

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42023
Docket No. MW-41996
14-3-NRAB-00003-120311**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 withheld Mr. D. Stanton from service on December 8, 2008 and continuing until April 17, 2009 (System File C-09-P018-17/10-09-0227 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Stanton shall now be paid for all lost time from December 8, 2008 and continuing until he was returned to service on April 17, 2009.”**

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 has been employed in the Carrier's Maintenance of Way Department. He has a seniority date of April 10, 1980 and a Foreman seniority date of August 15, 2006. At times relevant to the instant dispute, he was assigned as a Section Foreman.

By a letter dated October 13, 2008, the Claimant was removed from service and placed on a medical leave of absence, based on the Carrier's concerns about his physical ability to perform the duties of his position. He was treated by his personal physician. On November 10, 2008, the Carrier's Medical Department provisionally issued the Claimant an unrestricted clearance to return to work, pending a satisfactory result from an onsite work assessment, which was scheduled and conducted on November 25, 2008. For that assessment, which was conducted by a Carrier representative, an Organization representative and a Physical Therapist, the Claimant performed the tasks required of his position.

The Carrier never provided formal or written documentation as to the basis for its determination. Following the assessment, the Carrier initially indicated that the Claimant had passed the test and that documentation would be forthcoming; however, the Carrier reversed its position and stated that the Claimant had not passed. There being no sedentary positions in the Maintenance of Way craft, the Claimant was not allowed to return to work.

The Carrier points to a statement by Physical Therapist Matt Miller, the third member of the assessment team, that the Claimant demonstrated "poor body mechanics," had a "significant amount of difficulty in climbing on and off rail cars" and was "winded and tired by the end of the 90 minute assessment." His conclusion was that the Claimant would put himself at risk by performing his job in his then-present physical condition.

Miller recommended a work conditioning program, to be conducted under medical supervision, to improve the Claimant's ability to perform his job safely. The Claimant declined the Carrier's assistance. On January 12, 2009, the Claimant requested another job assessment, but requested that it be delayed until his return from an upcoming medical leave of absence. Following that return, the Claimant was again assessed and was medically cleared. He was returned to service on April 17, 2009.

The Organization filed a claim on February 2, 2009, disputing the Carrier's continued restraint on the Claimant from returning to service. The Carrier denied the claim, both as untimely and on the merits. The Organization appealed the denial up to and including the Carrier's highest designated official, but without resolution. The Organization then presented the claim to the Board for hearing and decision.

The Organization argues that the Carrier failed to justify its continued withholding of the Claimant from service following its own unrestricted clearance of him to return to work. It asserts that the subsequent assessment-based denial voided that clearance based on assertions unsupported by evidence of record.

The Organization rejects the Carrier's timeliness challenge as ignoring the Physical Therapist's delays in finishing the report which gave rise to the claim. According to the Organization, the time allowed the Carrier to complete its documentation extended at least a week, placing the start of the time for the filing of a claim not earlier than December 1, 2008, thereby placing the Organization's February 2, 2009 claim less than the allowed 60-day period. Indeed, complains the Organization, there has never been documentation of a final medical determination. Thus, it argues, the claim was not and could not have been untimely.

The Organization argues that the results of the onsite work assessment as described in the record - in the form of a Maintenance of Way Foreman who witnessed it - establish that the Claimant performed all work tasks satisfactorily. The Organization complains that the basis for the Carrier's "about face" from clearing him to work is unsupported by evidence and resulted, in the Organization's view, from influence on the part of the onsite Supervisor who had initiated the complaint; it asserts that there is no direct evidence to support the Claimant's physical inability to perform the duties of his position. It contends that the unauthenticated evidence from the Physical Therapist is not based on any knowledge of the physical requirements of the Claimant's job.

The Organization asserts that after it presented a prima facie case establishing the Claimant's physical ability to perform his duties, it then became the Carrier's obligation to rebut that evidence. This contends the Organization, the Carrier failed to do, leaving only the unauthenticated statements from the Physical Therapist and the original complaining Supervisor.

Conversely, the Carrier argues, as an initial matter, that the claim is time-barred pursuant to Rule 42, which requires filing within 60 days from the date of the occurrence giving rise to the claim. It asserts that the time ran from November 26, 2008, when the field assessment was complete and the Organization's representative spoke with the Carrier and documented the conversation. It urges that the claim should be dismissed as untimely.

