

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31682
Docket No. MW-30999
96-3-92-3-948**

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Union Pacific Railroad Company (former
(Western Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it removed Track Laborer S. V. Burns from service on September 10, 1991 through October 14, 1991, for allegedly making improper remarks to a coworker in the vicinity of Keddie, California [Carrier's File 920101 WPR].
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be paid for the net wage loss he suffered from September 10 through October 14, 1991."

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 waived right of appearance at hearing thereon.

On September 10, 1991, the Claimant was removed from service after he made a negative comment to a fellow employee. The Organization considered the Claimant's comment to be "joking" and alleges that the removal from service was improper. The Organization argues that the Carrier violated the Agreement in pulling Claimant from service under Rule 20 without providing an Investigation, in failing to properly deny the claim and in taking excessive time for medical evaluation and return to service.

The Board finds that the Claimant was justly removed from service by signed letter of September 12, 1991, as medically disqualified. Claimant was withheld from service pending medical results on his fitness to perform service. The Carrier's decision to withhold the Claimant from service under Section 111.2 of the Carrier's Form 2501, Physical Examination Rules must be judged on reasonableness. The Physical Examination Rule states in pertinent part:

"... supervisors should monitor the physical and mental conditions of employees under their jurisdiction... Persons who show conditions that indicate... mental impairment which could reasonably prevent them from performing their job safely... should be referred to the Medical Director... for final resolution. Where deemed necessary, such employee shall be withheld from service..., pending final medical resolution."

This Board's review finds ample evidence that the comment was not an isolated "joke", but a pattern of negative attack. The evidence of record shows the Claimant's comment of such an improper, callous and derogatory nature as not to be restated in this decision. The Claimant's behavior had previously resulted in removal in 1989 and 1990. Our review of the Claimant's letters as well as that of fellow employees is persuasive that the Carrier's actions were based on reasonable cause.

This Board rejects the Organization's procedural allegation under Rule 21 that the wrong officer responded to the claim as the Rule requires that "the Company shall... notify whoever filed the claim... of the reasons for such disallowance." This the Carrier did (Third Division Award 28800). The Board's further reading of the record also fails to find any probative evidence to suggest that the return to service was not expeditious under these circumstances. Our review of the October 1, 1991 Medical Evaluation as to the Claimant's account of events compared to the evidence of record contained in the Section Foreman's account at the time of the incident suggest the Claimant has serious problems.

Accordingly, the Board finds no procedural violation. On merits, the Board finds the Claimant was properly disqualified for reasons of safety. While this Board must guard against capricious, or arbitrary actions of a Carrier which might result in loss of work to an employee or from excessive time lag in returning Claimant to work, there is no persuasive evidence of either in this dispute. Carrier's actions were reasonable and did not violate the Agreement. This Board will not interfere with the Carrier's judgement in this matter.

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 29th day of August 1996.