

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 24851

Docket No. 44495

97-1-96-1-II-1863

The First Division consisted of the regular members and in addition Referee Marvin F. Hill, Jr. when award was rendered.

(Brotherhood of Locomotive Engineers

**PARTIES TO DISPUTE:** (

(Union Pacific Railroad Company (former Missouri

( Pacific Railroad, Upper Lines)

**STATEMENT OF CLAIM:**

“Claim of Engineer J. B. Burris, unassigned disabled engineer, receiving a disability annuity from the Railroad Retirement Board, for clearing of notation of a Level 2 assessed by the Carrier for insubordination to attend a back-to-work physical from his personal record, with contractual punitive damages of a basic day until such discipline is cleared, including days spent during the investigation, with a minimum of \$10,000, and with tort punitive damages for retaliatory harassment in amount of \$7.5 million dollars. The Organization claims on its own behalf the cost of processing the claim.”

**FINDINGS:**

The First 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.

Claimant, a disabled engineer who was receiving a disability annuity from the Railroad Retirement Board, was notified by the Carrier by letter dated June 17, 1994,

that he was to return to work. The Claimant did not return to work. Instead he responded by letter to the Carrier dated July 6, 1994, that he would not return to work on the advice of his treating physician.

An Investigation Notice dated July 19, 1994, citing alleged insubordination for failing to follow the Carrier's instructions to return to work, was sent to the Claimant. This Investigation was canceled August 19, 1994.

On September 16, 1994, another letter was sent to the Claimant instructing him to return to service. As before, the Claimant responded in writing, on September 26, 1994, advising that his condition was unchanged from his last correspondence. No Investigation was convened in connection with this exchange of correspondence.

On October 11, 1994, the Carrier sent a third letter instructing the Claimant to return to service. Claimant did not respond in writing to this third letter. On November 1, 1994, Claimant was sent a Notice of Investigation for his alleged failure to comply with the Carrier's instructions to return to work.

Formal Investigation was conducted on November 14, 1994. Following Investigation, the Claimant was assessed the discipline, which the Organization appealed, that is now the subject of this proceeding.

Claimant's discipline for insubordination was appealed to this Board on both procedural and substantive grounds. A time limit objection was made by the Organization at the opening of the formal Investigation. Article 44 of the Agreement requires that all charges be levied against an engineer within ten days of the Carrier having knowledge of the alleged rule infraction, or within ten days that the Carrier should have had notice of such alleged violation. On July 6, 1994, Claimant advised management in writing that he was physically unable to return to work. A charge was not forthcoming until November 1, 1994, well after the ten-day limitation period. It is clear that the Carrier knew of the Claimant's physical condition and his disability from that condition well before November 1, 1994.

Two on-property Awards have strictly construed the time provisions of Article 44, Award No. 24180 of this Board and Award No. 2 of Public Law Board No. 5430. These Awards are supported by other authority.

CARRIER MEMBERS' CONCURRING OPINION  
TO FIRST DIVISION AWARD 24851  
(Docket MW-44495)  
(Referee Hill)

While the Majority's decision denying the request for punitive damages is correct, its basis for so holding could have been stated with additional clarity. Certainly, prior Awards of this Board dealing with the subject of punitive damages make it unmistakably clear that the Board lacks jurisdiction to grant such relief. The most recent occasion for the Board to reaffirm its lack of jurisdiction is First Division Award 24847.

  
M. W. Fingerhut  
Carrier Member