

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41936
Docket No. MW-41954
14-3-NRAB-00003-120273**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees 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 withheld Mr. D. Rooker from service beginning on March 13, 2009 and continuing (System File C-09-P018-29/10-09-0301 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Rooker shall now ‘ . . . be paid for all straight time and overtime during the claim period beginning March 13, 2009, and continuing until the Carrier returns the Claimant to work.’”**

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 Claimant in this dispute is a Machine Operator, who is covered by the parties' Agreement and holds seniority with the MOW Department.

On January 19, 2009, the Claimant requested, and was granted, a medical leave of absence through March 19, 2009. The Claimant subsequently was granted several additional extensions, the last one ending on August 19, 2009. The Carrier's letters granting the medical leave extensions contained the following provision:

"Attached is a Medical Status Form which you will need to use when you return to work. The BNSF Medical Department's agent, MCMC LLC, will review this information in order to make recommendations regarding your 'fitness for duty.' Please have your physician complete and submit the form five (5) business days before your expected return to work or medical release date to expedite your 'fitness for duty' evaluation and avoid delays in your return to work."

According to the Organization, the Claimant was released to return to work, by his physician, without restriction, on March 13, 2009. Conversely, according to the Carrier, the Claimant's doctor recommended that the Claimant be allowed to return to work on April 8, 2009, and that he be restricted to performing sedentary work until June 23, 2009. A "Fitness for Duty Recommendation" dated April 8, 2009, prepared by Carrier medical personnel, confirms that he was approved for "Sedentary work only."

The Carrier notified the Claimant that there was no position available to him that fell within the restrictions imposed by the Claimant's doctor. On two occasions, including April 17, 2009, Medical Field Manager Chris McGinnis spoke to the Claimant by telephone and offered his assistance. During the call on April 17, 2009, the Claimant told McGinnis that he was considering pursuing an occupational disability annuity through the Railroad Retirement Board. The Claimant never contacted McGinnis again. On June 19, 2009, the Claimant extended his medical leave of absence through August 19, 2009. During that extension, the Railroad Retirement Board granted the Claimant a total and permanent disability effective July 1, 2009.

On April 20, 2009, the Organization filed a claim for the Claimant's alleged lost work opportunity and monetary loss because he was not returned to service – which the Carrier denied on appeal – based on the Claimant's personal doctor's failure to provide medical evidence that would support a full-duty release and the undisputed fact that there was no position that would accommodate the Claimant's restriction.

Before the Board, the Organization argues that the Carrier violated Rules 1, 2, 24, 25 and 29 of the parties' Agreement. It contends that the Claimant was unquestionably returned to full-duty service, without restriction, by the only competent medical evaluation rendered in this matter. It asserts that the unconditional release of the Claimant to immediate, full-service duty stands uncontested. The Organization maintains that not only was the Carrier's continued withholding of the Claimant from service arbitrary, its rationale for doing so was insufficient. It contends that the Carrier is, therefore, liable for all subsequent delays in processing the Claimant's return to work because they all impermissibly stem from its callousness or negligence in protracting the issue of his return to work.

The Organization argues, as well, that the Carrier took too long to medically evaluate the Claimant. It asserts that, customarily, the Carrier has five business days to perform a medical assessment and return the employee to work. The Organization maintains that, in the instant matter, the Carrier engaged, in essence, in an indefinite withholding of the Claimant from service. It contends that the Carrier's actions were arbitrary and capricious.

Conversely, the Carrier argues that the Organization failed to meet its burden of proving a violation of the parties' Agreement. It asserts that although the Organization cited Rules that were allegedly violated, it never produced any probative evidence to support its allegations. The Carrier cited numerous Awards which uphold the principle that the Organization must provide such actual evidence in order to meet its burden of proof.

The Carrier argues, in addition, that it properly withheld the Claimant from service. It contends, citing prior Awards, that it has a broad right to determine the physical fitness of its employees and has the right to withhold employees from service until they are determined to be physically qualified to work. It contends that

the Claimant was granted a medical leave of absence that was requested by his personal physician and that his physician stated that the Claimant could return to work only under the condition that he be given sedentary work until June 23, 2009. The Carrier asserts that the Organization presented no evidence showing that the Carrier acted in a manner contrary to the parties' Agreement or with a maleficent intent toward the Claimant. It argues that this is especially so because (1) the Claimant's physician initially requested that the Claimant only be given sedentary work until after June 23, 2009, and (2) the Claimant requested and was granted total and permanent disability status effective July 1, 2009.

The Carrier argues, as well, that even if the Board were to lend credence to any of the Organization's allegations, there would still be an irreconcilable dispute in facts. It contends, citing numerous prior Awards, that the Board is powerless to resolve irreconcilable factual disputes. It asserts, therefore, that, where there is a dispute over an essential fact, the Board must either dismiss the case or rule against the moving party.

Finally, the Carrier argues that, even if the Organization's claim had merit, the Claimant would not be entitled to any damages. It contends, citing prior Awards, that when a carrier reasonably holds an employee out of service pending medical documentation or further evaluation, the employee is not entitled to compensation for that period of time. It points out that the Claimant voluntarily commenced total and permanent disability effective July 1, 2009, and, therefore, any theoretical liability would have ended at that point in time.

It was the burden of the Organization to prove by substantial evidence that the Carrier's treatment of the Claimant was in violation of the parties' Agreement. For the reasons which follow, the Board concludes that the Organization failed to meet its burden.

The Parties are in disagreement as to the conditions, if any, under which the Claimant was cleared to return to work. The Organization contends that his return was without restrictions; on the other hand, the Carrier contends that he was restricted by his doctor to perform only sedentary work. The Board notes that the doctor's actual letter or note is not contained in the record. The documentation that the Organization relies on to support its contention that the Claimant was

“unquestionably” returned to full-duty service, without restriction, is its own letters and appeals in the case that make that assertion. Conversely, the Carrier’s statement to the opposite effect is supported by the Fitness for Duty Recommendation, which plainly states that the doctor’s recommendation contained restrictions. Thus, the Board has no choice but to conclude that the Organization failed to meet its burden of proof in this regard.

Based on the Claimant’s restricted availability, the Carrier concluded that it had no work consistent with the restrictions. While there may be circumstances of deceit or pretext that would warrant overturning such a Carrier determination, the Carrier is generally afforded leeway in determining whether it has sedentary work available. The Board is not persuaded that the Carrier’s conclusion was improper or unwarranted. Thus, no violation of the Agreement resulted from its determination.

The Board also notes that the Claimant’s application for retirement benefits was based on permanent and total disability. That assertion and the Railroad Retirement Board’s determination to grant his application is inconsistent with the Claimant’s assertion that he was fit to return to work. The Railroad Retirement Board’s determination is conclusive. Accordingly, we conclude that the instant claim is without merit and must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of July 2014.