

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43384
Docket No. MW-42560
19-3-NRAB-00003-140200**

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

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

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and withheld Mr. J. McCaslin, Jr. from his assigned truck driver position on Gang 9441 beginning on January 16, 2013 and continuing (System File D-1350U-301/1580500).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. McCaslin, Jr. shall ‘... be allowed compensation equal to the amount he would have received absent the clear and obvious violation of the Agreement. That is, Mr. McCaslin must be allowed compensation for all hours he was not allowed to work commencing January 16, 2013 and continuing until he is returned to service. This shall include all hours he would have been entitled, both straight time and overtime, had the violation not taken place.’”

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 worked as a truck driver on Gang 9441. On January 16, 2013, the Claimant was advised by his supervisor that he was being removed from service pending review by the Carrier's Employee Assistance Program (EAP). The Claimant was supplied a letter dated January 16, 2013, from Track Supervisor Ran Jaure, detailing the basis for the EAP referral and his removal from service.

After contacting the EAP, the Claimant was referred to Licensed Clinical Psychologist Michael Tandy, PhD. Dr. Tandy met with the Claimant on February 8th and 12th, 2013. On February 13, 2013, Dr. Tandy wrote a letter to the Carrier's EAP Manager detailing his assessment of the Claimant. Evidence indicates that Dr. Tandy again saw the Claimant on February 28, 2013, and then reported his findings to the Carrier's EAP Manager. On March 5, 2013, the EAP informed the Claimant he was medically cleared to return to work with no restrictions.

It should be noted the Claimant also met with his personal clinician, Brian Raymond, LCSW, after he was removed from service. Mr. Raymond saw the Claimant on both January 21st and 23rd, 2013, and wrote a report of his findings on January 25, 2013.

In summary, the Organization makes the following arguments:

- "1. The Carrier abused its discretion in withholding the Claimant from service when two clinicians had found the Claimant fit for work.**
- 2. Even assuming the Claimant was occupationally impaired, the Carrier still failed to properly accommodate the Claimant."**

In summary, the Carrier makes the following arguments:

- "1. It was proper to remove the Claimant from service based upon the Claimant's observed behavior detailed in the January 16, 2013 letter from Supervisor Jaure.**

- 2. The Carrier had the sole responsibility to determine when the Claimant was safe to return to work.**
- 3. The Organization failed to establish the Agreement was violated.”**

The Carrier has the right to remove employees from service regarding fitness for duty examinations provided the Carrier’s decision to exercise this right is not arbitrary. Here, the Claimant’s supervisor detailed specific, observable behaviors displayed by the Claimant leading to the referral and removal from service. These observable behaviors were not refuted. The supervisor’s referral and the Claimant’s removal from service were proper and reasonable.

There are only two detailed medical assessment reports contained in the evidence file, one from the Claimant’s clinician and the other from the Carrier-referred psychologist. The first report is from the Claimant’s clinician Brian Raymond, LCSW, dated January 25, 2013. In relevant part, Mr. Raymond’s report states the following regarding the Claimant’s ability to return to work:

“...During my two interviews in January 2013 with Mr. McCaslin, I do not believe him to be a threat to himself or to others both at home and on the job...I believe that it is safe for Mr. McCaslin to return to work immediately in order to be able to support himself and his family...”

The second detailed medical assessment report contained in the evidence file is from Carrier-referred psychologist Michael Tandy, PhD. Dr. Tandy met with the Claimant on February 8th and 12th, 2013. On February 13, 2013, Dr. Tandy wrote a letter to the Carrier’s EAP Manager detailing his assessment of the Claimant. In relevant part and under the heading titled “Executive Summary”, Dr. Tandy states the following:

“...There is no evidence from our clinical interview, intake history, or his responses to testing that Mr. McCaslin is a danger to himself or others, or that he is unable to perform his duties for the railroad. I cannot recommend that he be held out of work for any of these acute reasons...”

The Carrier argues, and evidence suggests that the Claimant was seen again by Dr. Tandy on February 28, 2013. However, the record is void of any detailed medical assessment regarding the February 28, 2013 meeting. The record is also void of any

communication from Dr. Tandy to the Carrier's EAP Manager regarding the February 28, 2013 meeting.

Again, the only detailed medical assessment reports in the record are the January 25, 2013 report from the Claimant's personal clinician, Mr. Raymond, and the February 13, 2013 report from Carrier-referred psychologist, Dr. Tandy. Mr. Raymond, and more importantly, Dr. Tandy both indicated the Claimant was able to return to work. There is no detailed medical evidence in the record explaining why the Carrier waited until March 5, 2013 to return the Claimant to service.

As stated above, the Carrier had the right to withhold the Claimant pending an EAP assessment. The Carrier-referred psychologist Dr. Tandy released the Claimant for work on February 13, 2013. The record is void of any detailed explanation as to why the Claimant continued to be withheld from service until March 5, 2013. As such, the Board finds the Claimant is to be compensated for all hours he was not allowed to work commencing February 14, 2013 and continuing until he was returned to service on March 5, 2013.

Although the Board may not have repeated every item of documentary evidence or all the arguments presented, we have considered all the relevant evidence and arguments presented in rendering the Award.

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 18th day of January 2019.