

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43014
Docket No. MW-42227
18-3-NRAB-00003-130196**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference)**
PARTIES TO DISPUTE: (
**(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 removed and withheld Mr. J. Barber from service from February 22, 2012 and continuing through February 29, 2012 (System File UP296WF12/1564536 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Barber shall now be compensated for a total of eighty (80) hours at his respective straight time rate of pay.”**

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 was working on a T2 compressed half schedule as an Operator on Gang 9102 on February 15, 2012, the last work day of the first half of the month, when he was told he was being charged with failing to conduct a proper risk assessment. His supervisor, Miller, offered him a choice of accepting a waiver and 30 day suspension or signing a request for an investigation. The Claimant rejected the waiver and requested that a formal hearing be convened.

There are two written statements in the on property correspondence. The first, submitted by the Carrier, was from the Manager of Track Programs, indicating that, after the Claimant chose to go to an investigation, he went home that night and did not show back up for work. It states that his supervisor called him after a few days asking why he was not at work and the Claimant told him that he was serving his suspension. It was explained that he does not serve any suspension until after the Investigation, and was told to show up for work the next day, after the gang had changed to a T1 schedule, and did so on March 1, 2012. According to the Manager, there were problems with the paperwork and the charges against the Claimant were dropped.

The Claimant submitted a statement stating that after he signed for an Investigation, his supervisor asked him to get his bags off the machine and told the timekeeper to take him to his car, which was parked 5 miles from the work site. He stated that the timekeeper wanted to know why he was asked to take him. The Claimant wrote that he did not walk off the job.

The Carrier argues initially that the claim was procedurally defective because it was filed under the disciplinary Rule, rather than the time claim rule, and seeks payment for the period the Claimant was "withheld from service" when no Investigation was held and no discipline assessed. It notes that Claimant's statement does not really refute the Manager's statement, or say that he was told not to come back to work or that he was being withheld from service. The Carrier contends that, at best, there is an irreconcilable dispute of fact over a material issue (whether the Claimant was withheld from service) which undermines the Organization's ability to meet its burden of proof in this case, and requires that the claim be dismissed, citing Third Division Awards 37204, 33895.

The Organization maintains that it appropriately initiated and progressed this claim. It asserts that the Claimant was told to go home after he signed the papers seeking an Investigation on February 15, 2012, and understood from what he was told that he was being withheld from service pending the results of the investigation. It points out that the Claimant's statement makes clear that he did not walk off the job, but followed his supervisor's instructions to leave and was escorted from the job site. The Organization seeks reimbursement for the period the Claimant remained off work during the second half of his T2 schedule in February, noting that no Investigation was held and the charges against the Claimant were dropped.

Without deciding the procedural issue, a careful review of the record convinces the Board that the Organization has failed to sustain its burden of proof in this case. Its claim is premised upon the assertion that the Claimant was improperly withheld from service during the claim period. Although there were statements submitted on behalf of both parties, and the Claimant's statement differs, in part, from what is contained in the Manager's statement with respect to what he was told when he went home on February 15, 2012, it does not assert that he was told that he should not return to work at his next scheduled work period, or that he was being withheld from service pending the Investigation. In fact, the Manager's statement makes clear that when the Claimant was contacted by his supervisor, he explained that he was staying home because he was serving his suspension, despite the fact that he had refused to sign a waiver agreeing to such suspension. At best, what was presented in this case raises a fundamental dispute in fact, and a possible misunderstanding on the Claimant's part, and is insufficient to meet the Organization's burden of establishing a *prima facie* case of a violation of the Agreement, requiring dismissal of the claim. See, e.g. Third Division Awards 33895, 37204.

AWARD

Claim dismissed.

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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 March 2018.