tested pursuant to his agreement with the Employee Assistance Program. While it is true the test was not made pursuant to FRA regulations, it is apparent the Carrier has chosen to adopt those regulations to all drug tests. On November 8, 1994, Dr. Joseph A. Thomasino, the Carrier's Medical Review Officer, wrote to

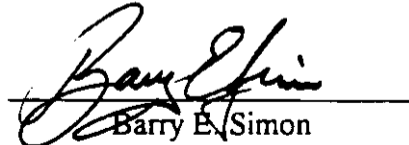
Assistant Vice President Employee Relations G. F. Leif regarding the recent change in the handling of "shy bladder" situations during urine drug screening. This memo clarified that the practice of giving an employee up to eight hours, or until his hours of service expired, to produce a sample was no longer in effect. Instead, under FRA and DOT regulations, an employee is given only two hours, or until his hours of service expires. Significantly, Thomasino further explained that DOT practices are applied to Agreement collections as well. We will, therefore, hold the Carrier to the standard promulgated by the FRA and the DOT.

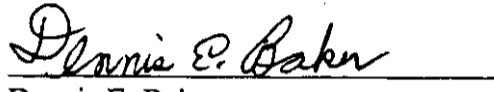
It is evident from documents from the Federal Railroad Administration that the two hour period commences when the employee demonstrates an inability to provide a specimen. The FRA further states, "The demonstrated inability by the donor to provide a specimen occurs at the time that the donor returns from the bathroom to the collector and provides either no specimen or a specimen of insufficient quantity." It is at this point, according to the FRA, that the two hour waiting time begins.

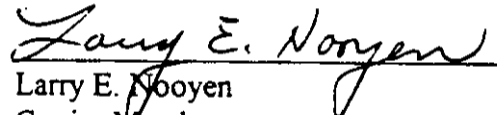
Based upon the facts in this case, the Board must find that the Carrier gave Claimant an insufficient time to produce a urine sample. Consequently, it was not privileged to discipline him for failing to provide a sample. The discipline, therefore, must be reversed.

Carrier has argued it offered to return Claimant to service by letter dated August 3, 1995. This offer, however, was declined. Because that offer did not indicate Claimant would have been required to forego his claim for pay for the time lost up to his return to service, we consider it to be an unconditional offer. Carrier, therefore, is liable only for the time Claimant lost up to August 3, 1995. The balance of the claim is denied.

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


Barry E. Simon
Chairman and Neutral Member


Dennis E. Baker
Employee Member


Larry E. Nooyen
Carrier Member

Dated: Jan 22, 1998
Arlington Heights, Illinois