

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 444

Case No. 444
UP 890759

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 Machine Operator Helper D. H. Smith was dismissed from service on September 13, 1989.

(2) Claim in behalf of Mr. Smith for wage loss suffered beginning July 27, 1989, until reinstated with seniority, vacation and all other rights unimpaired.

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

This is the second in the initial series of drug test cases appealed to this Board. Said cases arose out of the implementation of the Carrier's modified medical policy in April 1989.

The Carrier has conducted periodic return to duty and follow-up physical examinations of its employees including, urine testing for many many years. It added a drug diagnostic testing tool to its existing urinalysis testing program effective April 17, 1989. In conjunction therewith the Assistant Vice President of Engineering Services, S. J. McLaughlin, issued written statement and policy on April 10, 1989, entitled "Union Pacific Railroad Policy and Procedures Governing the Drug Testing Component of Engineering Department Physical examinations," to all employees covered thereunder. Said policy is referred to in our Award No. 473 which by reference is incorporated herein. The essence of said policy is that should an employee test positive for illegal or unauthorized drugs during a routine periodic physical examination then he/she would be medically disqualified from service and instructed that he/she would be permitted to return to service only upon their ability to demonstrate their fitness for duty within 90 days from the date of disqualification, by providing a negative urine sample through a medical facility selected by the Company Medical Director. Further, said 90 day period could only be extended by the employee's entrance into the Company's Employee Assistance Program (EAP) when such program required treatment of greater than the 90 days. Said policy also indicated that should an employee fail to become

"clean," or enter the Employee Assistance Program within the 90 day period, the employee would be subject to dismissal if determined that he had failed to comply with the company's instructions in this regard.

The policy also requires that an employee who had tested positive and had presented a negative sample after upon returning to service must be required to remain drug-free and to submit to follow-up drug testing, under the auspices of the Union Pacific Medical Director's office, for three years from the date of the employee's return to service. If the employee fails to provide a negative test at any time during this three year period, the employee may be subject to dismissal if it is determined that he failed to follow a valid Union Pacific instruction.

Each employee has been notified as to what is the policy. Each employee, when affected thereby, receives written advice from the Medical Director and also his supervisor reiterating the same instructions and advice so that there is little or no grounds for contesting proper notification.

The Union Pacific has required and conducted routine medical examinations of employees to ascertain their fitness for duty. This without ever bargaining thereon. The UP medical standards would change to meet the constancy and reflected changes in advancing medical technology. These examinations, since at least the 1970s, have included urinalysis for blood sugar and albumin.

Employees who fail to meet the applicable medical standards are routinely restricted, or held out of service without pay until the deficient medical condition is eliminated or corrected. This included elevated blood sugar, as determined by urinalysis, until the level was reduced. The affected employees have traditionally been required to follow Carrier instructions concerning the fitness testing process or face the disciplinary prospects for an insubordination charge. The Organization acquiesced in these procedures. On or about April 10, 1989 the Carrier's VP of Engineering Services, notified all its Engineering Department employees, that effective April 17, 1989 it was adding a drug screen test to the existing urinalysis component of the periodic physical examinations of "System Gang Employees". The governing policy and procedures, as set out hereinabove and the purpose therefor were placed in writing. Simply stated, the System Gang had the poorest safety record on the Union Pacific. Over 60% worse than the Company average. In fact, in the first 10 days of testing there was a positive rate of 18% developed for illegal or unauthorized drug uses. That was a tip of a problem.

The Brotherhood of Maintenance of Way Employees filed suit in the United States District Court for the District of Oregon requesting and receiving a Temporary Restraining Order (TRO) and Preliminary Injunction in Civil 89-476, on May 19, 1989. The Union Pacific appealed therefor to the United States Court of appeals for the Ninth Circuit. It also sought a stay pending appeal which was granted, June 20, by the Ninth Circuit Court of Appeals. However, in granting the stay the court asked the parties to show cause why in light of the United States Supreme Court decision Consolidated Rail Corporation No. 88 (491 US 105 L ed 2d 250, 109 S Ct) on June 19, 1989. The case should not be remanded to the District Court. The parties agreed to withdraw the appeal, dissolve the injunction and dismiss the action before the District Court.

Thus, the parties were in agreement that they were, in effect, bound by the decision in Consolidated Rail Corp.. This meant that whatever their contentions (issues) might be they constituted a minor dispute to be resolved under Section 3 of the Railway Labor Act, as amended. The series of cases before this Board involve discipline issued as a result of the Claimant involved failing to comply with an instruction to follow UP medical policy and take a drug screen test, to take a retest and produce a negative sample within 90 days of a positive test or a retest in a three year period following reinstatement to service.

In the instant case, the Claimant was given the letter dated April 26, 1989 with specific instructions from Track Supervisor R. C. Callaway. Instruction #3 from Track Supervisor R. C. Callaway, read:

"If you fail to provide a negative drug test, as set out above, within ninety (90) days from your date of disqualification, or if you fail to complete the Employee's Assistance Program successfully, as set out in paragraph 2 above, you are hereby notified that you may be subject to dismissal if it is determined that you failed to follow the instructions in this letter."

The Claimant Smith was given a formal investigation on September 1, 1989 on the charge that he failed to comply with Supervisor Callaway's instructions. As a result of the investigation Carrier concluded therefrom that he was culpable of insubordination. He was dismissed from service as discipline therefor. Clearly, the Claimant's medical disqualification resulted from the fact that he had proven positive for illegal or unauthorized drugs during his routine periodic physical examination and that he failed to provide a negative drug test within the 90 days thereafter. While the Claimant alleges that he attempted to contact Mr.

Halstead "sometime around July 20 or so" such becomes an assertion in view of Halstead's testimony that Smith had not left any communication regarding his desire to present himself for the retest of the urinalysis portion. The reason that Smith gave for the delay/failure for was that he believed it was 90 working days and not calendar days.

In view of that fact, and that Claimant has 15 1/2 years service with a clean service record and in light of the fact that implementation of the new policy was involved, the Claimant will be accorded the benefit of the doubt and will be reinstated to service with all rights unimpaired but without pay for time out of service. He will, of course, be required during his medical return to service examination to produce a negative drug test and also during the ensuing three year period.

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

Issued February 26, 1991.