

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41812
Docket No. MW-41380
14-3-NRAB-00003-100266

The Third Division consisted of the regular members and in addition Referee Burton White 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. J. Gillette from service beginning on October 9, 2007 and continuing until January 29, 2008 (System File C-08-P018-1/10-08-0011 BNR).
2. As a consequence of the violation referred to in Part (1) above, Claimant J. Gillette shall now be compensated at his applicable rate of pay for all straight time and overtime hours lost to him beginning on October 9, 2007 and continuing until January 29, 2008.”

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.

The Carrier alleges that the Claimant was observed sleeping in a truck that was stopped at a red light. By a letter dated September 19, 2007, the Carrier notified the Claimant that he was being placed on medical leave until September 25, 2007. The Claimant asserts, "First of all it was only alleged that I fell asleep behind the wheel of a company vehicle while at a stoplight, it was never proven or investigated, nor was I even asked what was going on."

As instructed in the September 19, 2007 letter, the Claimant contacted the Carrier's Field Manager of Medical & Environmental Health and, according to a letter from her dated September 20, 2007, informed her that he was ". . . being treated for high blood pressure, gout and a rapid heart rate. . . ." That letter asked him to consult his physician to fill out a Medical Status Report.

The Claimant saw his physician on September 21, 2007, and, pursuant to a cardiac and a hypertension review, received written releases for duty without restrictions effective October 9, 2007.

Nevertheless, the Claimant's physician sent a request dated October 3, 2007, asking that the Claimant not be returned to work until after October 15, 2007. The request was granted. The Claimant asserts that the request was made because his Roadmaster had warned him that he would be considered AWOL ". . . because the carrier only put me on medical leave until Sept. 25 , and that is why my doctor wrote that excuse"

By letter dated October 11, 2007, a Carrier official stated, "I have received a Fitness-for-Duty Recommendation form on October 9, 2007 requesting an extension to your medical leave of absence commencing October 16, 2007 through October 29, 2007. Therefore you are being granted this extension of medical leave of absence through October 29, 2007." The letter did not identify the source of the form.

By a Railroad Retirement Board form entitled "Supplemental Doctor's Statement" and dated October 17, 2007, the Claimant's physician noted that the Claimant had an "h/o [history of] somnolence." This form also stated that in the physician's opinion, the Claimant was "able to work without restriction" effective October 9, 2007.

The Carrier asserts, "Carrier's records show that . . . [the Claimant's] doctor has referred him to a [sleep] specialist, and that appointment is not until December 14, 2007 [The Claimant's] case will be reviewed when the specialist provides his/her findings." The Claimant asserts, "[S]econdly I went to my personal doctor who examined me and even ordered a sleep study, which came back normal and he released me to return to work. The carrier decided that was not good enough for them. So they said I needed to see a sleep specialist. *** My personal doctor never made any recommendation to see a specialist, this was made by the carrier."

The following Fitness-for-Duty Recommendations are in the record:

Effective Date	Medical Leave Until	Date of form
09/19/2007	09/28/2007	09/21/2007
09/29/2007	10/28/2007	10/09/2007
10/30/2007	11/30/2007	10/26/2007

The Claimant reported that his doctor ". . . first changed my medicine on 11/17/07 and after that the sleep doctor tested me and I passed the test So in retrospect it was the medicine that caused the sleepiness and not sleep apnea so there was no reason for me to be off."

The Claimant indicated that the Carrier informed him that he could return to work on January 29, 2008.

The following two factual disputes are evident in the record.

In its letter dated September 19, 2007, the Carrier stated, "Per discussion with your supervisor, you were observed sleeping in a truck while stopped at a stop light." In a letter dated September 20, 2007, the Field Manager of Medical and Environmental Health stated, "As we discussed, you had an episode of what was described by your co-worker, as 'sleeping while in the driver's seat of the truck while stopped at a light'."

The Carrier correctly states, "[The] Carrier has the right to medically disqualify individuals from service." See Third Division Award 28506, wherein the Board stated the principle:

“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. Such suspensions are not disciplinary in nature; and the disciplinary rules requiring Investigation are not applicable.”

Third Division Award 36037, which was cited by the Organization, makes the same point (and cites Third Division Award 28506):

“As a starting point, we note that prior Awards have established the principles governing the outcome in this case. First, the Carrier has the right to determine the physical fitness of its employees and to withhold employees from service until it has been established that they are physically qualified to work. An employee withheld from service on these grounds is not being disciplined, and therefore the disciplinary Rules requiring Investigation are not applicable. Third Division Awards 28506 and 33627.”

The record establishes that the Claimant was observed sleeping at a stoplight while in the driver’s seat of a Carrier vehicle. Although the Claimant asserted that the matter was alleged and not proven, nowhere does he state (let alone establish) that the observation was not correct. Moreover, as the Awards cited above state, an employee withheld from service on physical fitness grounds is not being disciplined and the Rules that require a formal investigation do not apply. The Carrier’s concern was supported both by statements made by the Claimant that indicate that he had been on medication that caused sleepiness and a notation by his personal physician that indicated that he had a history of somnolence. These factors add credence to the reports that he was observed sleeping and help to indicate that the Carrier’s action in removing the Claimant from duty was not unreasonable.

There is also dispute as to who referred the Claimant to a sleep specialist. In an internal email dated November 14, 2007, the Field Manager of Medical & Environmental Health stated, “His own dr. has referred him to a specialist 12-14-07.” In a letter to the Organization dated November 15, 2007, the Carrier stated, “Carrier records show that. . . . [the Claimant’s] doctor has referred him to a

specialist” In a letter to the Organization dated February 4, 2009, the Claimant stated, “My personal doctor never made any recommendation to see a specialist, this was made by the carrier.”

The record does not provide the Board with material on which to decide whose decision gave rise to the examination of the Claimant by a sleep specialist. In a sense, it is immaterial who ordered the study. If requested by the Claimant’s physician or required by the Carrier, it was reasonable for the Carrier to want to be sure that the Claimant’s sleep problem had been resolved. There is nothing in the record that would indicate that an appointment was available before December 14, 2007, when this sleep examination was held. Both parties agree that that examination indicated the Claimant’s ability to return to work.

The question then becomes why the Claimant was not returned to work until January 29, 2008. It is the view of the Board that a period of ten workdays would be reasonable for the Carrier to review the result of the December 14, 2007 examination. By the end of that period, the Claimant should have been returned to work. Accordingly, he should be made whole for the time following that reasonable time for review until his actual reinstatement.

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.