

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44240
Docket No. MW-44749
20-3-NRAB-00003-180068**

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 (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 withheld Mr. B. Bird from service from his position on Gang TCGX0004 beginning on June 23, 2016 and continuing through July 11, 2016 (System File C-16-P018-9/10-16-0323 BNR).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant B. Bird shall now' ... be paid (1) for all straight time hours, overtime hours, and Holiday pay, at the appropriate rate of pay, for everyday that the Claimant was improperly withheld from service by the Carrier; (2) be paid his Rule 38 Per Diem for everyday that he was improperly withheld from service; (3) be paid for two (2) round trip Pay Code 55 Travel Allowance payments for the two (2) round trips that he would have made from his residence in Bartley, Nebraska to Council Bluffs, Iowa, where gang CG-04 was working, and then back to his residence; and (4) be given credit for all days for which qualifying days are required, such as vacation qualifying days, as well as, any additional benefits lost during this time frame, as settlement of this clam (sic).”**

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 facts of this case are unique. Prior to June 22, 2016, the Claimant had inquired of his Roadmaster if he could take time off in order to move his family. He wanted to use personal leave rather vacation days. His request was denied. He approached his union representative and was assured he had rights. He again inquired of his Roadmaster and the denial was reiterated.

On June 22, 2016, the Claimant's Roadmaster performed an audit of the Claimant's assigned machine. The Claimant asked for witnesses to this audit, fearing that it was retribution for his requests and assertion of rights. He was denied witnesses and his Roadmaster started to make phone calls. The Claimant became visibly disturbed. When the Roadmaster asked if he was okay, he responded that he felt like he was being targeted and retaliated against. He declined an offer of medical attention but told his Roadmaster that he did not feel comfortable operating his machine at that time.

The Roadmaster issued a letter to the Claimant relating the Claimant's articulation of discomfort operating his machinery safely. The letter placed the Claimant on a two (2) week medical leave of absence and required him to contact the Carrier's Medical Department. The Claimant protested that he had not expressed any lack of confidence in his ability to work safely and had no anxieties beyond those created by the Roadmaster's current behavior. He tried to record the conversation with his Roadmaster and to get union representation on speaker

phone, but the Roadmaster threatened the Claimant with disciplinary charges if he persisted in these efforts.

The Claimant followed up with the Carrier's Medical Department and, by letter dated June 27, 2016 was referred to the Carrier's Employee Assistance Program for a fitness for duty evaluation. On June 28, 2016, the Claimant underwent a comprehensive biopsychosocial assessment that found his anxieties exclusively tied to the situation with his Roadmaster at work. The assessment further found that the Claimant had reacted "appropriately" to the stressful situation with his Roadmaster and was "fit to return to work." the Claimant was not given medical clearance by the Carrier to return to work until July 8 and did not return until July 11, 2016.

The Carrier maintains that when the Claimant informed his Roadmaster of not feeling he could safely operate his machine due to "significant symptoms of anxiety," the Roadmaster was reasonably concerned for his safety and well-being. It argues the Claimant's removal pending medical review and fitness for duty evaluation was entirely appropriate.

Grievant made a contemporaneous statement regarding the incident, which provides as follows in pertinent part, copied *verbatim*:

"I just finished up greasing my machine for the days work started it and was going to maintenance done in the log book when I was contacted on the radio by Mr. Gibson. He requested I shut down my machine and de-energize it so I did so. I started to worry that I was being targeted in retaliation for the previous couple days incidents. I exited the machine and met him as he was headed my way. He was going to do a machine audit. I asked Butch to be a witness Mr. Gibson told him to get welding. I requested a witness to the audit. He denied it. Mr Gibson said there was to much work to be done. I said there is a train called through our Form B could one of those guys that stopped working witness. He said yes. I said thank you. We took about three steps when Mr Gibson stopped and said I don't have to do that, smiled and started making phone calls. I fallowed him to listen till he Told me to stay right where I was. At this point I was scared, mad and shook up starting to fear I was going to get some kind of punishment. I started to

