SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 479

Case No. 479
File 890540

Parties to Dispute: Brotherhood of Maintenance of Employes
and
Union Pacific Railroad Company
(Former Missouri Pacific Railroad)

Statement of Claim: 1. Carrier violated the Agreement, especially Rule 12, when Trackman G. L. West was withheld from service on May 1, 1989.

2. Claim in behalf of Mr. West for eight (8) hours per day, any overtime and holiday pay, and any additional expense incurred that would normally be covered by benefits provided by the Carrier, beginning May 1, 1989 and continuing until Claimant is reinstated to service with all rights unimpaired.

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

Claimant, G. L. West, a System Rail Gang Trackman, was medically disqualified from service by Dr. D. E. Richling, M.D., Carrier's Medical Director. Said medical disqualification was made pursuant to the Carrier's articulated medical policy, particularly expressed by a letter of April 10, 1989, to all Engineering Department employees. It resulted from the periodic medical examination by the Claimant taken on April 17, 1989 including a urinalysis. Again, pursuant to the policy, the Claimant, subsequently, provided a urine sample which tested negative for illegal or unauthorized drugs. He was thereafter returned to service, on June 7, 1989.

The instant claims are predicated on an alleged violation of Rule 12 - Discipline. If a person has tested positive for drugs, Carrier has improperly removed the Employee from service on the grounds of medical disqualification. The Carrier had no probable cause to take the physical examination. The Carrier showed no evidence that the test was properly administered and the procedures thereafter protecting the security of the specimen was maintained. Thus, having not met the burden of proof the instant claim should be sustained. Carrier did not prove that the Claimant did fail the drug test and the claim should be sustained.

The Board finds that the Claimant was handled pursuant to the Carrier's long standing and well articulated medical policy. Said reasonable medical policy now included an additional required diagnostic test of urine testing for drug use, in addition to those for alcohol, sugar and albumin.

Carrier's announced medical policy is so formulated that the presence of unauthorized drugs in an employee's urine is sufficient for the Carrier to conclude that he is not fit for duty and therefore, should be withheld from service. However, if such employee produces a negative sample within 90 days the employee is returned to service. The employees involved are entitled to and do receive a confirmation test of any positive result. Those employees who do test positive are encouraged to participate in the Carrier's EAP.

The Carrier's lawful obligation to the public and to its employees to be ever mindful of safety, of its concomitant obligation to operate in the safest and the most efficient manner possible, required the modification of its policy to include the drug testing. Our Board finds that the Carrier has the authority to do so and that its policy is a reasonable exercise of such authority.

As pointed out in Second Division Award No. 11745:

> "...the United States Supreme Court decided two cases bearing directly on the subject of drugs and drug testing in the railroad industry- Skinner v. Railway Labor Executives Assn., 489 U.S. 1989 - and Conrail v. Railway Labor Executives Assn., 489 U.S. 1989 of which we have taken judicial notice.
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> In Skinner, the court, among other things held that the drug and alcohol test mandated and authorized in certain circumstances and situations by the Federal Railroad Administration, were reasonable under the Fourth Amendment even though there may be no suspicion that any particular employee was impaired. The court opined that the government's interest in regulating the conduct of railroad employes engaged in safety sensitive tasks presented a special need situation and that FRA regulations were designed not only to discern impairment but also to deter it."

Careful study of the aforementioned two Supreme Court decisions as well as a full review of all material in the record supports our clear conclusion that the investigation and discipline provisions of the agreement (Rule 11) were

not violated when the Carrier refused to certify Claimant as being medical qualified to resume service until he was able to successfully supply a negative drug screen.

Second Division Award No. 11748 also held:

"...As part of a periodical physical examination conducted by the Carrier, Claimant was given a drug test which showed positive for the presence of marijuana..."

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"...medical determinations concerning physical qualifications have traditionally been held as non-disciplinary but, nevertheless, subject to an arbitrary and capricious standard of review. See Second Division Awards 7863, 7087, Third Division Awards 21991, 14249."

"Nor can we find error in the fact that the Claimant was required to submit to a periodic physical examination..."

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"Having found no impropriety with the imposition of the physical examination of drug test for Claimant...or in the test administration or results, we find no basis to award Claimant with a compensation sought. We must therefore deny the claim."

Our Board can find no reason in the record to not follow said awards. We find that the Claimant herein was not disciplined or dismissed as alleged but, rather, was medically disqualified from service. Hence, the procedure for handling disputes of physical disability cases does not come into play. It was not ripe for its application. There was no impropriety in this case to require Claimant to undergo a routine periodic physical examination which included a drug test that Claimant failed to pass. Consequently, he was therefore properly medically disqualified from service until such time as he could prove himself fit for duty, which the Claimant did.

The Carrier faithfully followed compliance with its announced April 10, 1989 policy "Governing the Drug Testing Component of the Engineering Department Physical Examination." The claims are denied.

Award: Claim denied.

S. A. Hammons, Jr. Employee Member

D. A. Ring, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued August 27, 1991.