

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43803
Docket No. SG-44788
19-3-NRAB-00003-180221**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly C&O, Chesapeake District):

Claim on behalf of S. Conrad, for \$1340.31 (43 hours at his applicable rate) and \$248.10 in lost per diem expenses, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule and Rules 7, 8, 17, and 51, when, from July 12-26, 2016, Carrier improperly withheld the Claimant from service and required him to attend a medical examination without properly compensating him. Carrier’s File No. 2016-211471. General Chairman’s File No. HOCK-0009-18. BRS File Case No. 15748-C&C(CD). NMB Code No. 4.”

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.

At the time this claim was filed, the Claimant, S. Conrad, was assigned as a Signalman on Force 7Z22, with assigned hours of 7:00 A.M. to 5:00 P.M., working an 8-on/6-off schedule. He fell ill after work hours on July 19, 2016, and took the day off work on July 20, 2016. On Thursday, July 21, 2016, Claimant returned to work but was removed from service sometime in the afternoon by his supervisor, Signals Engineer Chuck Hendershot, after the Claimant told Hendershot that he was ill, he did not feel “safe,” and that he was concerned that with his “state of mind” he could possibly get someone hurt. Mr. Hendershot was concerned about Claimant’s safety and well-being and withheld him from service pending a medical exam. He gave the Claimant an MD3 form to be filled out by his personal physician and returned to the Carrier’s Medical Department for review. The Carrier’s policy is for employees to be paid up to five (5) days’ wages while they obtain an examination by their physicians.

On Friday, July 22, 2016, the Claimant was examined by his physician, who cleared him to work and faxed the MD3 form to the Carrier’s Medical Department that same day. The Claimant telephoned the CSX Medical Department to make sure it had received the report from his doctor; a nurse returned his call at approximately 4:30 P.M. and told the Claimant that he was cleared to return to work. According to the Carrier, the Medical Department followed its standard practice and instructed the Claimant to contact Mr. Hendershot about returning to work as soon as possible. According to the Claimant, he was informed by the Medical Department that they would contact his supervisor, who would contact him to let him know when to return to work. At about 12:15 P.M. on Monday, July 25, 2016, Hendershot called the Claimant, wanting to know where he was and why he had not called him back. Claimant explained that he had been told to wait for Hendershot’s call to him. Hendershot instructed him to return to work on Tuesday, July 26, 2016.

After the Claimant returned to work, he was notified that he was being charged as absent on July 23, 24 and 25 because he had not reported to work.¹ The Carrier refused to pay for any of the time he was gone, three hours on July 21 and all day July 22-25, 2016.

¹ The Claimant was not charged with formal absenteeism, and that issue is not part of this claim.

The Organization contends that the Carrier acted arbitrarily and in violation of Rule 55 in refusing to compensate the Claimant for the time he was off work due to the medical examination required by the Carrier. The Claimant was removed from service and told to get a fitness for duty exam from his personal physician, which he did. He followed the instructions he was given, with respect to getting the exam and with respect to waiting to be contacted by his supervisor about when he could return to work. The Carrier's policy is to pay employees up to five days to get such exams, and its failure to compensate the Claimant is both arbitrary and in violation of Rule 55 of the Agreement. The Carrier relies on the July 22, 2016, letter from the Medical Department to the Claimant, informing him that he was cleared for service and that if he had not heard from his supervisor, he should contact him. However, the Claimant did not receive the letter until July 28, 2016, after he had already returned to work. The Claimant should be reimbursed for all time he lost due to being withheld from service pending medical examination.

According to the Carrier, the Organization has failed to show that the Carrier violated any rules or agreements. The Carrier has the right to withhold an employee from service pending examination if it reasonably believes that the employee is ill or impaired to the extent that he poses a hazard to himself or others. The Carrier acted reasonably in removing the Claimant from service after he complained about his health and ability to work safely. Nor did the Carrier violate any rule or agreement when it failed to compensate the Claimant for the time he was off work. The policy is a voluntary one that compensates employees who have been held out of service for *up to* five days. Employees who are fit to work and fail to report for work cannot and should not receive compensation through this policy. Any alleged loss of work opportunity is a result of the Claimant's own failure to contact his supervisor for instructions on returning to work. There is a Carrier practice whereby employees are directed by the Medical Department to contact their supervisor for return to work instructions. This is evidenced in the Medical Department's July 22, 2016, letter to the Claimant, which instructs him to contact his supervisor if the supervisor has not contacted him. Hendershot's e-mail, which is in the record, confirms that the nurse, Kelly Caudell, followed the procedures and script established by the Medical Department and told the Claimant that he should contact his supervisor for instructions on returning to work.

The Board finds that the Carrier acted reasonably when it withheld the Claimant from service on the afternoon of July 21, 2016, pending the results of a medical examination—he had been ill for several days and had expressed concern about the state

of his health that in turn raised concerns on the part of his supervisor. The Claimant was able to see his personal physician the next day, July 22, 2016, and obtain clearance from him to return to work. The physician faxed the results of his examination to the Carrier's Medical Department, which agreed that the Claimant could return to work the next day, July 23, 2016.

It is at this point that the record of what happened next becomes murky. According to evidence from the Claimant, the Medical Department told him to wait until his supervisor contacted him with instructions on when he could return to work. According to evidence from the Carrier, the Medical Department told him to contact his supervisor to get instructions on when he could return to work. It is impossible for the Board to determine what the Claimant was actually told. When there are disputes in material facts like this, the Board must dismiss the claim as unproven, and it will do that with respect to the claim for compensation for July 23, 24 and 25, 2016.

However, there is no dispute that the Claimant was withheld from service pending medical examination for approximately three hours on July 21, 2016, and for the entire day on July 22, 2016, while he obtained the physician's examination required for him to return to work. The Carrier has an established policy of compensating employees under these circumstances for up to five days' wages. The record establishes that the Claimant was not paid for three hours on July 21, 2016, and he should have been. The Board is unable to determine from the record before it whether he was compensated for July 22, 2016,² but he should have been. The Board will accordingly remand the matter to the parties for them to review the Claimant's payroll records for July 22, 2016, and to compensate him for a full day's wages if he was not already compensated. The Board notes that the claim is for both wages and per diem. Per Diem is paid only to employees who actually work, so the Claimant is not entitled to any compensation for per diem he missed while awaiting his medical examination and return to work.

AWARD

Claim sustained in accordance with the Findings.

² The Carrier contends that a payroll correction was issued to pay the Claimant for July 22, 2016, but the Board is unable to decipher the payroll records to determine if that happened.

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 16th day of July 2019.