get shaky and weak in the knees as a responses to the fear. When he came back he asked if I was ok I said I feel like I am having anxiety. Mr. Gibson asked why? I stated because I was afraid I was being targeted and retaliated against for asking the Union for advice. Th only response I got to this was he asked me to define retribution. He asked if I needed medical attention. I said I just need to calm down. He was taking notes but didn't right everything down just select things. Once I said I didn't need medical attention. I stated that I did not feel comfortable operating my machine with my current state of mind do to the destruction of our current working relationship and the fear of further retribution. He started making phone calls again and I was sent to the van to sit down. When he returned to the van he called Jason the assistant Forman over to witness me saying why I didn't feel comfortable operating my machine at which point I stated the same as above. Then he grabbed another witness (Tyler Collins) to ride to the section house at Flynn yard. We sat in the section house as he used the Computer and would make or take calls each time leaving the room so we could not hear. Then he presented me with a letter stating 'Per our discussion today, you told me that you did not feel you could safely preform your job due to have significant symptoms of anxiety.' Which I never said. I tried to put a union rep on speaker phone when he was presenting it to me at which time Mr. Gibson threatened me with failure to comply if I did not hang up. Then I tried to record the conversation and was told it was against rules to record a BNSF Employee and received the same threat as previously stated. Tyler Collins was witness to all that happened in the section house."

At his psychological assessment, the Claimant related that during the confrontation he sat down on the ground and said he just needed to calm down. He asked if he could go sit in the van, and eventually they went to the office. He said he was asked to sign a letter saying he needed an assessment before returning to work. The Assessment states as follows in pertinent part:

"Therapist's Recommendations for Treatment: Benjamin completed an assessment. He would be diagnosed with an adjustment disorder with anxiety due to trying to cope with an anxiety provoking situation at work, where he felt 'targeted and a possible victim of retribution' by

his Roadmaster. He appears fit to return to work. He expects no more issues with his Roadmaster and has a plan to deal effectively with his Roadmaster, but if he continues to feel targeted, he would be recommended to seek further counseling in order to deal with the situation. He is discharged and appears fit to return to work.

He was not referred anywhere for treatment.”

The Organization points out that the Carrier never provided any documentation from a medical professional which would serve to counter the sole professional medical opinion of record: that Claimant was ready to render service on behalf of the Carrier as he had done prior to June 22, 2016 without issue. It characterizes the removal as retaliatory pretext for the Claimant’s seeking his union's support.

Though it is undisputed that Foreman Jason and T. Collins were present during parts of the exchange between the Claimant and Gibson, no statement from either was included in the record. The Claimant’s repeated efforts to obtain witnesses were rebuffed. The absence of statements from eyewitnesses strikes the Board as a lapse that properly leads to an adverse inference against the Carrier. It will therefore be assumed that to the extent conflict exists between the Claimant’s and Gibson’s renditions of events, the Claimant’s version should be deemed the more reliable.

Both parties have cited numerous awards as precedent in this case. The Organization provided guidance by pointing to Second Division Award 12193, where the Board affirmed the Carrier’s right to remove an employee for fitness evaluation, but applied the standard that such action cannot be arbitrary or unreasonable. In that case, the Carrier offered no explanation for its action, and the claim was accordingly sustained. We are fully persuaded by this analysis. In order to protect the health and safety of its work environment, the Carrier must have the authority and discretion to remove employees pending fitness evaluations when such fitness is properly called into question. As with other discretionary decisions made by an employer, managerial discretion must be deemed abused when the employer’s actions are arbitrary, capricious, discriminatory or unreasonable. This is the standard we will apply here.

The cases cited by the Carrier involving employee physical evaluations were distinguishable in that it was clear in each of those cases that the Carrier had an objective basis for seeking medical evaluation. In Third Division Award 35626 the employee had excessive sugar in his urine and the Carrier properly exercised its discretion to withhold the employee until it was under control. In PLB 6006 Award 127, the employee had had a seizure and the Carrier wanted more information which the Claimant failed to timely provide. In Third Division Award 30906, the employee suffered from dizziness, diarrhea and unsteady gait, establishing a firm basis for questioning fitness. In Third Division Award 19328, the Claimant had impaired vision, and was effectively blind in one eye. One cannot reasonably doubt the need for a fitness evaluation in such a case. In Third Division Award 32197, the Claimant's foot was edemous and painful following surgery, another firm basis for seeking confirmation of fitness. In PLB 2960, Award 162, the Claimant's right shoulder had a tendency to dislocate and the Carrier quite reasonably wanted additional information. In First Division Award 15765, the Claimant was recovering from a serious accident, and when offered the opportunity, declined to accept independent medical evaluation. Each of these cases clearly demonstrates an objective and reasonable physical basis for the Carrier's actions.

