

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 446

Case No. 446
UP File 890761

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 Trackman J. L. Williams was withheld from service on
 May 10, 1989.

(2) Claim in behalf of Mr. Williams for wage loss suffered
beginning May 10, 1989, until July 10, 1989.

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

This is the third in a series of cases involving the
results of drug screens taken as part of the employee's
periodic physical examination.

Southern District Tie Gang Trackman, Claimant Jimmy L.
Williams, was medically disqualified from service under date
of May 10, 1989 by the Union Pacific's Medical Director D.
E. Reisling, M.D. as the result of his periodic or
physical examination which revealed that he had tested
positive (THC) on a urinalysis for illegal or unauthorized
drugs.

The Claimant was advised that he could seek treatment
through the Company's Employee Assistance Program (EAP).
However, in any case, he would be unable to return to
service until such time as he demonstrated his physical
fitness for duty by providing a negative drug test sample.

The Claimant was also provided a letter, dated May 10,
1989, from his Track Supervisor also reiterating that the
urine sample taken during his May 2, 1989 periodical
physical examination had revealed a positive test for
illegal or unauthorized drugs. He was again advised of his
medical disqualification from service and given specific
instructions that he was being afforded not 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 Medical Director and providing a
urine sample that tested negative for illegal or
unauthorized drugs.

The Claimant was also advised that said 90 day period would be extended indefinitely if the employee chose to enter the EAP program and that such course of treatment required greater than 90 days to complete.

The Claimant complied with the instructions given and he was returned to service on June 29, 1989.

The Employees filed the instant claim on August 29, 1989 requesting a wage loss covering that period May 10, 1989 through July 10, 1989. The Union alleged that the Claimant had been dismissed from service without a formal investigation, that he had been subject to random drug testing and that same was conducted at the Newport Motel constituted a violation of Claimant's rights. The BMW asserted that the Carrier had targeted only those Maintenance of Way employees on System or Tie Gangs and that the organization had not entered into any agreement that "would allow dismissal as a result of this testing."

S. J. McLaughlin, Assistant Vice President - Engineering, under date of April 10, 1989, sent the following to all employees under his jurisdiction. It read:

"Dear Fellow Employee:

As you know, it is the long-standing policy of Union Pacific Railroad to ensure that employees are physically fit for duty at all times. In the past to promote this result, we have required physical fitness examination of Engineering Department employees. Through these examinations, we have endeavored to provide all railroad employees with the safe working environment and to safeguard the public welfare.

This year, we will again perform complete physical examination of system gang employees. Depending upon where employees are working, the examination process may begin as early as the week of April 17, 1989. All employees will be examined during the calendar year. As in the past, the purpose of this exam will be to determine each employee's fitness to perform his or her work safely without endangering the health or safety of the employee, co-workers or the public.

As you know, Union Pacific has a right to utilize medical diagnostic tools and tests designed to detect medical conditions which could limit or restrict employees in the safe performance of their job. One such diagnostic tool, urine testing for drug use, has now proven to be viable within the medical community, and will be added to our Medical Director's traditional urine sampling regiment

during this year's exam. Attached is a copy of the Company's policy governing this drug testing component of physical fitness examinations. (emphasis added)

Under the policy, as always, employees who fail the physical examination may be medically disqualified by the Medical Director and may not be permitted to return to work until they are physically fit as determined by a follow-up examination. I have been informed by the Medical Director that this will apply to any employees who fail the drug test component of the examination.

To provide for rehabilitation, all employees who fail the drug test will be afforded the opportunity to enroll in Union Pacific's Employee Assistant Program to which Union Pacific is committed and which, as you know, has been widely praised by the Department of Transportation and other outside groups. All employees who fail the drug test will be instructed to become fit for duty and to remain drug-free after returning to duty.

Like you, I know that the vast majority of Engineering Department employees perform their job safely and efficiently. Unfortunately, this does not apply to everyone. It is a tragic fact that system track and bridge gangs have the poorest record of any major reporting group in the Union Pacific Railroad with 13.44 reportables per 200,000 man-hours in 1988. This is over 60% worse than the company average. The type and frequency of the injuries strongly suggest that some employees may, in many cases, be physically unfit to safely perform their duties. In some cases, unfitness may be due to drug use. We have learned from reliable sources that drug use on system gangs is a serious physical fitness problem which must be corrected to ensure that only employees that are capable of performing the work are permitted on the job.

The physical fitness testing program of which I am notifying you today is not intended to replace or detract from Union Pacific's application and enforcement of Rule G or similar rules. This physical examination program will be administered through the Company's Medical Department in conjunction with the Company's Employee Assistance Program and Engineering Department management. Unlike the drug testing program applicable to Hours of Service Act employees it will not be conducted under the direction of the general direction of rules and operating practices. My foremost concern in announcing this program is simply to ensure that each employee in this department is physically fit to perform his or her assigned tasks at all times. I trust I can count on your support."

