

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33946
Docket No. MS-33426
00-3-96-3-822**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**(Scott E. Smith
PARTIES TO DISPUTE: (
(MTA Metro-North Railroad**

STATEMENT OF CLAIM:

“The following description (claim) is inclusive of dispute(s) contained in Docket BRS#95/NY0037 and Union File 76-19-95:

- 1. The company has recorded privileged and confidential medical information in the petitioner’s personnel file and denied him access to his medical records, subsequently, despite repeated requests for access to such information which were directly requested from the company medical department for the period 30th September 1993 through the present. The petitioner seeks the remedy of expunging such confidential and privileged medical information (regarding and including information related to his sick leave) from personnel files. The petitioner seeks the remedy of being granted access to medical records and any and all personnel records of this same period and that he be granted copies of such material. Furthermore, as charges of “excessive absenteeism” brought against the petitioner during that same period when he was held out of service were found unwarranted and subsequently dropped, the petitioner requests that such charges be removed from his records (remedy) in accordance with Rule 7-A-2.**

The existence of privileged medical information being contained within the petitioner’s employee personnel record is violative of his protections under the Federal confidentiality Rights [Privacy Act] and a basis for on-going and future frivolous and potentially malevolent assumptions, bias, and actions that impact upon his

standing and reputation within the company and within his employee and company personnel relationships.

2. The petitioner's dispute is that he was improperly taken out-of-service from the period 30th September, 1993 until 27th February 1995 and as such he makes claim to all back pay including overtime (subject to rights of promotion and job change by exercise of seniority rights Rule {2-B-1}). Within that same period, he was then improperly included in the 60 month program of company drug testing without basis. On 30th September 1993, the petitioner marked off at 6:00 A.M. and spoke with his assistant supervisor (Dan McArdle). He was on his way to GCT to talk with the company EAP. Instead, the field engineer (Charlie Bryke,) ordered the petitioner to submit to a urine test and ordered to the Harmon medical office. Specifying his need to utilize the company office's of the EAP first, the petitioner then conferenced with his union representative and lawyer. The union rep. then advised the petitioner to speak to his EAP counselor first which was the petitioner's request stating he had problems without specification to any one issue. [Note: The petitioner did not make use of his lawyer's advice to refuse the test based on his having signed off at 6: 00 A.M. Metro-North's operation SAVE was not implemented by the field engineer as called for in this circumstance given the concerns expressed. Indeed, no subsequent charges were filed by Metro-North regarding uses of substances or alcohol under FRA law, Rule G, though it should be noted that company policy requires that in these alleged circumstances an employee seek medical attention for which the petitioner was in pursuit. The dispute or question of the petitioner being improperly taken out-of-service is further attested to by the fact that the company then filed charges ("excessive absenteeism") regarding the petitioner being out sick in the period 30th September- until 27th February 1995 while he was kept out-of-service by the company. This would speak to the question of their own admission of improper procedure.
3. During the period the petitioner was kept out-of-service (30th September 1993 until 27th February 1995), he sought and received

services through the company's EAP, located 60 miles by train from the petitioner's home. He attempted to access all possible (and recommended) treatments available to him irrespective of the lengthy commute and attendant costs. When this finally became a hardship and real obstacle to maintaining treatment, he stopped in at the company Pass Bureau to inquire about securing a railroad pass. He was told by Pass Bureau staff member, David Bownus that if he was receiving services via the EAP that he was entitled to a pass which would have given him affordable access to medical services in this same period. Though he had all this time been receiving services via EAP, he was then denied further treatment by Assistant EAP Director, Don Clark -- after his request for a pass. EAP staff, Don Clark told the petitioner that this would be their last meeting (early 1994) because (paraphrase): "it's not the job of the EAP to see people on an individual basis." The petitioner requested a reason be provided in writing and finally had to utilize the union to so inquire, but no response was given by the EAP (despite a request for a letter to so specify.)

Company policy states that an employee out sick is not entitled to a pass except under certain circumstances, such as being involved in the EAP program. This confusion of information and benefit availability delayed mandated services and help that the petitioner was forced to seek by making unreliable the means by which the petitioner and possibly other employees can access affordable and suitable medical services within approved health care insurer's catchment areas.

