

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 434

Case No. 434
UP File 890692

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Union Pacific Railroad
 (Former Missouri Pacific Railroad Company)

Statement

of Claim: (1) Carrier violated the Agreement, especially Rule 12,
when C. Thibodeaux was withheld from service on May 10,
1989.

(2) Claim in behalf of Mr. Thibodeaux for wage loss suffered
beginning May 10, 1989, until June 28, 1989.

Findings: The Board has jurisdiction by reason of the parties
Agreement establishing this Board therefor.

This is the first in a series of cases involving the
results of a drug screen taken during a periodic physical
examination.

Trackman Clarence Thibodeaux was medically disqualified
from service as the result of Medical Director D. E.
Reisling, M.D. letter dated May 10, 1989. Said letter
advised the Claimant that as a result of his periodic
physical examination the drug screen test had proved
positive for illegal or unauthorized drugs. The Claimant,
was advised, consistent with the Company's well announced
medical policy, in essence, that he could seek treatment
through the Company's Employee Assistance Program (EAP) but,
in any case, he would be unable to return to service until
such time as he demonstrated his fitness for duty by
providing a negative drug test.

The Claimant also received similar letters from his
Track Supervisor advising along similar lines that the urine
sample taken from the Claimant had reflected a positive test
result. He was advised again of his medical
disqualification from service with specific instructions
that he will be afforded no more than 90 days from the date
of the letter to demonstrate that he had become drug-free by
presenting himself to a medical facility selected by the
Company's Medical Director to provide a urine sample that
tested negative for illegal or drugs. Thibodeaux was also
advised that the 90 day period could be extended

indefinitely if the employee chose to enter the EAP and that such course of treatment required greater than 90 days to complete.

The Claimant complied with those instructions outlined and presented the Carrier with a negative sample. He was then reinstated to service, on June 26, 1989.

The Organization filed the instant claim on July 7, 1989 for the time claiming compensation for the period of May 10, through June 28, 1989 alleging that the Claimant had been dismissed from service without the benefit of a formal investigation.

The Union among other things asserted that the Carrier was only targeting those MofW employees on the system who were in tie gangs; that the Union (BMW) had not entered into any agreement that would allow dismissal as a result of drug testing and that the Carrier had not held a formal investigation before disciplining the Claimant.

Carrier asserts no agreement was necessary to permit the Carrier to administer routine periodical physical examinations. Further, that Carrier is not required to hold a formal investigation to medically disqualify an employee. It pointed out that the procedure in question is not random drug testing but rather the administration of a proper periodical physical examination.

The facts of this case present a narrow issue. It is clear therefrom that the Claimant was not disciplined or dismissed from service. Rather, he was only medically disqualified from service for a period of time as a result of a urinalysis test which tested positive. He was reinstated medically when he subsequently presented a negative urine sample.

Any other issues raised by the parties such as should and/or how the drug test is conducted is deemed irrelevant. The Claimant at no time took exception to the drug screen, the positive finding, nor to the methodology which produced that finding. Such issues are not properly before this Board.

Simply stated it was a medical disqualification rendered in accordance with the April 10, 1989 policy governing the drug testing component of the Engineering Department physical examinations.

The record discloses no showing that the Carrier did not have the right to conduct periodical physical examination. For sure the complained of test was not random

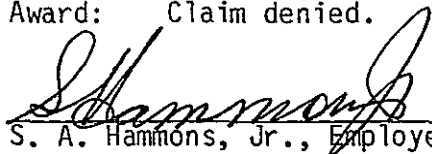
drug testing. It was part of the periodic physical examinations that were performed gang by gang.

It is noted that the Claimant's claim for wage loss was in excess of that which was proper to claim for because it was shown that he was on vacation on the dates of May 10, 11, and 12, and was on a personal business leave of absence during the period May 15 through the 19th. As of May 23 the Claimant was placed on a medical leave of absence and returned to work on June 26, 1989. There appears to be no valid justification for this claim.

The Carrier notified all its employees with its April 10, 1989 announcement of the policy, effective April 17, 1989, governing the addition of the drug testing component of the Engineering Department's physical examinations. The BMWE immediately filed suit in the United States District Court for the District of Oregon, Civil 89-476, and obtained a Preliminary Restraining Order from Judge Redden on May 19, 1989. However, the United States Court of Appeals for the Ninth Circuit issued an Order in Case 89-35390 for a stay pending an appeal and asked the parties to show cause why the appeal should not be remanded to the District Court in light of the Supreme Court Decision in Consolidated Rail Corp. V Railway Labor Executives Assoc. No. 88-1 June 19, 1989 (491 US 105 L ED 550, 1055) based thereon. The parties there stipulated to the District Court that said Appeal to the US Court of Appeals was withdrawn and the injunction dissolved and the action dismissed. No evidence was offered to demonstrate that Carrier had no right to do what it did. Nor that bargaining as per Section 6 or 2(6) of the Act was involved.

In the circumstances, the claim in this case is without merit and will be denied.

Award: Claim denied.


S. A. Hammons, Jr., Employee Member


D. A. Ring, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member