The attached medical policy read:

"Union Pacific Railroad Policy and Procedures Governing the Drug Testing Component
of Engineering Department physical examinations

Union Pacific is obligated to maintain a safe working environment for its employees and to meet its obligation to the public by conducting its operations in accordance with the highest standards of safety. The use of illegal or unauthorized drugs is not consistent with this commitment to safety.

To identify the use of such illegal or unauthorized drugs by employees in the Engineering Department, Union Pacific will include a drug test as a component of the urine sampling regiment during the physical examination.

Any employee who test positive for illegal or unauthorized drugs during the physical examination may, upon the recommendation of the Medical Director, be disqualified from service until such time as he or she demonstrates fitness to return to duty. Each employee disqualified from service in these circumstances will be provided a personal letter from the office of the Medical Director (a) setting out the results of the tests, (b) stating the facts of the employee's disqualification from service, (c) offering the treatment for any drug problem through the Company's Employee Assistance Program, and (d) stating that the employee may not qualify to return to service until he or she demonstrates fitness for duty in accordance with instructions to be issued by the Engineering Department. Those instructions, which are based on advice provided by the Company Medical Director are as follows:

1. Subject to the exception of paragraph 2 below, each employee disqualified from service under this program will be given a period of not more than 90 days from the date of disqualification to demonstrate that he or she has become drug free by presenting himself or herself to a Medical Director facility selected by the Company Medical Director and providing a urine sample which tests negative for illegal or unauthorized drugs.

2. At the discretion of our designated Employee Assistant Program Counselor, this 90-day period will be extended indefinitely as necessary for any employee who chooses to enter and to complete successfully a course of treatment established under the auspices of the Company's Employee Assistance Program. However, one condition for successful completion of the Employee Assistance Program is that the employee present himself or herself to a medical

facility selected by the Employee Assistance Program and provide a urine sample which tests negative for illegal or unauthorized drugs. Only in such a circumstance will the Employee Assistance Program staff recommend to the Company Medical Director that the employee be qualified to return to service.

3. If the employee fails to provide a negative drug test, as set out above, within 90 days from the date of disqualification from service, or if the employee fails to complete the Employee Assistance Program successfully as set out in paragraph 2 above. The employee will be notified in writing that he or she may be subject to dismissal if it is determined that the employee failed to follow a valid Union Pacific instruction.

4. As a condition of any return to service under this program, Union Pacific will instruct the employee that he or she must remain drug-free and must 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 the employee failed to follow a valid Union Pacific instruction.

Union Pacific Railroad Company, "
April 10, 1989"

Union Pacific physical examination rules in part read:

"Procedure for Handling Disputed Physical and Disability Cases

Section XI

1. Where applicable according to labor agreement, when an employee contends that he/she is not physically disqualified and protests suspension from service or change of occupation on that account, the employee or his local or general chairman in his/her behalf may discuss the case with the general officer of the department concerned. If the circumstances warrant, the general officer may arrange for re-examination of the employee.

The Claimant Trackman, J. L. Williams, in the instant case was not dismissed from service, as contended, but rather he was medically disqualified. Such

disqualification, if desired, may be handled pursuant to Section 11 of the physical examination rules. Here, they were not.

It was not a random "drug test," as alleged, but rather was with a gang brought to the Newport Motel for physical examination including the urine drug analysis test.

Dr. Reisling's letter of May 10, 1989 addressed to the Claimant enclosed therewith a copy of the results of his positive urinalysis test. Dr. Reisling said:

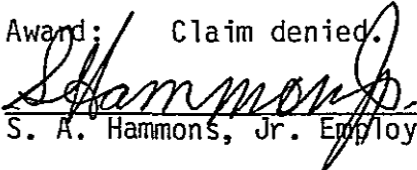
"You were recently tested for drugs as part of the Union Pacific Railroad Physical Examination Program the results of which were sent to my office. I am providing you with a copy of your results which as you can see were positive."

That information as to being a positive result was between Dr. Reisling and the Claimant and was privileged information. However, the Carrier's now knows that such information, insofar as this Board is concerned, should become public information when it becomes a matter for the grievance procedure. The privilege of confidentiality is removed once the matter in dispute enters the grievance procedure. Notwithstanding, the Claimant chose not to follow Form 2501, Section 11.

The Board finds the claim to be without merit. Here, the Claimant was handled pursuant to its medical policy which was not shown to be improper, unreasonable, arbitrary or capricious. The new medical policy is therefore deemed reasonable.

The Claimant presented a negative sample and was returned to service. The period of time for which he was out of service he was medically disqualified because of the fact that he had been found to have a positive finding in the drug screen test. Such medical finding was not inconsistent with Carrier's required physical examination rules and medical policies. This claim 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