

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40992  
Docket No. MW-41268  
11-3-NRAB-00003-100142**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
( IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Union Pacific Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it improperly withheld Mr. T. Kowalske from returning to service from October 15, 2008 through November 21, 2008 (System File D-0850U-203/1513525).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Kowalske shall now ‘. . . be allowed compensation equal to the amount he would have received absent the clear and obvious violation of the Agreement. That is, Mr. Kowalske must be allowed compensation for all hours he was not allowed to work between October 15 and November 21 when he returned to service. This shall include all hours he would have been entitled, both straight time and overtime, had the violation not taken place.’”**

**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.

At the relevant time, the Claimant was a section foreman.

Due to an observation of the Claimant's physical condition on October 1, 2008, by Manager Track Projects D. Gallegos, the Claimant was referred for a drug test. After taking the test, the Claimant was ordered to go home and wait for the results. The Claimant's test returned positive, but after being given the opportunity to provide documentation to the Medical Review Officer (MRO) the test was deemed to be negative once the MRO determined that the Claimant's positive test result occurred because he was taking a certain medication. The Claimant was advised of the final negative result on or about October 10 and he was compensated from October 1 through October 14, 2008.

However, although the Claimant's drug test was ultimately determined to be negative, the Claimant was not immediately returned to work. On October 15, 2008, General Superintendent R. Castagna wrote the Claimant advising:

"You reported a physical condition to a manager that is a safety concern and I am concerned about your personal safety and welfare at work. Therefore, I have contacted the Union Pacific Health Services Department and asked that they assist you by conducting a medical review and clearance in accordance with Sections 2.5b of Union Pacific Railroad Company's Medical Rules, revised March 1, 1997, which reads:

#### **2.5b SUPERVISOR-REQUESTED EVALUATION**

If a Supervisor observes an employee's unsafe behavior(s) that may be associated with a physical or mental condition, or the Supervisor becomes aware of an Employee's unsafe behavior(s) or medical

condition which might be associated with an Employee's physical or mental impairment, the Supervisor should immediately: 1.) notify the Health Services Department (HSD) and/or the local Manager-Employee Assistance (Manager-EA) in cases of possible substance abuse or mental impairment, and 2.) temporarily assign the Employee alternative job duties in a safe working environment during the evaluation period. . . ."

The Claimant was also advised that he was ". . . temporarily removed from service pending the medical review results" and was further advised in the October 15, 2008 letter that he was to have his doctor provide:

- "1. A full description of your current medical condition, including diagnosis and prognosis.
2. Any work restrictions, recommended by your treating doctor and the anticipated expiration date of the suggested restrictions.
3. Any medications you are taking.
4. Your current level of function."

The parties differ as to how quickly the Claimant responded or whether the Carrier was at fault for delays. However, by letter dated November 21, 2008, General Superintendent Castagna advised the Claimant that "[t]he Health and Medical Services Department has determined that based on medical documentation available to Union Pacific Railroad, you can return to work with no restrictions." The Claimant was returned to work on November 21, 2008, but he was not compensated for the period he was held out of service commencing October 15, 2008, until he was returned to work. This claim seeks that compensation.

There is no question that the Carrier has the managerial right to assure the safety of its operations and, as part of that managerial right, the Carrier can make reasonable managerial determinations concerning whether employees can be subjected to drug tests based on observed physical conditions and, if deemed appropriate, to require fitness-for-duty examinations as was done here. However,

when making those determinations, the Carrier must be required to follow its own Rules — which it did not do in this case.

After the Claimant's drug test was deemed negative due to the medical explanation given, commencing October 15, 2008, the Carrier continued to hold the Claimant out of service pending a fitness-for-duty determination which required the providing of further medical information. However, as specifically set forth in General Superintendent Castagna's October 15, 2008 letter to the Claimant, Section 2.5b of the Carrier's Medical Rules provides that "[i]f . . . the Supervisor becomes aware of an Employee's . . . medical condition which might be associated with an Employee's physical or mental impairment, the Supervisor should immediately . . . temporarily assign the Employee alternative job duties in a safe working environment during the evaluation period." There is no explanation in this record as to why the temporary assignment to alternative job duties for the Claimant was not made. Had such an assignment been made (or if there was a reasonable explanation why such an assignment could not be made) there may well have been no issue concerning compensation entitlements as the Carrier sorted out whether the Claimant could return to work. Given that no temporary assignment was made, attempted, or an explanation given as to why one could not be made, because the Carrier did not follow its own requirements to make such assignments and because the Claimant was ultimately found fit for duty, the Claimant must be made whole for the time he was held out of service. By the Carrier's own Rule, assigning the Claimant to alternative job duties (or attempting to do so) is a condition of the fitness-for-duty evaluation process. Because that condition was not followed, assessing fault for delay to either the Carrier or the Claimant is not material.

We are satisfied that the Rule 2.5b issue was sufficiently raised on the property. The Carrier cited and quoted that Rule in its entirety in General Superintendent Castagna's October 15, 2008 letter and the Organization throughout the handling on the property objected to the Carrier holding the Claimant out of service.

This claim shall therefore be sustained and the Claimant shall be made whole.

**AWARD**

Claim sustained.

**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 July 2011.