Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26019
Docket No. 45005
04-1-00-1-U-2208

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of Engineer F. C. Cadell, Union Pacific (former CNW), Northeast 2 District regularly assigned to Suburban Commuter District Assignment 7115 requests full time and miles for 30 work days withheld from service Beginning May 7, 1999 through June 25, 1999.

Claim premised on CNW -BLE Physical Examination Agreement of March 15, 1969."

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.

By letter dated May 6, 1999, Director Transportation Services Commuter Operations D. R. Grewe removed the Claimant from service pending a medical review. Grewe's letter read as follows:

> "It has come to my attention that you may be experiencing some health problems based on recent observations of your work performance. I am concerned about your personal safety and welfare. Therefore, I have contacted the Union Pacific Health Services Department and asked that they assist you by conducting a medical review and clearance in accordance with Section 2.5.b of the Union Pacific Railroad Company's Medical Rules, revised January 1, 1996, which reads:
>
> '2.5.b Supervisor Requested Evaluation
>
> If a Supervisor observes an Employee's unsafe behavior that may be associated with a physical or mental condition, or the Superviosr becomes aware of an Employee's unsafe behavior or medical condition which might be associated with an Employee's physical or mental impairment, the Supervisor should immediately: 1) notify the Health Services Department (HSD) and/or the local Manager-Employee Assistance (Manager-EA). In cases of possible substance abuse or mental impairment, and 2) with assistance from the HSD and/or the Manager-EA, refer the Employee for a Fitness for Duty Evaluation. When the Supervisor requests a Fitness for Duty Evaluation, the Supervisor may either: 1) temporarily withhold the Employee from active service, or 2) temporarily assign the Employee alternative job duties in a safe environment during the evaluation period. The Supervisor must notify the Employee, in writing, that a Fitness for Duty Evaluation has been requested in either instance. When the Supervisor requests a Fitness for Duty Evaluation, the evaluation consists of a drug screen, and other examination(s) as deem necessary by the Health Services Department.'

> You are hereby instructed to call the Employee Assistance Hotline at 1-800-779-1212 within 24 hours after receipt of this letter. This letter will serve as notice that you are temporarily removed fro service pending the medical review results.
>
> After you contact the Hotline, you will be instructed further concerning Fitness for Duty evaluation appointment(s) you will need to undergo before obtaining medical clearance for return to work. After review of the results of these evaluation(s), the Medical Director's office will issue a medical Fitness for Duty decision, and I will update you regarding medical clearance as soon as I receive it. The Manager-Employee Assistance, and/or the Health Services Department will offer you full support to draw this effort to a conclusion."

The Carrier explains that it took this action because, in early 1999, employees assigned to work with the Claimant had complained about his "erratic, short-fused behavior." According to the Carrier, there were employee complaints that he had become increasingly argumentative, angry and erratic, and had once left his control panel to search out and demand that a passenger be thrown off the train. The Carrier further points out that the Claimant was assigned as a Locomotive Engineer in suburban passenger service, requiring him to operate crowded passenger trains at speeds up to 70 MPH in a busy metropolitan-area terminal. For this reason, says the Carrier, passenger service employees are closely monitored to protect the safety of passengers and employees.

The Claimant took a first examination on May 12, 1999, and a second on June 2, 1999. These were both psychiatric evaluations, and on June 12, 1999, the examining doctor advised Manager-Employee Assistance Sizemore that the Claimant, while exhibiting some significant obsessive-compulsive features, had no psychiatric disorder that would prevent him from completing assigned job tasks. Dr. Sizemore then forwarded this information to the Carrier's Medical Director who, on June 21, 1999, determined that the Claimant was medically cleared to work with no restrictions. The Claimant returned to work on June 26, 1999.

The Organization now claims he is entitled to the earnings he lost while out of service. In support of its position, the Organization cites the parties' March 15, 1969 Agreement on Physical Examinations. Section (a) of that Agreement directs

that the Carrier pay lost earnings to an employee when directed to travel away from the home terminal of his assignment for a physical examination. The section concludes with the statement, "It is understood the employee is only paid in those circumstances where he passes the physical examination and is able to perform service. Section (b) entitles an employee who is held out of service a copy of the examining physician's findings and diagnosis. Section (c) then describes the procedure to be followed when an employee is found to be unable to perform service by the examining physician, and the employee's physician disagrees with the diagnosis of the examining physician. In such cases, the two physicians select a neutral physician, and the decision of the majority of the three will be final. This section then provides, "If it is determined by the majority that the employee's condition did not warrant his being withheld from service, he will be returned to service and paid for all time lost."

Although the Agreement does not specifically refer to the type of situation encountered in this case, i.e., the employee is withheld from service, but the initial examining physician finds there was no medical reason for such action, the intent of the Agreement is clear. If the employee's removal from service is not supported by the findings of the medical examination, he should be compensated for the time lost.

The instant case is analogous to Award 24559, wherein this Division wrote:

> "On the basis of alleged threatening remarks made in the presence of one of Carrier's Trainmasters, Claimant was held out of service and required to undergo an evaluation by one of Carrier's doctors. Approximately two weeks after this evaluation was completed Claimant was allowed to return to duty. No treatment or therapy was prescribed by the doctor. The claim before this Board seeks compensation for the time Claimant was held out of service.
>
> The claim will be sustained. What is actually involved here is that Claimant was visited with what amounts to a two week suspension on the unproven allegations of a Trainmaster, without charges, Investigation and Hearing. This action is at odds with the Investigation and Discipline Rules of the Agreement."

We have reviewed the Awards cited by the Carrier and do not find them to be on point. These Awards deal with the question of an employee being removed from

service for a fitness for duty examination. We do not take issue with the Carrier withholding an employee from service when there are legitimate questions raised about his ability to perform his job due to the possibility of a medical or psychological condition. When, however, a layman determines that an employee might not be medically qualified to work, and a doctor of the Carrier's own choosing concludes otherwise, the employee should not be made to suffer. The Carrier, if it elects to remove the employee from service, does so at its own peril. It does not make sense that the employee should be made whole only when the Carrier's doctor agrees with the official who removed the employee, but is then overruled by a neutral doctor. If the Carrier's doctor initially determines that the employee is medically qualified, the same result should follow. Any other conclusion would certainly lend itself to abuse, as recognized in Award 24559.

The Carrier shall compensate the Claimant for time lost as a result of being withheld from service pending the results of his fitness for duty examination.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of June 2004.