Assuming, for the purpose of argument, that the claim is found to be timely, the Carrier argues that it properly withheld the Claimant from service based on reasonable cause to conclude that he lacked physical fitness to perform the duties of his position. It contends that it had a duty to exercise its judgment in order to protect employees from injury. It contends that the record evidence establishes that both the Division Engineer and the Physical Therapist concluded that the Claimant had not been able to successfully complete the job assessment and that he would be a safety risk if returned to service. Only after he completed a later assessment was the Carrier warranted in returning him to service.

As to the Organization's argument that the Local Chairman determined that the Claimant had passed the assessment, the Carrier asserts that it is the Carrier's right and responsibility to make that determination and that it did so, based on the information supplied by the assessment team. As to the length of time the Claimant was withheld from service, the Carrier asserts that the period was based on the Claimant's own status and denies the existence of any evidence that it acted improperly.

The Carrier argues that it was the Organization's burden to prove any impropriety in its determination to withhold the Claimant from service for medical reasons, but that the Organization failed to provide any such information. As to the facts disputed by the Organization, the Carrier points out that determination of such conflicts is reserved to it, the Carrier; it urges that the Carrier's conclusion that the facts support its conclusions is binding.

Finally, the Carrier argues that the Organization failed to establish any entitlement to damages. It contends that (1) the Claimant was reasonably withheld from service following the November 26 assessment, (2) he was reasonably kept out of service based on that unfitness, (3) he took a voluntary medical leave of absence from

February 13 through March 31, 2009, and (4) he was reinstated within a reasonable time after passing a subsequent assessment conducted at his request. It contends that his later medical condition cannot be used to determine his earlier condition. The Carrier points out, in any event, that any monetary recovery would be offset by any outside earnings during the period he was off work. The Carrier concludes that, for those reasons, there was not, and cannot be any recovery by the Claimant.

It is well established that the right to determine an employee's medical fitness to perform the duties of his position rests with the Carrier and that the Carrier is within its rights to withhold an employee from service when it reasonably concludes that the employee is not medically fit. The purpose of such a determination is to ensure the safety of the employee and co-workers. It was the burden of the Organization to demonstrate the unreasonableness of the Carrier's determination or the length of time the Carrier withheld the Claimant from service. For the reasons which follow, the Board concludes that the Organization failed to prove that the Carrier acted unreasonably.

Initially, the Board is not persuaded by the Carrier's argument that the claim was untimely filed. There is a presumption of arbitrability; and, in the instant case, the evidence is that the occurrence giving rise to the claim was not the November 26 assessment, but the Carrier's final determination of the Claimant's unfitness and its notice of that determination. That happened less than 60 days before the Organization filed its claim. Therefore, the Board holds that the claim was not untimely.

The record evidence establishes that the Carrier made its determination that the Claimant was not physically able to perform the duties of his position primarily on the observations and conclusions of the Physical Therapist quoted above, that the Claimant was not physically able to perform. His statement was supported by Carrier representatives who observed the Claimant and who observed the onsite assessment. The Organization provided evidence from the Local Chairman, who also observed the onsite assessment, which it asserts established a prima facie case supporting the Organization's position. It urges that the burden of proof thereupon passed to the Carrier, which failed to meet it. The Board is not persuaded that the lay evidence provided by the Local Chairman was sufficient to establish a prima facie case; and so the burden did not shift.

The Organization challenges the Carrier's action withholding the Claimant from service on the basis that it was never provided with medical documentation of the reasons for the Carrier's action. However, it is not disputed that the Organization was advised of Miller's statement and conclusions, as described above. The Organization points to no specific procedure or timetable for providing the reasons an employee is withheld from service for medical reasons; and the Board finds no violation of the Agreement in the procedure used or the communication of the determination made.

The Board also finds that the Carrier acted within its authority in crediting the medical evidence, rather than the statement from the Local Chairman. The Board concludes that the Carrier reasonably determined that the Claimant was physically unable to perform the duties of his position and thus reasonably withheld him from service.

The Board notes that the Carrier recommended that the Claimant undergo a work conditioning program and offered assistance to him and his physician to structure such a program, but that the Claimant rejected the offer. That left the Carrier with no basis to conclude that the Claimant was, or had become, physically able to perform service. He delayed his return in order to take a medical leave of absence. The Board concludes that the Carrier was not obligated to return him to work during that period. Accordingly, the Carrier's first obligation to return the Claimant to work was when he passed the work assessment which he requested. The evidence establishes that the Carrier returned the Claimant to work within a reasonable time thereafter.

The Board concludes that the Carrier acted reasonably in withholding the Claimant from service and that it was not obligated to return him to service prior to the time that it did. Accordingly, the Claimant is not entitled to damages and the claim must be denied.

AWARD

Claim denied.

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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 28th day of August 2014.