

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36056

Docket No. MW-33836

02-3-97-3-295

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employes**
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. S. R. Elliott from service following his medical release by the Carrier’s Medical Department on December 11, 1995 and continuing (Carrier’s File 960250 MPR)**
- (2) **As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated “*** 40 hours weekly at Claimant’s respective rate of pay and for any overtime and holiday pay he would have been entitled to in his absence. In addition, Claimant is entitled to time and mileage incurred for 240 miles at \$.31 per mile and 8 hours at the overtime rate for transit time.”**

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 Claimant reported for work on December 11, 1995 after being out of service more than ten months following a work-related injury. He was released to work with no restrictions. During a return-to-work safety conference with his Supervisors, the Claimant remarked, “If I have to use a chipping gun, I will probably re-injure myself.”

Other comments attributed to the Claimant indicated he would have difficulty accepting responsibility for himself in the event someone else or a Supervisor told him to do something unsafe.

As a result of the discussion, the Carrier again withheld the Claimant from service until his physical and mental fitness for duty could be re-evaluated. These examinations were completed and the Claimant was returned to service on January 28, 1996 after a one-week delay, requested by the Claimant, to permit him to attend to some personal business. His release was again without any restrictions.

The right of the Carrier to remove an employee from service when there is a reasonable basis for concern about physical and/or mental fitness for duty has been recognized in prior Awards between these same parties. See Third Division Awards 28506 and 33627.

The Claimant did not deny making the re-injury remark associated with the use of the chipping gun. This comment was inconsistent with his having just been released with no restrictions. Moreover, the Claimant's remark about personal responsibility for his own safety, also not denied, could reasonably trigger concerns about his mental fitness. Accordingly, we find the Carrier had a proper basis for withholding the Claimant from service as it did.

The portion of the claim seeking payment for transit time and mileage must also be rejected. No applicable Rule support for this portion of the claim has been cited. In addition, it is unrefuted that the Carrier used the closest available evaluators to make the necessary examinations.

AWARD

Claim denied.

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 21st day of May, 2002.