The Carrier also offered precedential cases dealing with psychological issues and conduct. In Third Division Award 33627, the Claimant apparently exhibited multiple and repeated instances of jittery behavior, being jumpy and lacking concentration. We agree with the reviewing Board that such on-going conduct warranted medical assessment. In Third Division Award 35370, the Claimant was carrying pepper spray or mace and a stun gun because he believed cult members were following him at work. The Carrier's Medical Director removed him for evaluation. We agree with the reviewing Board in that case that the Director acted in a reasonable manner.

The question before this Board is whether the Carrier abused its discretion in requiring proof of fitness for duty after the events of June 22, 2016. In considering this question we note that supervision is not expected to have the skills of a counselor or the patience of a monk. Rather, a supervisor's response to an employee's anxiety need only be reasonable under the circumstances. In order for Gibson's actions to be deemed reasonable we require a showing that the Claimant's behavior constituted a credible basis for questioning the Claimant's general fitness

for duty. Given the facts of record, we find the Roadmaster did indeed abuse his managerial discretion.

The Claimant made it clear that he was suffering from anxiety. He said he just needed to calm down. He explained he was not comfortable operating his machine at the time and plainly asserted he did not need medical attention. As indicated earlier, the Claimant's version of the exchange is accepted as opposed to Gibson's because there were witnesses whose statements either were not taken or were not made available as part of the record. This lapse in the evidence properly results in an adverse inference against Gibson's unsubstantiated statements, rendering the Claimant's version of the exchange the one to be credited. As a result, we do not credit Gibson's broad assertion that the Claimant said he could not do "his job."

The facts of record align this case with that of the Claimant in Third Division Award 41393, where the Claimant Noll, a signal maintainer in Illinois, reported pain affecting his personal and work life. He was seen limping and having difficulty getting into and out of his truck. He had been having problems with his hip for quite some time with no impact on job performance. Like the Claimant here, at no time was there an admission of inability to perform signal maintenance, and like the instant case, the Medical Department confirmed Noll's ability to do his assigned work.

The Claimant Bird was clear in explaining that he was upset and needed to calm down before resuming work. Subsequent psychological evaluation confirmed this. We do not agree that transitory anxiety or the need to calm down before resuming work duties constitutes a reasonable basis for removing an employee from his job for two weeks. The situation plainly begged for de-escalation and nothing more.

It is significant that the Claimant specifically attributed his anxiety exclusively to "destruction of our current working relationship and fear of further retribution." This clearly refers to a temporary and immediate situation created by Gibson's actions. Gibson decided to audit the Claimant's machine; there was no credible explanation in the record for the timing of this audit beyond the Claimant's perception that Gibson was retaliating against him for asserting union rights. Actually, it was Gibson who said there was too much work to allow witnesses to

their exchange, a comment which undermines the timing of his taking the Claimant's machine out of service. Further, Gibson's insistence on having a series of phone conversations out of the Claimant's hearing and endeavoring to have him sign a letter agreeing to removal added fuel to the fire. Each of these actions operated to validate the Claimant's perception of retaliation and therefore to exacerbate his anxiety.

There is no evidence Gibson at any time offered the Claimant assurances of non-retribution. Gibson denied every single one of the Claimant's requests, apparently without explanation. He did everything to aggravate the Claimant's anxiety and nothing to provide an iota of reassurance that it was unfounded. The Claimant was very clear that he did not need or want medical attention, and this assertion was subsequently validated by psychological analysis. His request for an opportunity to calm down was entirely reasonable under the circumstances. He had not previously suffered from anxiety, hence there was no basis on which to conclude he was more than temporarily incapacitated.

The reasonable roadmaster would have at least made a minimalist effort to calm the Claimant down and perhaps sent him home for the day. There was no basis in the Claimant's conduct or in the Claimant's medical assessment for questioning fitness for duty. It was unreasonable to poke at the Claimant's anxiety, and to convert his assertion of temporary discomfort about machine operation into an unwarranted exaggeration that he was no longer capable of performing his job at all. The record in this case supports a finding that the Claimant's removal from service was unreasonable under the circumstances.

Claim sustained. The Claimant shall be paid for all straight time hours, overtime hours, and Holiday pay, at the appropriate rate of pay, for everyday that he was improperly withheld from service by the Carrier. The Carrier may deduct from this compensation pay for time lost after the exchange between the Claimant and Gibson on June 22, 2016. If the time lost that day cannot be determined, four hours shall be deducted. Outside earnings will not be deducted in the calculation of back pay. The Claimant shall be given credit for all days for which qualifying days are required, such as vacation qualifying days, as well as, any additional benefits lost. Any other claim not expressly granted in this award is hereby denied.

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 23rd day of October 2020.