4. During the period the petitioner was kept out-of-service, the petitioner provided a letter to the hearing officer stating that permission be granted John Smith, Chief Engineer, to speak (only) with the company medical department in confirming (only) that he had a doctor's note covering sick days out that were then questioned by the company (and for which he was unsuccessfully charged with "excessive absenteeism.") The petitioner is protesting the subsequent violative intrusion of non-medical staff into information contained within his medical records (evident at hearings and shown

within transcripts of hearings by statements made by non-medical company personnel testifying.) [Subsequently, there was also an improperly long delay in providing the petitioner with copies of requested transcript hearings.] The petitioner also is seeking censure of the company for requests and attempts (by John Smith, Chief Engineer) to secure confidential medical information about the petitioner from the VA at Montrose without his permission. Treating VA staff told the petitioner that Chief Engineer Smith, (in his attempts to invalidate the petitioner's recorded explanations of his absence from his tour of duty) had stated to them that he had permission to acquire such information but never produced such documentation.

5. Regarding the major dispute of improperly taking the petitioner out-of-service (September 30, 1993 until February 27, 1995) and the request for a remedy of full back pay, an additional complaint is made by the petitioner. Despite the fact that the petitioner's medical doctor O.K.'d his return to work on the date of June 21, 1994, the company medical department would not allow him back to work for reasons of their own. The Assistant Director of the Medical Department, Dr. Go, held him out but did not sign all medical forms thereby obstructing the petitioner's receipt of disability pay from Met-Life's Supplemental Insurance and railroad sickness benefits. Additionally, he was held out from working despite a finding he could return to work on June 21, 1994 but was not provided with a formal treatment recommendation by Metro-North's Medical Department until November 20, 1994 subsequent to their rejection of his prior M.D.'s determination. The petitioner then asked the company EAP for another referral that would meet with company approval but the EAP was not able to get him into a program that they recommended until December 12, 1994. Subsequently, the determination of this next medical program staff was that the petitioner should not have been held out of work from June 21, 1994 until February 27, 1995. The petitioner again requests that the remedy be made that he receive all back pay including overtime pay based on seniority rights to work overtime

hours at the rate of time and a halt Back Disability pay is minimally due him for this time period.

6. The petitioner requests the remedy that submitted time slips be made good (whole) by the company including the following: (a): A day's pay for a personal day taken in 1993 which he requested in 1994 while he was out sick but was not paid. (b): A day's pay for the hearing held on March 15, 1994 and a day's pay for part 2 of that hearing held on May 19, 1994. The claim of the company was dismissed and accordingly (Rule 7-A-2) the petitioner should be paid.
7. The petitioner similarly requests a day's pay for a submitted time slip regarding the 27th of February, 1995. On the 23rd of February 1995, the petitioner notified James Hanson, Assistant Supervisor, that he would make a bump at CP 25 on the 24th February 1995 at 2:00 P.M. When the petitioner arrived there at 2:00 P.M., he received a call from John Smith, Chief Engineer, to report to his office at 3:30 P.M. After arriving there, the petitioner was told to go home and report to North White Plains training center at 8:30 A.M. on February 27, 1995. He is requesting a day's pay for the 24th of February based upon Rule 2.B.1 and in accordance with Rule 2.C. 1. He also asks for an additional 7.5 hours overtime pay for the testing at North White Plains. He had to leave his home at 6:30 A.M. for the training tests instead of his regular shift hours beginning 2:00 P.M. at OW -- necessitating hours and headquarters outside of his normal work requirements (and scheduled hours) for which he was not paid at contractual overtime rate. An additional day's pay is due him (PFNW) for what would have been his entitled day's work and pay (position) at OW."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On or about October 1, 1993 the Claimant reported for duty under the suspicion of using drugs or alcohol. At the time he was ordered to submit to substance abuse testing, but declined to do so. As such, he was removed from service and referred to the Carrier's Employee Assistance Program.

In August 1994 the Carrier was advised that the Claimant had not successfully completed the program because of "... inadequacy of treatments ... reported ..." and that the Claimant was to continue in the program for an additional 60 days, a period which was later extended to December. By December 22, 1994 the Carrier had not heard from the Claimant and it ordered him to report for duty within 15 days. Eventually, the Claimant was deemed fit to return on February 24, 1995 and he returned to duty four days later.

The Claimant contends that he was wrongfully withheld from service in the first instance and that he was further harmed when the Carrier did not return him to service until February 28, 1995. In addition, he asserts that the Carrier violated the Agreement when it failed to provide him with a transcript of his Hearing and refused his requests to purge his employment file and to allow him to review his employment and medical records.

The record shows that the Claimant was withheld from service on October 1, 1993. Therefore, in order for a challenge to that action to be timely, the claim should have been filed within 45 days. However, the Claimant did not contest the action until March 28, 1995. Thus, the claim is untimely and is not properly before the Board. Moreover, the Claimant's appeal to the Board is untimely. The record shows that the Carrier declined the claim on December 7, 1995 and, therefore, a timely appeal should

have been filed by September 6, 1996. However, the Claimant did not file his Notice of Intent until September 30, 1996.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.