

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43245
Docket No. MW-43912
18-3-NRAB-00003-160636**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier withheld Claimant Mr. N. Rausch from service pending a medical evaluation. From April 1, 2015, until April 8, 2015 (System File 2433-FR90-151/12-14-0137 SLF).

(2) As a consequence of the violation referred to in Part (1) above, Claimant N. Rausch shall be compensated forty (40) hours straight time and twenty (20) hours and ten (10) minutes overtime.

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 Organization filed a claim alleging that the Carrier violated the Agreement when it failed to pay the Claimant for the time he was withheld from service pending a medical evaluation. The Claimant was cleared to return to work.

The Carrier counters that there is no Rule violation presented in this Claim. Carrier was solidly within their right to send the Claimant for an evaluation based upon his worrying behavior. The Carrier argues that the Claimant was acting in an alarming manner. It was brought to a supervisor's attention and the Claimant was removed from service pending a medical evaluation. The Carrier followed the safe course for fear that the Claimant was a risk of harm to himself or others. The Carrier has a responsibility to provide a safe workplace for the Claimant and his coworkers.

This Division has reviewed the record. The only information about his condition was that he was returned to work and had a mandatory referral to EAP. The Claimant was not withheld from service following his evaluation and was cleared to return to work.

Third Division Award 41393 is instructive in its discussion of the "rule of fallibility." That analysis recognizes that the Carrier has a right to remove employee for evaluations. However, that right is not unfettered.

The Rule of Fallibility recognizes that co-workers and supervisors from a non-medical background can be alerted to a co-workers condition. As in Award 41393, and the other Awards cited by the Organization, the Carrier has the right and responsibility to have an employee evaluated.

Award 41393 and the other Organization-cited awards recognize the limitations on the Carrier's right to evaluate employees. There is no question that the Carrier had the right to send the Claimant for a fitness evaluation based upon how the Claimant was acting on the work site. However, having the right to send an employee for an evaluation does not end the inquiry when, as here, the employee was not withheld by the medical evaluator.

As discussed in Award 41393, the onus is not upon the employee who has been sent for an evaluation and for whom there was nothing that would warrant

withholding them from service. The Rule of Fallibility places the onus directly on the Carrier. If the decision to withhold an employee pending a medical evaluation results in the employee being cleared, it is the Carrier, and not the Employee, who should bear the burden of that mistake.

Here, the Claimant was sent for a medical evaluation and was cleared to return to work. As discussed in Award 41393, he should not bear the burden of being withheld from service for no valid medical reason.

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 26th day of June 2018.