

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43957
Docket No. MW-43115
20-3-NRAB-00003-190390**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 Carrier violated the Agreement when it removed and withheld Track Inspector J. Brock from service beginning on January 13, 2014 through January 27, 2014 (System File S-P-1841-G/11-14-0158 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Brock shall be allowed ' ... 85 hours of straight time 16 hours overtime and reimbursement for the 272 miles at the current mileage rate.’”**

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.

On January 13, 2014, the Carrier removed the Claimant from service allegedly until he completed a respirator fit test. The Carrier released him for service on January 27, 2014, even though he did not undergo any respirator fit test. Applicable provisions of the parties' Agreement states as follows:

"RULE 23. FAILURE TO QUALIFY

- A. Employees awarded bulletined positions, or employees securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company.

NOTE: 'Without additional expense to the Company' is understood to mean that an employee qualifying on a position will be entitled to the rate of pay he was receiving on his immediately previous assignment.

- B. An employee failing to qualify for a position secured by bulletin, or in exercise of seniority will be given notice in writing of reason for such disqualification."

The Organization notes that CHS, the contractor hired by BNSF to conduct respirator fit testing, was advised in back in 2011 that the Claimant was unable to wear a standard respirator. The Organization maintains that the Claimant has never in his career needed to wear a respirator. It notes he did not have a respirator fit test in either 2012 or 2013. It concludes he was wrongfully held out of service for no good reason. In its view, the Carrier's unreasonable handling of the Claimant's situation was in violation of the Agreement and caused the Claimant to lose compensation without any reason at all.

The Carrier maintains that a certified letter was sent to the Claimant on November 1, 2013 and a second certified letter was sent to him on December 2, 2013. Both letters stated the deadline for respirator fit testing was Tuesday December 31, 2013, and both included instructions for getting respirator fit tested. Each letter also explained if an employee fails to become fit tested by December 31, 2013, he/she will be

disqualified/removed from service and will be unable to hold, bump or bid to any Maintenance of Way position until respirator fit tested.

The Claimant did not get fit tested by December 31, 2013, and accordingly was disqualified from his Track Inspector position on January 6, 2014. Upon returning from vacation on January 14, the Claimant contacted Director Maintenance Support Melodi Tripp, advising that he had a medical condition that prevented him from wearing a respirator. Tripp informed the Claimant that if an employee had a medical condition preventing him/her from wearing a respirator, the employee needed to go through a medical accommodation process. She advised him on how to begin the process.

On January 24, 2014, BNSF Maintenance was notified that the Claimant was approved for a medical accommodation and a Human Resources Field Manager would schedule a meeting and train him on how to use the Positive Air Pressure Respirator (PAPR). The Claimant Brock was recalled to a Track Inspector position at Vancouver effective January 27, 2014. The Carrier denies that this accommodation process was anything but proper and necessary. It argues the Claimant chose to be taken out of service rather than the other way around.

We are not persuaded that the Carrier acted in an unreasonable fashion in this instance, or that its actions were in breach of the parties' Agreement. The Carrier is responsible for compliance with all applicable safety regulations. Any past lapse in officially designating or recording an accommodation would by no means serve as a reason to avoid doing it in the future. Despite multiple, clear communications that the fit testing was being required, the Claimant chose of his own volition not to comply. In so doing, he opted for the consequence of being relieved from service. The Carrier's handling of this matter may not have been smooth, but a contract violation does not exist.

AWARD

Claim denied.

ORDER

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This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of March 2020.