

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 614

Docket No. 614
File 930087

Parties Brotherhood of Maintenance of Way Employes
to and
Dispute Union Pacific Railroad Company
(Former MOPAC)

Statement

of Claim: (1) Carrier violated the Agreement, especially Rule 12, when J. M. Hinton (SSN 429-54-6824) was dismissed from service on December 3, 1992.

(2) Claim in behalf of Mr. Hinton for wage loss suffered beginning November 2, 1992 and continuing until Claimant is reinstated with seniority, vacation and all other rights unimpaired.

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

The Claimant, Trackman Jesse M. Hinton with 17 years seniority, was notified November 2, 1992 to attend a formal investigation to be held on November 17, 1992 on the charge:

"...you were allegedly insubordinate when you failed to comply with instructions given you by Track Supervisor L. D. Taylor in his letters of April 27, 1989 and June 23, 1989 to remain drug free indefinitely as evidenced by the positive drug test as a result of the follow-up drug test given you on October 12, 1992 at North Little Rock, Arkansas..."

Carrier concluded therefrom that Claimant was culpable of the charge placed against him. He was dismissed from service, on December 3, 1992, as discipline therefor.

The facts reflect that Claimant had tested positive for illegal or unauthorized drugs as a result of an April 18, 1989 routine physical examination. Under the Carrier drug policy of April 10, 1989 (articulated by Stan McLaughlin, Assistant Vice President Engineering Services), the Claimant was advised on April 27, 1989 that he had two choices either to present a negative urine sample within 90 days or enter the EAP program. Following a return to service the employee must remain drug free and must submit to follow-up drug testing for a three year period.

The Claimant elected to present a negative urine sample. He was returned to service and thereby subject himself to remain drug free and to follow-up testing.

The Carrier, on January 9, 1990, adopted and issued on January 16, 1990 a revised "Drug and Alcohol Policy and Procedure." It was sent to all employees by Executive Vice President - Operation, R. K. Davison, and advising the coverage of the due policy. As pertinent to this case, two sections apply:

Section X Removal from Service/Disciplinary investigation, in part reading:

"...if it is determined the employee violated Rule G or Rule 607 with particular reference to drugs or alcohol, the employee will be subject to dismissal or other appropriate disciplinary action."

and Section XII Follow-up Testing Program reading:

"After returning to service following any Rule G or Rule 607 violation, or disqualification from service by the Company Medical Director, with particular reference to drugs or alcohol, employees will be selected for follow-up drug (and alcohol if appropriate) testing objectively and neutrally through a random selection program... for at least two years and possibly up to five years following return to service." (underscoring added)

The Claimant had previously been returned to service June 23, 1989 subject to his obligation to remain drug free and the follow up testing. Claimant's follow-up drug test occurred on October 12, 1992. The date of that test was clearly outside of the former drug policy's three year limitation but within the five year limitation of the new January 9, 1990 policy. The crux of this dispute then is whether Carrier was within its right to test the Claimant subjective to a follow-up drug test arising outside of the three year limitation.

The Board finds that the new drug policy must be applied prospectively from January 9, 1990 and not retroactively. The Claimant had been advised on June 23, 1989:

"As you were previously advised, a condition of your return to service is that you remain drug-free and submit to follow-up drug testing under the auspices of the Union Pacific Medical Director's office for three (3) years from the date of your return to service. You may be subject to

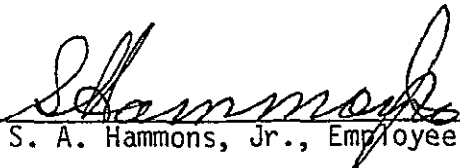
dismissal if it is determined that you failed to follow this instruction." (underscoring supplied)


Clearly, the Claimant failed to remain drug free and thus was in violation of that part of the drug policy's instructions. However, the proof thereof was provided by reason of the Claimant's follow-up drug screen of October 12, 1992. That screen was, in effect, tainted evidence and the fruit thereof is denied to Carrier's case. But for that drug screen the Claimant would not have been found to have tested positive or in violation of the instruction to remain drug free. Claimant will be returned to service with all rights unimpaired but without pay for time lost because the Board finds that the revelation of *continued drug use*, the positive drug screen, was obtained outside the three year period. His dereliction is overlooked this time because he is not a hours of service employee. This is deemed as appropriate disciplinary action in this particular case. The Claimant's long years of service have been recognized.

The option of his entering the Employee Assistance Program is now available to him.

Award: Claim disposed of as per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.


S. A. Hammons, Jr., Employee Member


D. A. Ring, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member