

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42762
Docket No. MW-42961
17-3-NRAB-00003-150011**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier wrongfully removed and withheld Claimant J. Snyder from service on May 15 and continuing until June 4, 2013 (System File Snyderc.113/2013-145674 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Snyder shall now be compensated for all ‘... wages, benefits, and credits....’ suffered as a result of the Carrier removing and withholding him.”**

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.

While the Claimant was working on May 15, 2013, the Roadmaster became concerned about his physical well-being. She consequently, at approximately 5:00 P.M., removed the Claimant from service and advised him to see his personal physician for a medical evaluation. She provided the Claimant with the forms he would have to present in order to return to service. The following day she filed a "Withheld from Service Form" with the Carrier's Medical Department, stating she "noticed shortness of breath while working, also frequent exhaustion and confusion." In describing the circumstances relevant to her action, the Roadmaster wrote:

"I watched the employee working today and he became extremely short of breath. Also, other employees have expressed concerns about his exhaustion. I have also noticed the employee struggling to perform his physical work throughout the day with bending and up and down movements. When talking to the employee he a lot of times becomes confused with the job task."

The Claimant did not see his personal physician until May 30, 2013. The doctor prepared a report indicating the Claimant could return to work the following day without restrictions. This report was sent by fax to the Carrier's Medical Department and received at 2:35 P.M. the same day. The Claimant returned to work on June 4, 2013. In accordance with the Carrier's practice in such circumstances, the Claimant received the compensation he would have earned for the first five workdays following his being removed from service. Accordingly, he was paid through May 22, 2013. This claim seeks the balance of the earnings he lost until his return to work.

The respective rights of the Carrier and the affected employee were addressed in Third Division Award 41393, stating:

"It is well-established that the Carrier may withhold employees from work pending medical determination of their fitness for duty; indeed, some Awards have indicated that the Carrier "... has a duty to remove from service employees who are physically unqualified for their jobs." (Third Division Award 25186) The Organization is correct that the Carrier's latitude to withhold employees is not unfettered, but that latitude is broad. The Carrier must have a "rational basis" for its

determination, or “reason to believe the employee’s continued service may jeopardize his health or safety, or that of his fellow workers.” (Second Division Award 12193)

* * *

Even if the Carrier has a rational basis to withhold an employee from duty, the Board has held that when it does so, it bears what Referee Dana Eischen called in Second Division Award 7033 “the risk of fallibility.” The initial decision to withhold is not made by a doctor – that is what “withheld pending medical evaluation” means. The decision is made by a Supervisor or other management official. If the Carrier is wrong in its initial assessment and the employee is medically able to perform his or her job, the employee will have lost pay for time that he or she could have worked but was held off work. The “risk of fallibility” is another way of saying that if a physically qualified employee is held off work pending medical evaluation, it is the Carrier, not the employee, who should bear the financial consequences of its decision to withhold the employee from work.”

In the instant case, while his doctor reported four diagnoses of chronic conditions, no treatment was prescribed and no restrictions were placed upon the Claimant’s return to work. As was found in Award No. 41393, “There is no reason why he should suffer the loss of pay occasioned by the Carrier’s concerns about his health.” We find, therefore, that the Claimant should be made whole for the time lost as a result of his being held out of service. On the other hand, Second Division Award 12193, authored by the Referee herein, recognized that the employee, when responsible for a delay in obtaining a medical evaluation, must bear some responsibility for the amount of time lost. In this case, the Board finds that the Claimant’s delay in not seeing his personal physician for two weeks should not subject the Carrier to an excessive penalty. The Board concludes that the Carrier’s payment of lost earnings for five workdays satisfied its obligation to make Claimant whole. Consequently, we will not award a monetary remedy.

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 September 2017.