Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41811
Docket No. MW-41338
14-3-NRAB-00003-100212

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(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 removed and withheld Mr. J. James from service beginning February 15, 2008 and continuing until March 17, 2008 [System File C-08-P018-22/10-08-0238(MW) BNR].

2. As a consequence of the violation referred to in Part (1) above, Claimant J. James shall now '. . . be paid for all of his straight time and any overtime that he was not allowed to work starting February 15, 2008 and continuing until his return to work on March 17, 2008. Additionally I request that he [be] paid for two-hundred-fifty (250) miles at fifty and one-half ($.505) cents per mile for the mileage he had to drive at his expense to go to the many doctor and evaluation appointments he was required to go to. I also request that all of these days be shown as vacation qualifying days. ***"

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 January 30, 2008, while off duty, the Claimant suffered an allergic reaction and was admitted to a hospital. While there, ". . . he was found to be in atrial fibrillation with a rapid ventricular response." He was discharged from the hospital on January 31, 2008. As a result of his heart condition, the Claimant saw a cardiologist who, in his notes (dated February 1, 2008), reported, "The patient does have an extensive ethanol history and drinks 12 beers on a daily basis." The Carrier explains, "Given this information, [the] Carrier referred [the] Claimant to an Employee Assistance Program (EAP) Counselor."

The Claimant was released for work by his physician effective February 15, 2008.

The Claimant saw an EAP Counselor on February 26, 2008. That official reported to the Carrier that the Claimant ". . . says he drinks at most 12 beers in a week and most of that would be on a weekend if he was watching a football game." The Counselor also noted, "[The] Patient has worked for the railroad since 1978 and has never missed work for any reason. He receives random drug tests and breathalyzer tests from both the railroad and DOT and has never tested positive." The Counselor added, "Based on the information provided and outlined here, I see no reason that [the] patient cannot return to work. It does not appear that he has a problem with ETOH."

On February 27, 2008, the cardiologist filed an addendum to his notes:

> "Following initial evaluation of . . . [the Claimant] on February 1, 2008, after reviewing the history and physical as dictated by me . . . [the Claimant] called and corrected my dictation. I had mentioned that he drank on the average of 12 beers on a daily basis. However, the patient reviewed the history and physical as dictated and called in a correction claiming he drank typically up to 12 beers on a weekly basis, not a daily basis, and wanted his records corrected accordingly."

According to the Carrier's Submission, the Claimant was cleared to return to work effective March 6, 2008. According to the Organization, the Claimant was

returned to work on March 17, 2008. According to the Claimant, he went back to work on March 12.

In Third Division Award 32328, the Board held:

> "The applicable principles have been clearly enunciated by the Board in Second Division Award 12491 involving the instant Carrier:
>
> 'Arbitral precedent establishes that Carriers have an ". . . inherent managerial right to withhold employees from employment until the question of their physical qualifications has been clarified." (See PLB 3898, Award 22; also Second Division Award 7230; Third Division Award 14127). However, such precedent also holds that Carriers are liable for ". . . undue and unwarranted delay(s) in ascertaining a returning worker's physical fitness" (Third Division Awards 26263, 21560; and Second Division Awards 6758, 6704, 7247). A number of Awards suggest that a maximum of 5 days to process papers in return-to-work cases, comparable to the instant one, is sufficient time to get an employee back to work (See Second Division Awards 5537, 6278, 6331) . . . ."

In support of its action to withhold the Claimant from service, the Carrier cited Third Division Award 28506, wherein the Board stated:

> "It is well established that a Carrier has the right, upon reasonable cause, to subject an employee to appropriate medical evaluation to determine his fitness to perform the duties of his position in a safe and responsible manner. It has also been held that the Carrier may, in proper circumstances, withhold the employee from service pending the results of such evaluations."

The Carrier also argues that it has a responsibility to workplace safety to ". . . assure the employee can return to work and not place himself or coworkers in danger. This is a moral obligation." See, Public Law Board No. 6006, Award 127.

The principles argued by the Carrier are indisputable; however, the determination by the Carrier that the Claimant should remain off work was based solely upon the sentence in the cardiologist's notes that his patient drank 12 beers a day. The general principles cited by the Carrier were not enough considering that

there were specific aspects about the Claimant's record that should have been taken into consideration. The Claimant was released to work by the cardiologist with no restrictions. He had worked for the Carrier since 1978 and had, as the EAP Counselor noted, been subject to random drug and breathalyzer tests and had never tested positive. This would have been remarkable for a person who drank two six-packs of beer a day. Given this background, the action by the Carrier to withhold the Claimant from service on the basis of one sentence in the doctor's notes without further inquiry must be deemed to be unreasonable.

The Board is not convinced, however, that the Carrier's error justifies payment of the Claimant's driving expenses.

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 27th day of February 2014.