

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

(a) That the Missouri Pacific Railroad Company violated Rule 31(a) and (b) of the controlling Agreement when they unjustly suspended Carman Arnold Macias from service starting on April 18, 1987.

(b) That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Macias at the pro rata rate for each work day lost starting on April 18, 1987 and continuing for each work day lost during the suspension.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On April 17, 1987, the Carrier's special agent hand delivered a letter dated April 14, 1987, to the Claimant, the contents of which notified him of his suspension from service pursuant to Section III, Paragraph 2, of Union Pacific Railroad Form 2501, Physical Examination Rules, revised June 1, 1984. This section was invoked pursuant to the Carrier's observation of the Claimant's job performance and its concern for his personal welfare and those around him. The Claimant was advised that the EAP counselor would offer him full support. On May 21, 1987, the Organization filed a claim with the Carrier asking why the Claimant had been removed from service and why he had not been afforded the protection of Rule 31 of the Controlling Agreement as suspension was a form of discipline. The Carrier did not respond to this letter and in a subsequent letter by the Organization on August 4, 1987, the Carrier was charged with failure to comply with the time limits set out in Rule 30 and the Organization requested reinstatement with backpay. Additionally, the Organization requested a copy of the April 14, 1987 letter. On August 21, 1987, the Carrier advised the Organization that the Claimant was suspended

from service under the Physical Examination Rules and therefore could not be considered discipline.

The Organization argues that if the Carrier believes that the Claimant has a medical problem, it can refer him for a physical examination under the Physical Examination Rules. In the instant case, the Organization claims that the record is without any medical evidence that the Claimant had been properly and medically disqualified under the rules. Further, the Claimant was not directed to the EAP, merely informed that it was available. The Carrier's failure to respond to the Organization's letters and to conduct an investigation were clear violations of Rules 30 and 31, respectively.

The Carrier argues that the Claimant was removed from service on April 14, 1987, for the same reason he was removed on August 4, 1986. The Carrier claims that on April 14, 1987, the Claimant was notified that he was being referred to the EAP and that he was being withheld from service pending the outcome of his involvement with the EAP. The Carrier states that the Claimant has not been disciplined and, as such, Rule 31 is not applicable and has not been violated. The Carrier further argues that the Claimant held himself out of service by not "progressing" with the EAP and did not present any evidence that he could perform the necessary work.

At issue before the Board are two rights which, for the most part, are mutually exclusive of each other. The first is the absolute right of the Carrier to direct an employee to submit to a physical examination once it makes a good faith determination that such an examination is necessary. An order to submit to a physical examination will be considered made in good faith following the Carrier's impartial observation and knowledge of the employee's medical history. In so doing, the health of the employee and the safety of fellow workers are protected. Secondly, there is agreement due process rights, notice and the right to be heard, guaranteed the Claimant by Rules 30 and 31. These due process rights of the Claimant give rise to certain obligations which the Carrier, by its failure to respond, as noted above, did not meet.

It is well established that the "suspension" of an employee pending medical examination and rehabilitation, if necessary, is not a disciplinary action. However, Rule 30 states that "all claims or grievances must be presented" and "should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance" of the reasons for such disallowance." In the instant case, a simple statement by the Carrier of its good faith reasons for directing the medical examination would have sufficed.

Based on the foregoing, the Board finds that while the Carrier acted in good faith in withholding the Claimant from service and directing him to the EAP for medical consultation and evaluation, it was also required to respond to the Organization's letter of May 21, 1987, and thereafter. As such, the Board sustains the claim up to August 21, 1987, the date the Carrier responded to the May 21, 1987 claim and the Claimant shall be made whole in accordance with the Agreement. From that date, the Board denies the claim.

Form 1
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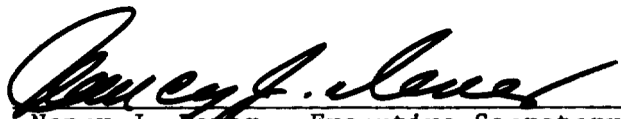
Award No. 11730
Docket No. 11569
89-2-88-2-92

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1989.