NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT No. 1011

TRANSPORTATION*COMMUNICATIONS INTERNATIONAL UNION

and

CONSOLIDATED RAIL CORPORATION

AWARD No. 45

Case No. 45
Docket No CR-4131

STATEMENT OF CLAIM

Claim submitted on behalf of F. P. Hennessey, Jr., for eight hours for each of the following dates: July 16, 17, 18, 19, 20, 21, 22, 1987, at 2306.16 per month. Claimant was recalled from furlough on July 14, 1987, and took a physical examination on July 16, 1987. He was then withheld from service pending the results of a urinalysis test which ultimately showed negative.

FINDINGS

The Claimant was advised by letter dated July 14, 1987 that he was recalled from furlough and awarded the position of Personnel Assistant. He was advised in the letter that, in accordance with Rule 5 (b), he must report for duty by July 24, 1987 or his seniority would be forfeited. In accordance with the requirement for a return-to-work physical examination, the Claimant reported for and underwent such examination on July 16. As part of the examination, he supplied a urine sample for

controlled substance analysis. The Carrier stated the result of the drug screen report was received on July 22, and it was negative. The Carrier's Medical Examiner promptly found the Claimant fit for service, and the Claimant returned to duty on July 23. (Other than the results of the drug screen, the Claimant had been found qualified for service based on his examination on July 16.)

The drug testing of an employee returning to service from furlough arises under the Carrier's Drug Testing Policy effective February 20, 1987. Such testing is only one part of the new procedure initiated unilaterally by the Carrier.

The claim before the Board is that the Claimant should be paid for eight hours for each day in the period from July 16 through July 22. This is based on a general attack on the Drug Testing Policy itself and the more narrow ground that the Claimant was improperly withheld from service during this period. At the outset, the Board finds no basis for the claim for July 16, the date on which the examination was made, or for July 18-19, which are scheduled rest days for the position.

Consideration of the Organization's position on the Drug Testing Policy itself will be considered in further detail below. The Board first addresses the question of whether or not the Claimant was improperly withheld from service, pending receipt

of the drug testing results. This will be done on the assumption for this purpose only that there is no substantive basis for the challenge to the Drug Testing Policy itself.

Applicable Rules relating to recall of the furloughed employees are as follows:

RULE 18 - REDUCING FORCES AND DISPLACEMENT RIGHTS

. . .

(h) Furloughed employes shall be subject to recall in accordance with Rule 5.

RULE 5 - BULLETINING AND AWARDING OF POSITIONS

. . .

(e) When a permanent position is awarded to a qualified furloughed employe and it does not require a change in residence, he shall be recalled by certified mail to his home address. An employe failing to report for duty within ten (10) calendar days after such notice was mailed, except under circumstances beyond his control, shall forfeit all seniority.

Again assuming, for the sake of the discussion here, that the Carrier's Drug Testing Policy is appropriate in all respects, may the Carrier wait for the results of the drug test to qualify for service an employee returning from furlough? Previous awards have found in favor of claimants where medical review has taken an unreasonable time for completion, and employees have thus been improperly denied opportunity for work solely because of such delay. The Board does not find such applicable here. The

drug test was part of the return-to-work examination. The seven-day period involved to obtain the results is not unreasonable, given the necessity of using outside sources for processing. As pointed out by the Carrier, there is no Rule specifying the precise time between a furloughed employee's notification of eligibility to return to work and the date upon which work must be offered to him. While it is true that the Claimant might have started work sooner absent a drug test, the inclusion of the drug test necessitated a longer period than heretofore to determine a returning employee's qualification for service.

Attention now turns to the major issue in dispute here; namely, the Organization's contention as to the impropriety of the unilaterally imposed Drug Testing Program in its entirety. In considering this question, the Board has reviewed the submissions of the parties both in reference to this claim and in reference to that considered in Award No. 53 (Docket No. CR-4194-D). Part of the discussion in these disputes concerned the question of whether the Program gave rise to a "major dispute" or "minor dispute". This portion of the dispute has now been resolved by the decision of the Supreme Court in Consolidated Rail Corporation v. Railway Labor Executives' Association, _______ U.S. ________, 109 S. Ct. 2477 (1989). The Court determined the matter

to be a minor dispute, subject to arbitral review under the Railway Labor Act. The Court stated in pertinent part as follows:

> . . . We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board. . . .
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> . . .
>
> Because we conclude that Conrail's contractual arguments are not obviously insubstantial, we hold that the case before us constitutes a minor dispute that is within the exclusive jurisdiction of the Board. We make clear, however, that we go no further than to hold that Conrail has met the light burden of persuading this Court that its drug-testing practice is arguably justified by the implied terms of its collective bargaining agreement. We do not seek to minimize any force in the Union's arguments that the discretion afforded Conrail by the parties' implied agreement, as interpreted in light of past practice, cannot be understood to extend this far. Thus, in no way do we suggest that Conrail is or is not entitled to prevail before the Board on the merits of the dispute.

This, of course, does not resolve the issue. Rather, it leaves it to this Board and to other Boards considering the same issue for determination. Previous Awards involving the Carrier's Drug Testing Program have reviewed the legitimacy of the Drug Testing Program against the existing Rules Agreement. This Board finds no reason to differ from the conclusions reached therein and likewise finds no necessity to cover the same ground again.

This dispute does not concern discipline imposed as a result of the Program but rather the consequences of physical examinations uniformly required upon return to work. Supportive of such examinations under the Program are Awards of Special Boards of Adjustment No. 909 and 910, which held as follows:

Special Board of Adjustment 909, Award 93 (Blackwell):

> After due study of the foregoing and of the record as a whole, inclusive of the submissions of the parties in support of their positions in the case, the Board finds and concludes that the Carrier's Drug Policy is addressed to the need for the Carrier to have a drug-free work force; and that there can be no valid protest of this objective.

Special Board of Adjustment 910, Award 300 (Weston):

> That Policy represents a reasonable exercise of managerial discretion and a good faith effort to deal with a problem of enormous magnitude from the safety as well as economic standpoints in the transportation industry as well as throughout the nation. The Policy is upheld by this Board; it has not been administered in a disparate or unreasonable fashion.

Special Board of Adjustment No. 910, Award 312, Referee Bergman:

> It is not disputed that the physical examinations required periodically and usually after an employee has been absent from service for a period of time is standard operating procedure that has long been practiced without objection. It is a matter of public knowledge that the medical profession has advanced in its knowledge of infirmities of persons developed from the constant research of medical science. An examination that at one time may have consisted of nothing more than a test for blood pressure and pulse rate has been advanced to encompass findings relative to other conditions that may prove disabling and/or disqualifiying for continued service of the employee. It certainly is a matter of public knowledge that the use of controlled substance has become a public enemy in our society. . . .

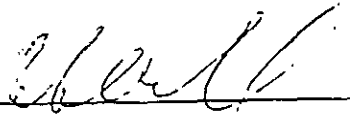
Just as a test would include good eye sight and good hearing, recognition of the disabling factors of controlled substance would require testing to assure that physical and mental ability to function, especially in the railroad industry, is not unreasonable.

Nothing in the dispute considered herein leads this Board to a conclusion differing from those above cited.

A W A R D

Claim denied.

HERBERT L. MARX, JR., Chairman and Neutral Member



ROBERT O'NEILL, Carrier Member

J. R. JENKINS, Employee Member

NEW YORK, NY

DATED: 3-27-90