

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29585
Docket No. MW-30172
93-3-91-3-616

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly withheld Mr. Cecil Smith from service (Carrier's File 900674 MPR).

(2) Claimant Cecil Smith shall be compensated for all wage loss suffered plus benefits, retroactive sixty (60) days from August 31, 1991 and continuing until he is returned to service."

FINDINGS:

The Third 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 employe 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 January 15, 1990, Claimant voluntarily entered Carrier's Employee Assistance Program (EAP). In order to protect Claimant's seniority, a leave of absence was obtained on his behalf by the EAP counselor.

On June 15, 1990, as part of the program, Claimant provided a urine sample at a Carrier designated clinic. According to the Organization, Claimant was notified, on July 2, 1990, that his sample was negative for drugs and alcohol. It is not exactly clear what happened next. At some point, Claimant apparently contacted his representative who, in turn, contacted the EAP counselor regarding Claimant's return to active service. At this point, the counselor requested a second urine test, which was taken on August 2, 1990. The results of this test, which were also negative, were released on August 21, 1990. On August 27, 1990, the EAP counselor approved Claimant's return to service. Following this approval, he first performed service on September 1, 1990.

The Organization claims Claimant was improperly withheld from service from July 2 through September 1, 1990. It argues he should have been returned upon successfully completing the first drug screen. After that, the Organization asserts, the Carrier had no valid reason for keeping Claimant from working.

An employee entering the EAP and needing treatment which requires an absence from work is treated as if he is on a medical leave of absence. During the course of the employee's leave of absence, he is considered unqualified to perform service for the Carrier. As with a medical leave of absence, a determination must be made as to the employee's fitness to return to work before he is released for service. In the case of employees in the EAP program, this determination may be based upon drug testing, a medical examination, and other factors which are considered in deciding whether the treatment program has been successful or if additional treatment is necessary. The final decision, however, is made by the counselor.

While we would expect the counselor to act in an expeditious manner when considering an employee's return to service, the employee should not be made to suffer an unreasonable delay. There must be evidence, however, that the counselor acted in an unreasonable manner in delaying the employee's return. Such proof is lacking in this case. There is no evidence to show Claimant was fully qualified to return to service immediately following the receipt of the results of the first drug test. Furthermore, there are indications in the record that Claimant was remiss in contacting the counselor after those results were available. Certainly, Claimant should not benefit from his own delay.

Under the circumstances, we cannot find that the Agreement was violated.

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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.