

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35716
Docket No. MW-33731
01-3-97-3-152

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Oklahoma,
(Kansas & Texas Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed Foreman R. K. Wylie from service on September 14, 1995 and withheld from service until October 24, 1995, and failed and refused to compensate him for the wage loss suffered as a result thereof (System File MW-96-5-OKT/960053 OKT).
- (2) As a consequence of the violation referred to in Part (1) above, Foreman R. K. Wylie shall be compensated for two hundred twenty-four (224) hours' pay at his straight time rate plus all overtime and all other benefits.”

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.

The Carrier contends that on June 20, 1995 the Claimant took a respiratory protection fitness for duty exam and that as a result of subsequent medical reports it determined the necessity for an evaluation and assessment. It relies upon the provisions of Physical Examination Rules, Section III, 2 which provides:

“2. Officers and supervisors should monitor the physical and mental conditions of employees under their jurisdiction and others with whom they come in contact. Persons who show conditions that indicate physical or mental impairment which could reasonably prevent them from performing their job safely, or whose employment or continued employment could reasonably aggravate that impairment, should be referred to the Medical Director or Employee Assistance Director as appropriate for final resolution. Where deemed necessary, such employee shall be withheld from service by the supervising officer pending final medical resolution.”

As a result of this determination, the Carrier alleges it sent a “2501” letter to the Claimant on September 5, 1995 and again on September 8, 1995. The first letter instructed the Claimant to contact the Employee Assistance hotline to make appropriate arrangements for a fitness for duty examination. The second letter contained the same advice, with the additional provision that the Claimant would be withheld from service commencing September 12, 1995.

The Carrier contends that the Claimant contacted Sheila Braken, of the Medical Director’s Office, and informed her that “he did not have time for this nonsense and had a farm to run and that he was not going to comply with the instructions of the first Form 2501 letter that was sent to him.” The Carrier points out that it has the absolute right to require the examination and that its action was not disciplinary. The Claimant eventually was scheduled for an appointment on September 24, 1995 and was returned to work on October 23, 1995.

The Organization contends that the Claimant did not receive the first letter and that he immediately contacted the appropriate party upon receipt of the second communication. It claims that the action taken by the Carrier was disciplinary and that it had no justification for withholding the Claimant from service.

There is nothing in the record to indicate that the Claimant received the first Form 2501 letter. It must be noted that the letter was sent by certified mail, but no return receipt was produced. The Claimant states in a letter dated February 20, 1996, directed to General Chairman F. D. Lewis at the Southern Pacific Atlantic Federation, that he did not receive two letters, indicating that the only one received was the one removing him from service. He goes on to state that he spoke to Sheila Braken upon receipt of this communication. He further states that he told her he was on vacation that week and had a farm and wheat to plant.

It is clear that the Carrier has the right to require certain physical examinations, but it is not necessary in this proceeding to determine whether its directive to the Claimant was appropriate, because such is not necessary to the resolution of this matter. The two solid pieces of evidence with regard to the letter on September 5, 1995 are the absence of the return receipt and the denial by the Claimant that he received the letter. In a letter directly to General Chairman Lewis by W. E. Naro, Director Labor Relations for Union Pacific Road Company, on March 15, 1996, it is stated in part "Had Claimant cooperated with Carrier instructions to contact Employee Assistance, there would have been no need to pull him out of service under the Form 2501." Because the Carrier failed to establish that the Claimant received the letter of September 5, 1995 its subsequent action in removing the Claimant from service was predicated upon a false assumption.

Under the foregoing set of facts the Carrier was wrong when it withdrew the Claimant from service by virtue of its letter on September 8, 1995. Notwithstanding, the Claimant in his letter of February 20, 1996 indicates that he was on vacation, and further indicates that he "did not have time for this nonsense, especially since I felt I had no chemical dependency problem and Union Pacific was not paying for the evaluation." Whether or not the Carrier was required to pay for the evaluation, the Claimant was required to comply with the requirements of the letter. As a result of the foregoing, both the Carrier and the Claimant share a responsibility for the time out of service. The Claimant shall be reimbursed for all time lost from September 24, 1995 until the time he was returned to service. The pay shall consist of all straight time hours which he would have worked, but shall not include overtime pay or online expenses.

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 24th day of October, 2001.