

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41783
Docket No. MW-41141
13-3-NRAB-00003-090484**

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

**(Brotherhood of Maintenance of Way Employees 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, by letter dated September 14, 2007, removed Mr. C. Davis from service and continued to withhold him from service through October 11, 2007 [System File C-08-P018-5/10-08-0089(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Davis shall now ‘. . . be paid for all straight time and overtime he was denied from September 14, 2007 through and including October 11, 2007. ***’”**

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.

At the time this dispute arose, the Claimant worked as a Foreman in Graf, Wisconsin.

The claim by the Organization makes two central points: the removal of the Claimant from duty was arbitrary and, assuming without agreeing, that the removal had validity, the Claimant was kept from duty for an unreasonable period.

By letter dated September 14, 2007, and signed by a Division Engineer, the Claimant was withheld from service and placed on a leave of absence "until September 19, 2007." The letter stated that the action was taken because of a report from two named railroad Officials that "on September 12th and 13th, 2007, they observed you to be in obvious pain when walking, also that you were having difficulty getting up from a kneeling position." The letter instructed the Claimant to make contact with the Medical and Environmental Health [MEH] Regional Manager so that a determination could be made as to "whether a medical evaluation will be necessary assessing your ability to work safely."

By letter dated September 17, 2007, a BNSF Field Manager wrote to the Claimant's physician stating, in part, "In order to address Mr. Davis' fitness for duty and ability to return to work we will require your clinical findings, office visit notes, reports of all diagnostic studies performed, and your objective opinion regarding his work capabilities."

Written material from the Claimant's personal physician was received by the Carrier on September 26, 2007. It stated, in part:

"On my exam, he still walks well. He does have decreased range of motion in his right hip. He will externally rotate to 30 degrees, can just barely internally rotate back to neutral, will abduct 35 degrees, adduct 10, flex to 80 degrees and fully extend. * * * He does have osteoarthritis of his right hip with bone on bone contact superiorly He does have moderate osteoarthritis of his left hip as well

IMPRESSIONS

Degenerative joint disease, hips, right greater than left.

PLAN

The patient continues to function reasonably well at his current job. We did discuss the long-term outlook including the ultimate need for joint replacement. He does have a very broad neck and is a quite large individual”

The Claimant was released to return to work on October 11, 2007. A Fitness-for-Duty Recommendation dated October 11, 2007, states: “Following MEH review, the EE is recommended to RTW without restrictions, and the PROVISION that if the EE continues to have complaints regarding hip pain while performing regular job duties, the issue of his being allowed to continue to perform said duties will be addressed with the EE. FMEH will remain available to discuss/monitor this matter with the EE and supervision.”

The Organization filed a claim on November 1, 2007.

Throughout its Submission, the Organization states a concern that the Carrier Officials who alleged that the Claimant was having physical difficulty in performing his work were not identified at all times in the history of the Carrier’s action and the ensuing dispute:

- The Division Engineer, the author of the letter dated September 14, 2007, “did not observe Claimant in his work environment and the letter was based upon individual oral statements from employees who were identified at the May 13, 2009 conference as Messrs. M. Veitz and L. Hochstatter.”**
- Referring to the Carrier’s letter dated December 27, 2007 denying the claim, the Organization writes, “The Carrier in this correspondence, does not indicate who it was that allegedly observed the Claimant having trouble walking and performing his duties”**
- Referring to a denial letter from the Carrier dated April 13, the Organization notes, “Again, the Carrier did not supply any information about who allegedly observed the Claimant, or what exactly it was that was observed.”**

This recurrent quibble by the Organization is without merit because the September 14, 2007 letter that removed the Claimant from service named the Carrier management personnel who had made the observation and gave details about what they had reported.

Moreover, other correspondence provided more detail. The Carrier's letter to the Claimant's physician (copied to the Local Chairman) provided the following details of what had been observed and of its concern:

According to supervision Davis was observed to have problems walking (while in pain), bending, getting up from a kneeling position, standing for reasonable periods of time typically associated with his job, difficulty maneuvering over rails and around obstacles/objects, and he was observed sitting more than usual. This included his sitting for longer periods of time. Davis works on/near moving equipment and near/around live track. In discussing this with Davis, he attributed the observed problems to his working 60+ hour workweeks. Davis also confirmed that he scheduled an orthopedic evaluation to address his condition prior to our intervention. On Friday he informed his immediate supervisor that his condition was worsening and that he may have hip problems requiring surgery.

The Organization argues:

"In this instance, the Carrier arbitrarily removed the Claimant from service. As stated previously, there was no change in the Claimant's ability to do his job from the time he was removed from service, until the time he was released to return to his position. The Claimant did not undergo any medical treatment during that time and was clearly capable of doing his job during the time of this dispute."

