

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42375
Docket No. MW-42574
16-3-NRAB-00003-140233**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when Mr. T. Lathrop was withheld from service beginning on August 15, 2011 and continuing (System File C-11-P018-27/10-12-0011 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Lathrop shall ‘. . . be immediately returned to full duty and paid for all lost time, both straight time and overtime, from August 15, 2011 until he is returned to full duty. Furthermore, I request that Mr. Lathrop be fully credited with vacation qualifying days for all days from August 15, 2011 until he is returned to full duty. ***’”**

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 July 26, 2011, the Claimant was released by his personal physician to return to work from a medical leave. He was told he would need to meet with a mental health provider before he could return to duty. The Claimant met with Sharon Hanson on August 15, 2011 and she forwarded a release to duty to EAP Coordinator Dennis Reinecker. Neither Reinecker nor Hanson are BNSF employees. BNSF did not receive the release to duty until October 4, 2011. The Claimant returned to service on October 6, 2011.

The Carrier asserts it is BNSF's medical department, not an employee's personal physician, who determines when an employee is ready to return to work. On October 4, 2011, LifeSynch's EAP Director, Amy Pool sent an email to Dr. Sharon Clark of BNSF's medical department and Organization Vice-Chairman Roy Miller, stating "[W]e are very close to being able to make the return to work recommendation with regard to EAP concerns. I would be happy to discuss Mr. Lathrop's status with you. What is your phone number? I can call you this afternoon." This email makes it clear that as of October 4, the Director was not yet ready to clear the Claimant to work.

The Organization argues the length of time the Claimant was withheld from service was improper. Medical evaluation showed him clear to return to work without restriction on August 15. As of September 6, the Carrier had received everything, yet on September 9, the matter was still pending with Dr. Sharon Clark of BNSF's Medical Department. Everything had been received at that point. To continue to withhold the Claimant was unreasonable and an abuse of discretion.

On September 6, 2011, Roy Miller wrote Field Manager for Medical and Environmental Health Daniel Best saying the Claimant had called to inquire about his return to work. Best replied: "I believe MCMC has received everything provided by this employee. It appears that Dr. Sharon Clark (BNSF Medical Officer) is currently reviewing the case, is in contact with EAP, and is in the process of obtaining additional information and analyzing his fitness for duty. Once the fitness for duty review is complete Mr. Lathrop will be notified." This correspondence establishes that the BNSF Medical Department was in contact with

EAP regarding the receipt of additional information and had not completed its review.

On September 9, Miller inquired of Best again, and Best responded, stating “All I know is that it is still with Dr. Clark in Ft. Worth. Yesterday I spoke to the nurse case manager handling the case and she acknowledged that Dr. Clark has it. Sorry that is all I can tell you at this point.” This evidence indicates that the Claimant’s return to work was still under review with the BNSF Medical Department as of September 9.

The most telling communication was the October 4 email from the EAP to Dr. Clark stating there were continuing EAP concerns. This correspondence establishes that the delay was not a result of administrative negligence, but rather sourced in some questions that needed to be answered before the Claimant could be returned to work. Dialogue needed to occur between the Medical Department and the EAP. There is no showing that EAP intentionally withheld information from the Medical Department or that the Medical Department ignored its need to communicate with EAP.

The existence of EAP concerns that required communication between EAP and the BNSF Medical Department negates any conclusion that the delay was arbitrary or capricious. The evidence establishes that the Claimant could not have been cleared to work as of the sending of the October 4 email. It follows that the release to work two days later did not constitute an unreasonable delay.

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 30th day of August 2016.