

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35370
Docket No. MW-35341
01-3-99-3-204**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company (former
(Burlington Northern Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and withheld Mr. K. R. Klundt from his assigned position as foreman at Milford, Nebraska beginning July 24 through September 4, 1997 and subsequently failed to properly compensate him for all time lost as a result thereof (System File C-98-P018-2/MWA 98-01-15AD BNR)**
- (2) The Agreement was further violated when the Carrier withheld Mr. K. R. Klundt from service beginning September 5, 1997 and continuing until such time as he was returned to service (System File C-98-P018-1/MWA 98-01-15AC).**
- (3) As a consequence of the violation referred to in Part (1) above, Foreman K. R. Klundt shall be compensated for ‘... all overtime hours worked on the Milford, NE section from July 24, 1997 through September 4, 1997 at the Section Foreman’s rate of pay.’**
- (4) As a consequence of the violation referred to in Part (2) above, Foreman K. R. Klundt shall be compensated for all lost wages that he would have received had he not been improperly withheld from service for the period beginning September 5, 1997 and continuing until his being 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 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 July 24, 1997, the Claimant was employed as a Section Foreman on the Milford (Nebraska) Section Gang. During that day, several employees on his gang spoke to Roadmaster Odenbach, expressing concern about the Claimant's ability to perform his work. According to these employees, the Claimant was carrying either pepper spray or mace, and had a stun gun in his vehicle. The Claimant had indicated to them that cult members were following him at work, and that he was concerned for his safety.

The Roadmaster discussed this situation with the Division Engineer and the Carrier's Medical Director, and it was determined by the Medical Director that the Claimant should be removed from service. He was subsequently referred for a psychological examination. At the request of the Organization, the Carrier agreed to maintain the Claimant's compensation until the evaluation was completed.

The Claimant was first seen by Matthew B. R. Nessetti, Ph.D., FPPR, on August 4, 1997, and it was recommended, according to the Carrier, that the Claimant receive family and individual therapy, as well as an evaluation for medical therapy. The Claimant was then referred to Rafael Tatay, M.D., who saw him on August 26, 1997, and, according to the Carrier, recommended therapy and psychotropic medications before he could be returned to work. Upon review of these reports, the Medical Director, on September 4, 1997, informed the Claimant that he was medically disqualified from service and suggested he see a psychiatrist of his choosing.

The Claimant's personal physician advised the Medical Director on December 18, 1997, that the Claimant was capable of returning to work. The Claimant was given an "Ability to Work Form" for his doctor to complete, and it was returned to the Medical Director on December 23, 1997. The Claimant was thereafter released to return to his regular position.

The Organization presented two claims to the Board. The first part of the claim asks for payment for the overtime the Claimant would have earned while he was compensated but not permitted to work. This period runs from July 24 through September 4, 1997. The second portion of the claim seeks compensation for the period from September 5, 1997, until he was released to return to work on December 23, 1997.

Although it argued on the property that the Carrier violated the discipline Rule by withholding the Claimant from service without affording him the protections of that Rule, and continued that argument in its Submission before the Board, we do not find merit in such a position. Under similar circumstances in Third Division Award 33627, the Board wrote:

"It is clear that the Claimant's being withheld from service was not disciplinary in nature. It was based on observations of the Claimant's behavior which led the Carrier to question the Claimant's fitness for duty. The Carrier has the right to withhold an employee from service where it has a reasonable basis for concern with the employee's medical fitness."

The Organization argues that the Claimant had requested, on September 8, 1997, a copy of the reports furnished by the two doctors who evaluated him. According to the Claimant's letter, both doctors told him he was fully capable of working. Because the Carrier did not honor this request, the Organization asks the Board to draw a negative inference and conclude the reports cleared him to return to work. While we are not prepared to draw such an inference, we do hold that the burden is initially upon the Carrier to support with some documentation its decision to medically disqualify an employee. None has been proffered by the Carrier, either during the handling of this dispute on the property or before the Board. We cannot, therefore, find that the Carrier had a legitimate basis for withholding the Claimant from service subsequent to September 4, 1997. While it would not be appropriate for the Board to question the medical or psychological opinions of the doctors who

evaluated the Claimant, we must see some evidence they, in fact, determined he was not qualified to work. The mere fact that he needed therapy does not require the conclusion that he was medically unfit for duty. We find, therefore, that the Claimant's removal from work between September 5 and December 23, 1997, was in violation of the Agreement.

In reaching this conclusion, we have rejected the Carrier's argument that the Claimant had not furnished a release to receive this information. A May 18, 1998, memorandum from the Carrier's Medical Department to the Assistant Director, Labor Relations confirms that the Claimant wrote to the Medical Director on September 8, 1997, requesting his records. If this was not satisfactory to constitute a release, the Medical Director had an obligation to provide the Claimant with a document that would accomplish that.

With respect to the claim for overtime pay, the Carrier asserts the Organization approached the Labor Relations Department and requested that the Claimant be afforded a day's pay for each work day until an evaluation was performed, because the Claimant would not be able to collect sickness benefits from the Railroad Retirement Board without a determination he was, in fact, sick.

The resolution to this part of the claim goes to the question of whether the Carrier was reasonable in withholding the Claimant from service until it could conduct an evaluation. Based upon the contentions made by the Carrier with respect to the information provided to the Roadmaster, we find the Carrier's decision to be reasonable. As noted in the Award cited above, the Carrier has the right to remove an employee from service pending evaluation when there are reasonable indications that medical or psychological conditions may prevent the employee from performing the duties of his job. The fact that a subsequent evaluation may prove that the employee was medically qualified does not negate the Carrier's right to take such preventive measures. Third Division Award 30253 is directly on point on this issue. There, the employee was withheld from service for a psychiatric evaluation that found him to be fit to return to work. The Board denied the claim for compensation during the period between his removal from service and his return to work.

In the instant case, the Board finds that the Claimant should be compensated the earnings he would have received had he worked from September 5 through December

23, 1997. Because the Carrier had no contractual obligation to compensate the Claimant for the period up to his evaluation, we must deny the balance of the claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of March, 2001.