

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43376
Docket No. MW-42352
19-3-NRAB-00003-130356 (Old)
19-3-NRAB-00003-180451 (New)

The Third Division consisted of the regular members and in addition Referee Paul Betts when the 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 Agreement was violated when the Carrier removed Mr. M. Pino from service on April 4, 2012 and continued to withhold him from service until May 7, 2012 (System File D-1250U-201/1572516).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Pino shall now “*** be allowed compensation for all hours he was not allowed to work commencing April 4, 2012 and continuing until he returned to service on May 7, 2012. 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.

The Claimant worked as a system truck driver on Gang 9056. On April 4, 2012, the Claimant was removed from service by Manager of Track Programs Gary Mehalic pending a Fitness for Duty (FFD) exam. The Carrier maintains the removal was based upon statements made by the Claimant to his fellow gang members as well as members of supervision regarding his ability to work safely.

The Carrier sent the Claimant two letters dated April 9, 2012; one requiring the Claimant to undergo a medical review by his treating physician (with information from the review to be provided to the Carrier), and the other notifying the Claimant he was being disqualified as a System Truck Driver.

After a review of medical records and discussion with the Claimant, the Carrier's Health and Medical Services Department (HMS) scheduled the FFD exam for April 23, 2012. On May 2, 2012, the Carrier's physician determined the Claimant was medically cleared to return to work. The Claimant then exercised his seniority and returned to work on May 7, 2012.

The April 9, 2012 letter sent to the Claimant details the Carrier's Health Services Rule related to Supervisor-Requested Evaluations; Rule 2.5(b). In relevant part, the Rule states the following:

"If a supervisor...becomes aware of an Employee's unsafe behavior(s) or medical condition which might be associated with an Employees physical or mental impairment, the Supervisor should immediately...with assistance from the HMD and/or Manager-EA, refer the Employee for a Fitness-for-Duty Evaluation. When the Supervisor requests a Fitness-for-Duty Evaluation the Supervisor may...temporarily withhold the Employee from active service..."

In summary, the Organization makes the following arguments:

- "1. The Carrier used its ability to medically remove the Claimant from service as a form of discipline/suspension against the**

Claimant because he had voiced safety concerns and was frustrated with being displaced from his regular assignment.

- 2. The carrier failed to justify its actions for disqualifying and removing the claimant from service. Just because the employee expressed dissatisfaction and safety concerns doesn't give the Carrier the right to remove him from service.**
- 3. The Carrier could have assigned the Claimant to a different job pending results of the FFD exam.”**

In summary, the Carrier makes the following arguments:

- “1. The Claimant told co-workers and supervision he could not work safely on April 4, 2012. Based upon this self-reporting, the Claimant was removed from service pending the FFD results.**
- 2. The Carrier has the right to withhold an employee from service when there are medical concerns. Here, the Carrier did so until the employee was medically cleared to perform the duties of his position safely.**
- 3. The Organization failed to satisfy its burden of proof in establishing a violation of the agreement.”**

The Organization argues the Claimant believed he had been inappropriately displaced from his boom truck assignment and had been forced to work another vehicle position. The Organization maintains the Claimant was making passing comments regarding his frustration with the displacement. Although the Claimant may have been frustrated with the displacement, it does not negate the fact that he told co-workers and supervision he could not work safely, and he was concerned that he would ruin the gang's safety record.

In relevant part, Manager Mehalic provided the following statement concerning the incident:

“...I believe the action of the Carrier, Manager and Supervisor was truly appropriate. Mr. Pino, although my have been frustrated about his situation, gave him no reason to say and give treating statement about getting hurt on the job. He told several employees that he was going to ruin the gang’s safety record. Mr. Pino himself told me personally he made these statements and told me personally that he could not perform his job when I interviewed him. His statements, to me surely compromised his safety, and other employees around him. Because of his statements to me deliberately, I felt he was not fit for duty under reasonable standards. Mr. Pino’s statements were never taken out of context when I heard them myself, from him. I my option, Mr. Pino needed an appropriate evaluation because of this statements, conduct and behavior.”

There was no evidence of record refuting Manager Mehalic’s statement above.

Furthermore, there was no evidence of record refuting the following statement by Track Supervisor Joe Davis:

“...As for this claim, Mr. Pino was removed from service pending a mental and physical evaluation because of his behavior and comments that Mr. Pino made to members of our team and to myself.”

Here, the Carrier removed the Claimant based upon the self-reporting of the Claimant, whereby he told both co-workers and members of supervision that he was unable to work safely, and he was concerned he would ruin the gang’s safety record.

Safety within the industry is of paramount importance. The self-reporting of safety concerns regarding oneself or other members of one’s gang must be taken seriously. Here, the Carrier acted reasonably and responsibly. The Carrier is charged with ensuring the safety of its workforce, and its actions here were appropriate and were not arbitrary.

Although the Board may not have repeated every item of documentary evidence or testimony, nor all the arguments presented, we have considered all the relevant evidence, testimony, and arguments presented in rendering this Award.

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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 18th day of January 2019.