

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37578
Docket No. MW-38160
05-3-04-3-69**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier improperly removed and withheld Mr. J. L. Raybourn from service beginning on October 23, 2002 and continuing until December 17, 2002 [System File C-03-P018-16/10-03-0097 (MW) BNR].
2. As a consequence of the violation referred to in Part (1) above, Claimant J. L. Raybourn shall now be compensated for ‘. . . all time lost account his improper removal from service.’”

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 October 23, 2002, while the Claimant was assigned and working as a Section Foreman, Roadmaster Jansen notified the Claimant that he was being removed from

service for alleged medical reasons. The Claimant complied with the Carrier's instructions by arranging for and undergoing a medical evaluation by his psychiatrist on October 24, 2002. As a result of this evaluation, the Claimant was deemed medically fit to return to duty, but the Carrier withheld him from service until December 17, 2002. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision to withhold the Claimant from service until December 17, 2002. The Carrier denied the claim.

The Organization initially contends that the record demonstrates that the Claimant was examined by his psychiatrist and released to return to duty on October 24, 2002. Moreover, the Carrier was in possession of related documentation supporting this medical conclusion, as documented by the Carrier's memo entry of October 29, 2002. The Organization acknowledges that the Carrier has the right, upon reasonable cause, to subject an employee to appropriate medical evaluation to determine fitness for duty. The Organization maintains, however, that the Carrier does not have carte blanche authority to withhold an employee from service for medical evaluation without just and sufficient cause or to withhold an employee from service for an unreasonable period of time. The Organization points out that numerous Awards have determined that five work days is considered a reasonable period of time for a carrier to complete a proper medical assessment under such circumstances.

The Organization emphasizes that the Carrier confirmed that the Claimant had been medically examined and released to return to duty the day after he was removed from service, so there can be no doubt that the Carrier was dilatory in reviewing the situation when it continued to withhold the Claimant from duty until December 17, 2002. The Organization asserts that as a result of the Carrier's procrastination, and through no fault of his own, the Claimant was unjustly withheld from service for an inordinate and excessive period of time, and he is entitled to the requested remedy.

The Organization then points out that the Carrier was required to demonstrate a medical basis for removing the Claimant from service. The Organization asserts, however, that the Carrier's determination was based on the uncorroborated contentions set forth in its letter of November 26, 2003, and the Carrier failed to provide any substantive evidence whatsoever to support its decision to remove the Claimant from service. The Organization argues that the documents that the Carrier provided in response to the Organization's request actually relate to a medical situation involving the Claimant that occurred in 2003. The Organization insists that this documentation is an obvious attempt by the Carrier to further confuse the issue and manufacture justifications for its actions in this case. The Organization emphasizes

that the 2003 information does not apply to the claim period, and it has no relevance or applicability whatsoever to the instant claim.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that although the Organization argued that the Claimant was improperly removed from service, the Organization failed to explain why it was improper to remove the Claimant. The Carrier insists that the Claimant obviously was ill. Moreover, the Carrier points out that in making its argument, the Organization failed to mention or recognize that the Claimant was not released by the Medical Department until December 17, 2002.

The Carrier then argues that there is nothing in the Rules cited by the Organization that addresses the Claimant's illness. In addition, the Organization has not explained how the Carrier violated the parties' Agreement. The Carrier insists that the release from the Claimant's psychiatrist did not address the Claimant's medical condition or the reason for his strange behavior, and the release from the EAP similarly did not address the Claimant's medical status. The Carrier maintains that the Claimant had serious medical problems prior to his removal for medical reasons, and the Carrier was concerned about the Claimant's ability to safely perform his duties as a supervisor. The Carrier points out that the Claimant ultimately was diagnosed with Parkinson's disease, which had been masked by his previous illness. The Claimant's psychiatrist was treating the Claimant for bi-polar disorder, and the psychiatrist did not conduct a medical review for Parkinson's or other medical problems. The Carrier insists that this is the reason why the Carrier's Medical Department should be allowed to review cases for medical problems.

The Carrier emphasizes that numerous Board Awards have found that the Carrier has a broad right to have a complete medical evaluation to determine an employee's fitness for duty. The Carrier contends that, contrary to the Organization's assertion that the Claimant was removed without cause, when a Section Foreman is wandering around aimlessly, soiling his pants, and absenting himself from work, there is sufficient cause to remove him from service for medical review. The Carrier maintains that the Organization's position concerning "cause" has no merit. The Claimant clearly was ill, and he was not aware of his surroundings or in full possession of his mental faculties. The Carrier argues that the Claimant needed an evaluation from his own psychiatrist, as well as a complete medical review. The Carrier insists

that it was within its managerial rights to review the Claimant medically, for his own safety and that of the employees working with him.

As for the Organization's argument that the 2003 medical information has no relevance to the instant claim, the Carrier contends that this information does have relevance because it concerns the cause for the Claimant's removal and his medical condition. The Claimant was ill in 2002, 2003, and 2004, and the Carrier insists that his continued illness is very relevant to the instant claim. The Carrier argues that it was entitled to question the adequacy of the Claimant's release and to request further medical information as a condition of allowing the Claimant to return to work. The Carrier emphasizes that the Board long has upheld the Carrier's right to remove employees from service for medical reasons.

The Carrier goes on to assert that given the Claimant's responsibilities as a Section Foreman, it is difficult to understand why the Organization would claim that there was no cause for further medical examination of this employee. The Carrier points out that the Claimant could have put his own life in jeopardy, as well as the lives of his co-workers. In light of the Claimant's behavior at work and his medical history at the time of his removal from service, the Carrier insists that it had reasonable grounds to doubt the adequacy of the release from the Claimant's psychiatrist, until a complete medical review was done by the Medical Department. The Carrier further asserts that because it is crystal clear that the Claimant needed more treatment than medication for his mental condition, there was a need for additional medical evaluation and the delay in returning the Claimant to service was reasonable.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board thoroughly reviewed the record, and we find that the Organization met its burden of proof that the Carrier improperly withheld the Claimant from service for the period December 2 through December 17, 2002. The Organization filed a claim covering the period October 23 through December 17, 2002. However, the record is clear that after the Claimant's psychiatrist certified him as being capable of going back to work, the Carrier properly determined that it wanted to perform its own analysis before it put the Claimant back into the workplace. For whatever reason, the Carrier was unable to obtain the Claimant's doctor's information until November 25, 2002.

The Carrier's medical officer then approved the Claimant's return to service on December 2, 2002. There is absolutely no reason in this record to support the Carrier's refusal to return the Claimant to work on December 2, 2002.

The Carrier is correct that the Carrier does have a right to review an employee's personal physician's records before returning an employee back to work. However, it is fundamental that that review and determination must be made within a reasonable period of time. In this case, the Claimant's doctor authorized him to go back to work at the end of October. Unfortunately, it was the Claimant's doctor's fault that the Carrier did not obtain the records before November 25, 2002. However, once the Carrier did receive those records, the Board is of the belief that it should have been able to return the Claimant to work within one week's time. Therefore, we will sustain the claim in part and order that the Claimant should have been returned to work on December 2 instead of December 17, 2002. Consequently, the Claimant will be awarded backpay for that period.

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 24th day of August 2005.