

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42978
Docket No. MW-42882
18-3-NRAB-00003-150076**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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 improperly removed and withheld Mr. P. Heaton, III from a foreman position beginning on September 10, 2013 and continuing through October 2, 2013 (System File C-13-P018-46/10-13-0677 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant P. Heaton, III shall ‘... be paid for all lost straight time and overtime lost as a result of this improper removal from service. As well as being credited for all vacation qualifying days and any benefits lost during this time frame.”**

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.

This claim concerns whether the Carrier violated the Agreement when it held the Claimant out-of-service for medical reasons. The Claimant has established and holds seniority with the Carrier's Maintenance of Way Department, and at the time the dispute arose, he was assigned as a Foreman.

On June 26, 2013, the Claimant was taken out of service for medical reasons, and he was returned to service on July 10, 2013. On September 10, 2013, the Claimant's supervisor received a report that the Claimant had symptoms similar to those he experienced earlier that summer that kept him out of work. It is not clear in the record whether this report was made by the Claimant or one of his coworkers. In any event, the Claimant's supervisor took the Claimant out of service pending medical review of the Claimant's fitness for duty.

After the Claimant informed the Carrier that his doctor was not available until October 17, 2013, the Carrier was able to arrange for the Claimant to see another doctor sooner. The record is not clear when this examination occurred. There is a doctor's note in the record indicating that the Claimant was seen on September 11, 2013, but the Carrier claims the examination occurred on September 12, 2013. There is also a dispute over the results of the examination. The doctor's note dated September 11, 2013, states that the Claimant "may return to work today" and "[h]e has no medical condition that should interfere with his ability to safely do his job." The Carrier contends that the Claimant's doctor opined that the Claimant should be able to go back to work as long as he did not work "in the heat," but there is no documentation in the record from the doctor to support that contention.

Based on the Carrier's concern with the heat limitation, it sought to get additional information from the Claimant's doctor before clearing him to return to work. The Carrier submits that it communicated such to the Claimant and that it made several unsuccessful efforts to contact the doctor. The Carrier contends that it finally was able to speak to the doctor's office on October 1, 2013, and it learned that the Claimant did not have medical restrictions that would preclude him from returning to work.

The Organization argues that once the Claimant's doctor returned the Claimant to work without reservation, it was incumbent on the Carrier to return

the Claimant to work promptly, unless another cause reasonably suggested itself as fresh grounds for disqualification, and that no such grounds existed here. The Carrier argues that it has a broad right to determine the physical fitness of its employees and has the right to withhold them from service until they are determined to be physically qualified to work. The Carrier argues that it operated within these rights when it held the Claimant out of service.

It is well-settled that a Carrier may withhold employees from work pending medical determination of their fitness for duty and that the Carrier has broad, but not unfettered, latitude do so. The Carrier must have a rational basis for its determination, or reason to believe the employee's continued service may jeopardize the employee's health or safety, or that of the employee's fellow workers. See Third Division Awards 12193, 25186, 41393, and 42762. At the same time, even if the Carrier has a rational basis to withhold an employee from service, it bears the "risk of infallibility," such that if the Carrier is wrong in its initial assessment or the employee could have been put back to work sooner, it is the Carrier, not the employee, who should bear the financial consequences of its decision to withhold the employee from work. See Second Division Awards 6561 and 7033, and Third Division Awards 41393, and 42762.

When a Carrier has exercised its right to withhold an employee from service due to physical disqualification and there is a dispute over whether the employee was physically qualified, the burden of proving disqualification rests with the Carrier. As explained in Second Division Award 6561:

"The Carrier's finding of a physical disqualification gives rise to a dispute and the burden of proving the physical disqualification by substantial material evidence of probative value is upon the Carrier. The sole issue before the Board is whether the Carrier satisfied the burden. It is the opinion of the majority of the Board that the Chief Surgeons [sic] that the Claimant was physically disqualified is not supported by substantial evidence of probative value. The Carrier's finding, to prevail, required medical evidence to sustain it."

In the instant case, there is a dispute over whether the Claimant was fit for duty. Regardless of whether the Claimant or a coworker informed the Claimant's supervisor that the Claimant was exhibiting symptoms that put his fitness in question, the Carrier properly withheld the Claimant from service pending a fitness

for duty evaluation. That evaluation occurred the next day by a doctor identified by the Carrier, and, as stated in a letter from that doctor, the Claimant was cleared to return to work and found to have “no medical condition that should interfere with his ability to safely perform his job.” The Carrier did not provide any medical evidence to dispute this letter. The Carrier’s evidence consisted of an email from its Medical and Environmental Health Manager that was written ten months after the incident. This email primarily contains hearsay accounts of communications between the Carrier and the doctor’s office, and are of little probative value in assessing the Claimant’s fitness for duty.

In short, the best evidence of the Claimant’s fitness for duty is the doctor’s note of September 11, 2013, stating that the Claimant may be returned to work that day. The Carrier has not meet its burden to provide medical evidence that the Claimant should have been held out of service after that day.

AWARD

Claim sustained.

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 14th day of February 2018.