

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40676
Docket No. MW-40139
10-3-NRAB-00003-070363
(07-3-363)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier withheld Mr. S. Miller from service on February 3 through 23, 2005 [System File C-05-P018-10/10-05-0168(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Miller shall now ‘. . . be paid all straight time and all overtime and holidays lost due to this violation and days lost going toward vacation qualification.’”**

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.

On March 25, 2005 the Organization filed a claim alleging that “Rules 1, 25 and 29 but not limited thereto, were violated on February 3, thru February 23, 2005 when the Carrier held the Claimant out of service after he was released by his doctor to return to full duty with no restrictions.”

On May 23, 2005 the Carrier denied the claim. “Mr. Miller was having back problems affecting his mobility. The Carrier had a reasonable concern for his health and his ability to safely perform his duties, so Mr. Miller was removed from service for evaluation. The Carrier’s Medical Department did not receive the requested information from his Doctor until February 22, 2005, and he was released ‘Full Duty’ that day.”

The Organization appealed on July 8, 2005 noting the Carrier instructed the Claimant to contact its contract medical representative and to “follow her instructions. The Claimant did see a doctor and had a release for full duty on February 9, 2005. The Carrier did not contact the Claimant until February 23, 2005, and the Claimant returned to work on February 24, 2005.”

The Carrier “said nothing when he had to mark off to get the shot for his ailment in the past. Then the Medical Department lost the paper work and then dragged their feet in returning the Claimant back to work after he [w]as release[d] for full duty by his doctor effective February 3, 2005.”

The Organization never received a response to its request for an explanation about the incomplete medical status form (MSF) that required returning the MSF to the Claimant’s physician on February 8 as well as the Carrier’s request for additional medical information.

On August 31, 2005 the Carrier denied the appeal. The Claimant informed the Roadmaster on January 31, 2005 that he could not report for duty due to an ongoing back condition. Because this raises a question of his ability to safely perform his job duties, the Claimant was placed on medical leave of absence until February 7, 2005. Although the Claimant states he was released for full duty effective February 9, his physician did not sign the MSF until February 21 and did not return it to the Carrier until February 24. In this regard, the Claimant

informed the Medical Department on February 21 that his physician had lost the initial MSF as well as another one requesting more medical information.

The Organization issued a confirmation-of-conference letter on December 14, 2006. The Carrier had no medical documents to support removing the Claimant from service when his physician had released the Claimant for work. Instead of returning the Claimant to work on February 3, the Carrier instructed the Claimant to contact its contract medical representative, but she was not available until February 7, and she faxed the MSF to the Claimant's physician that day.

The physician returned the MSF on February 8, but it was incomplete and was returned to the physician on that date. The physician left for vacation on February 9 and did not return until February 21, 2005. Had the medical representative been available on February 3 (when the Claimant was ready to return to work) rather than February 7, the Claimant would have returned to service by February 4.

The Board finds that the Claimant advised the Carrier on January 31, 2005, that he had a back problem requiring medical attention. The Claimant received treatment on February 1, 2005, and, based on his physician's advice, was to remain off duty on February 2, but could return to work on February 3. Given the Claimant's statement of January 31, the Roadmaster informed the Claimant on February 2, that he was removed from service pending medical assessment. Thus, the Carrier had reasonable cause to remove the Claimant from service for medical assessment of his continuing back problem to determine whether he could safely perform his duties.

Although the Claimant's prior medical absences for treatment had not caused the Carrier to request a medical assessment, the Carrier is not precluded from requesting a medical assessment at this later date for the ongoing problem. The Carrier's action towards the Claimant coincides with Third Division Award 19328, as well as other Awards, reflecting the Carrier's right to remove an employee from service for medical reasons and to require medical documentation and/or examination prior to returning the employee to service. The Carrier did not act in bad faith or in an arbitrary or discriminatory manner towards the Claimant.

Numerous Awards show that once an employee is removed from service, the Carrier is liable for undue and unreasonable delays in returning the employee to work. Five business days is deemed a reasonable amount of time for the Carrier to attain a medical assessment. (See Third Division Awards 20419, 24146 and 24865.) Because the Carrier placed the Claimant in medical leave of absence status from February 3 through February 7, the Carrier anticipated that five days was a reasonable amount of time to attain a medical assessment of the Claimant's condition.

The Claimant complied with the Carrier's instructions of February 2 and promptly contacted the medical representative but the representative, was not available until February 7. Notwithstanding the Claimant's following the Carrier's instructions, the medical assessment was delayed several days due to the medical representative's unavailability.

Because the Claimant was available to return to work on February 3 and the Carrier had the MSF no later than February 7, the Claimant could have been returned to duty no later than February 9 but for the inactions and omissions of the contract medical representative. That is, the medical representative was not promptly available and the Carrier did not respond to the Organization's timely request for an explanation about the incomplete MSF such that it necessitated returning the form to the physician and the request for more medical information. The information submitted by the physician on February 7 is not disclosed by the Carrier; there is no way to determine whether or why the MSF was incomplete.

These actions and/or inactions by the Carrier do not insulate it from the consequences of not returning the Claimant to work in a reasonable amount of time such as five business days notwithstanding the subsequent absence of the physician due to vacation or the recognition on February 21 that the MSF had been misplaced.

The Claimant was retained off duty for an unreasonable amount of time through no fault of his own. The Board finds that the Claimant should have been returned to work by no later than February 9. The claim is sustained from that date until he was returned on February 24. The Claimant will be compensated for those intervening days wherein he was denied an opportunity to perform his job duties and earn compensation.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division

Dated at Chicago, Illinois, this 1st day of November 2010.