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PUBLIC LAW BOARD NO. 4104

B.M.W.E.

Case No. 69

PARTIES TO DISPUTE:

Brotherhood of Maintenance of
Way Employees

vs.

Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it improperly withheld Machine Operator R.D. Smith from service beginning June 26, 1985 (System File 7 Gr. GMWA 86-1-21C).

2. The Agreement was further violated when the Carrier failed and refused to convene a Medical Board in accordance with Rule 41, as requested by the General Chairman in his letter dated September 24, 1985 (System File 7 Gr. GMWA 86-1-21D).

3. As a consequence of the violation referred to in Part (1) hereof, Mr. R.D. Smith shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered from the date actually withheld from service and continuing until he is returned to service.

4. As a consequence of the violation referred to in Part (2) hereof, the Carrier shall be required to convene a Medical Board to examine the Claimant in accordance with the provisions of Rule 41 and the Claimant shall be allowed the remedy prescribed by Rule 41E."

OPINION OF BOARD: Claimant, R.D. Smith, was employed as a Group 5 Machine Operator when this dispute arose. Following a five month furlough, Claimant was returned to service and was given a required physical examination on May 2, 1985 and was returned to duty. On June 7, 1985, Carrier advised Claimant that he had tested positive for marijuana and was to contact a counselor at the Employee Assistance Program. Claimant was then placed on a medical leave of absence. Subsequently, he was evaluated at two hospitals for inpatient treatment, but refused to enter the programs. He was then withheld from service until granted approval by the Medical Department. Claimant submitted evidence in September 1985 from a Council Bluffs, Iowa hospital stating that Claimant did not have

a drug/alcohol abuse problem. The Organization requested a Medical Board if Carrier did not agree with the submission from the hospital. Carrier denied the establishment of a Medical Board. Two claims were filed by the Organization; 1) failure to establish a Medical Board; 2) Claimant was improperly withheld from service. Carrier denied the claims.

The Organization appealed the decision of Carrier. Carrier denied the appeal. Thereafter, the claims were handled in the usual manner on the property. They are now before this Board for adjudication.

The Organization contends that Claimant is entitled to a Medical Board as per Rule 41. It argues that Rule 41, Paragraph A, clearly provides for the establishment of a Medical Board to resolve disputes that involve employees who have been withheld from service in connection with alleged medical disabilities. It asserts that Claimant underwent extensive physical and mental examinations by physicians at a Council Bluffs, Iowa hospital which contradicts Carrier's opinion.

Additionally, it asserts that Carrier's return-to-duty urinalysis testing was improper due to an injunction from the United States District Court. As such, the Organization avers that the urinalysis test results should not be used as a basis to withhold Claimant from service. The Organization further states that Carrier did not provide any medical evidence regarding Claimant's inability to perform his duties. It asserts that the opinions of two counselors does not contain medical evidence but

only recommendations to seek further treatment. Accordingly, the Organization asserts that Claimant was improperly withheld from service and in addition, was not provided with a Medical Board. For those reasons, it asks that the claim be sustained.

Carrier, on the other hand, asserts that Claimant was properly withheld from service. It maintains that Claimant's failure to be treated at two hospitals which recommended further treatment was the basis for being withheld from service. Carrier argues that it did not seek to discipline Claimant, but instead was intent on seeking treatment for his situation. It avers that Claimant's lack of cooperation in this endeavor resulted in the action taken by Carrier. Additionally, Carrier asserts that the injunction referred to by the Organization does not apply in this case. It states that the injunction did not apply to examinations already taken, but only that Carrier would not continue to perform the drug screening. For the aforementioned reasons, Carrier asks that the claim be denied.

A review of the record evidence reveals a number of issues that must be addressed. Carrier contends that it did not seek to discipline Claimant, but did request that he seek treatment at two facilities which he refused. For that reason, Carrier withheld Claimant from service. Although the Organization believes it is entitled to a Medical Board, it must be pointed out that the second facility was indeed chosen by the Assistant General Chairman of the Organization. Both facilities recommended inpatient treatment. Since both evaluations agreed on Claimant's treatment, there was

no requirement to establish a Medical Board.

Additionally, although an injunction was issued that would discontinue drug screening from return-to-duty physicals, such was not in effect at the time Claimant was tested. Therefore, the results of the test are applicable in this case. However, under these particular circumstances, it is clear that Claimant did seek treatment and was eventually returned to duty. For those reasons, Claimant is to be reimbursed for all wage loss suffered from November 1, 1985 to the date he returned to service.¹ Accordingly, the claim is sustained to the extent indicated in the Opinion.

¹At the hearing on January 14, 1988, I directed that Claimant be returned to service.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

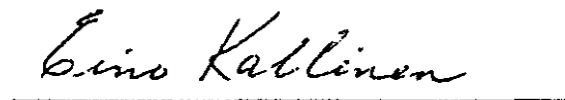
That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

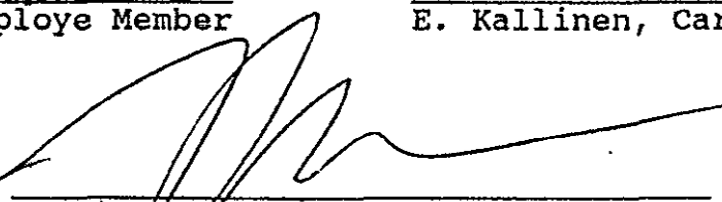
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

1/2/91