The record establishes that the Claimant was withheld from service because he exhibited difficulties in movement that caused Carrier supervision to be concerned about the safety of the Claimant and other personnel. Input from the Claimant and from his physician in reference to the Claimant's physical problems established a credible context for what had been reported about his physical condition on the job. Whether the reported difficulties were caused by long work days, as asserted by the Claimant, or his degenerative joint disease, or both, it cannot be said that there was no basis for what was reported about the Claimant's

physical difficulties that were observed on September 12 and 13 and referred to in the Carrier's letter of September 14, 2009, or that his temporary removal from active duty was arbitrary.

Given the nature of the Claimant's physical ailment, the fact that he did not receive medical treatment during his absence from work neither refutes the validity of what was reported about his functioning on September 12 and 13, 2009, nor does it establish that he was capable of safely performing his work at that time.

The Organization makes other arguments related to its charge that the Claimant's removal from service was arbitrary. Among them are the following points: (1) those who made reports about the Claimant's condition were not medical personnel; (2) the conditions observed were caused by the Claimant having worked long hours on overtime; and (3) implied that as a Foreman, the Claimant was not required to perform physical work. It also notes that the Claimant's removal was not made based on the Division Engineer's personal observations and asserts, "In fact, no Carrier supervisor observed the Claimant with these alleged difficulties."

While it is true that none of the Carrier personnel who provided the information that led to the decision to withhold the Claimant from active service were medical personnel, this argument has no force. To give it credence, one would have to agree that only supervisors with medical credentials are qualified to make such decisions. Clearly, this is an unsupportable view.

Even if the observed conditions that led to the Claimant's removal from active service had been triggered by long hours of work as stated by the Claimant, the fact remains that at the time in question, the Claimant's body was not able to meet all the requirements of his position. Moreover, this response by the Claimant tends to confirm the observations that triggered his removal.

The Organization cites Rule 55 B, which states that a Foreman is "An employee designed to direct the work of men and reporting to officials of the railroad" The Carrier responds, "BNSF foremen are 'working foremen' and must be able to assist with or perform Maintenance of Way work." Unlike the situation in Public Law Board No. 4431, we do not have within the record before the Board the relevant job description; nevertheless, we are called upon to assess this aspect of the dispute. Even when one's scope of duties are limited to the direction of others, such an employee may well be called upon to perform a hands-on check of

an employee's work, to demonstrate to employees how to perform a task, to show why what they are doing needs correction, and, at times, to step in and help. Thus, it cannot be said, as implied in the argument advanced by the Organization that a Foreman's job is devoid of physical involvement.

The Division Engineer removed the Claimant from work based upon input from two Carrier Officers about their direct observations. One was an Assistant Director Maintenance Production and the other was a Roadmaster.

Based on the above analysis, the Board concludes that the Claimant's removal from active service cannot be said to have been arbitrary.

The Organization contends that the Claimant was removed from service for 27 days. While this is true by a strict calendar count, it is not a helpful figure. The record establishes that the Carrier received written information from the Claimant's physician on September 26 and that the Carrier's physical examination of the Claimant took place on October 11, at which point the Claimant was released for duty. This reduces the period of concern to 15 calendar days. The Organization's Submission draws attention to Second Division Award 12491, wherein the Board held, in relevant part, as follows:

“. . . inherent managerial right to withhold employees from employment until the question of their physical qualifications has been clarified However, such precedent also holds that Carriers are liable for ‘. . . undue and unwarranted delay(s) in ascertaining a returning worker's physical fitness’”

The question then becomes whether the period of time between receipt of written information from the Claimant's physician and the return of the Claimant to work was or was not reasonable. The parties present various Awards in which (putting aside cases in which delays by the claimant lengthened matters) the range of reasonableness ranges from five days (Third Division Award 36037 citing Third Division Award 32328) to seven days (Third Division Award 36763) to 12 days (Third Division Award 36329). The Carrier states that in Third Division Award 36329, “. . . the Board held that two months was not an unreasonable delay in returning the claimant to service,” but that assertion is based on a misreading of the Award. The Award notes, “[T]he record reveals that the Claimant is responsible for a majority of the days he ‘missed.’” The Board stated, “. . . [T]he Carrier's

review and testing process took approximately 12 days, which, in the circumstances, cannot be considered an unreasonable amount of time.”

Given that there is no set standard for what interval of time before an employee is returned to work and the wide range of time periods that are considered reasonable as shown in the various Awards cited by the parties, the Board is of the view that the 15-day interval stretches the standard of reasonableness. We find that under the particular facts and circumstances presented in this case, ten days would not be an unreasonable amount of time.

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 25th day of November 2013.