

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35405
Docket No. MW-34970
01-3-98-3-702

The Third Division consisted of the regular members and in addition Referee Ann S. **Kenis** when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The agreement was violated when the Carrier withheld Mr. M.E. Anderson from service on March **3, 1997** and failed to charge and hold a disciplinary hearing or grant and hold an unjust treatment hearing as requested by Vice Chairman R.L. Bobby within letters dated March 7 and **18, 1997** (System Files **T-D-1304-B/MWB 97-07-16AB** and **T-D-1303-B/MWB 97-07-09AA** BNR).
- (2) As a consequence of the violations referred to in Part (1) above, Mr. M.E. Anderson shall be returned to service with seniority and all other rights unimpaired, his record cleared of any reference to his removal from service and he shall be compensated for all wage **loss** suffered.”

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 March **3, 1997**, the Carrier notified the Claimant that it had “received reports indicating that you displayed inappropriate behavior to individuals while on duty and on BNSF property. Reports indicate that you have made numerous threatening comments.” As a result, the Claimant was removed from service and placed on paid medical leave pending evaluation by the Employee Assistance Program. The Claimant was told to notify the EAP within 48 hours of receipt of the Carrier’s letter, and to comply with any and all recommendations made by the EAP. The Claimant was further informed that he would be notified once it was determined that it was safe for him to return to service.

This dispute involves concurrent claims tiled on the Claimant’s behalf. On March **7, 1997**, the Organization requested an Unjust Treatment Hearing in accordance with Rule 62. The request was denied by the Carrier on March 14, 1997, and a claim was subsequently filed by the Organization on April **11, 1997** asserting that the Claimant had been improperly denied an Unjust Treatment Hearing. The claim requested that the Claimant be granted such a Hearing; that he be made whole for any lost earnings and benefits; and that his record be cleared. The Carrier denied the claim, contending that the Claimant had been withheld from service for medical reasons pending an evaluation relating to potential threats of workplace violence and hostility, and that, under the circumstances, there had been no violation of any of the provisions of the Agreement.

A second claim, filed on April 21, 1997, contended that the Claimant was being withheld from service in violation of Rule 40, the Discipline Rule. Under that provision **of the** contract, an Investigation must be held no later than 15 days from the occurrence giving rise to the dispute. Moreover, in the case where an employee is withheld from service, the Investigation must be held within ten days after the date on which the employee has been withheld from service. The claim asserted that the Claimant had neither been charged nor instructed to attend an Investigation, even though he had been withheld from service.

Before these two claims could be resolved, the Claimant was dismissed on June 16, 1997 after a Hearing for failing to comply with the Carrier's instructions to report to the EAP for evaluation. No claim has been tiled protesting the Claimant's dismissal.

Initially, the Board points out that the Claimant was not charged with any Rule violation and the Claimant's being withheld from service was not disciplinary in nature. It was based upon the Claimant's behavior which led the Carrier to question the Claimant's fitness for duty. It is well-established that such actions do not trigger the application of Rule 40. Therefore, contrary to the Organization's contention, the discipline and Investigation provisions of the Agreement are not applicable. See, e.g., Third Division Awards **28506, 33627**, as well as Public Law Board No. 5332, Award 1 and Public Law Board No. 4402, Award 3.

The next question is whether the Claimant had the right to an Unjust Treatment Hearing. The Carrier advanced a number of arguments in support of its position that it properly denied the Claimant's request. It argues that it could have opted to take the disciplinary route, in which case the Claimant would have been dismissed for directing threats against fellow employees. Instead, the Carrier elected the more compassionate alternative of paid medical leave and directed the Claimant to the EAP for psychological evaluation. The Carrier contends that it has the absolute right to take such action and to withhold employees from service pending medical evaluations. In requesting the Unjust Treatment Hearing, the Claimant never specified just how he had been wronged by the Carrier's actions. Under these circumstances, the Carrier submits that it had the discretion to determine that an Unjust Treatment Hearing would serve no useful purpose.

The Board carefully reviewed the precedent Awards cited by the Carrier and finds that they are not on point. It is true, as the Carrier points out, that numerous decisions of the Board have supported the Carrier's right to require an employee to be examined to determine his physical or psychological status and to be cleared prior to any return to service. Even in these cases, however, the Board's right is not unfettered. It is subject to challenge if based on arbitrary or capricious reasons. See, Third Division Awards **26249, 25634** and Awards cited therein.

But that does not directly address the issue in this case. The real question is whether the Carrier can properly deny an employee's request for an Unjust Treatment Hearing under the circumstances presented here.

Rule 62 provides as follows:

“An employee who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same right of hearing and appeal as provided in Rule 40, if written request is made to his immediate superior within twenty (20) calendar days after the date of the occurrence of the cause for complaint.”

It is the opinion of the Board that there was no contractual basis for the Carrier to have denied the Claimant's request. The language of Rule 62 clearly establishes the employee's right to request and he granted an Unjust Treatment Hearing. There is no language of limitation excluding cases such as this one in which an employee is removed from service on paid medical leave for the purpose of determining that employee's psychological fitness. Moreover, there is no contractual language that gives the Carrier the discretion to grant or deny the request based on its determination of the merits **of the** claim.

The Carrier chose to take a non-disciplinary approach in dealing with the Claimant's behavior in the workplace. In so doing, its actions were not absolute but were subject to challenge under the provisions of Rule 62. The Carrier's determination that the Claimant's request was frivolous or without merit does not provide a proper basis for not complying with the clear language of the Agreement,

The final question is one of remedy. Generally, a remedy ordered by the Board seeks to place the employee in the position he would have been in had it not been for the contractual violation. That is not possible in this case. The Claimant was dismissed from the Carrier's service as a result of an Investigation on other grounds. Because he is no longer an employee, the request for an Unjust Treatment Hearing is moot. Moreover, no claim for damages can be awarded. The Claimant was on paid medical leave at the time he requested the Unjust Treatment Hearing, and he did not suffer any wage loss as a result. The Board further notes that the Organization in its Statement of Claim seeks that the Claimant be reinstated. That requested remedy is not only beyond the scope of the original claim, but it also exceeds the “make whole” relief that can be awarded to remedy the Carrier's failure to hold an Unjust Treatment Hearing. Accordingly, we sustain only that portion of the first paragraph of the Organization's Statement of Claim concerning the Unjust Treatment Hearing request.

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 26th day of April, 2001.