

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40288
Docket No. MW-39584
10-3-NRAB-00003-060367
(06-3-367)**

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: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier withheld and medically disqualified Mr. R. Duran from service (System File RJ-0550-202/1427769).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Duran shall now be ‘. . . compensated for all hours that he was denied the opportunity to work, while he was removed from service pending medical evaluation. Specifically, Claimant must be compensated all hours at his applicable straight time and overtime rates of pay commencing from March 30, 2005, when his physician Mark Sanders released him with no restrictions to return to work, until he is reinstated to service.’”**

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, who was assigned as a Sectionman, was taken to the Emergency Room complaining of chest pains on or about March 23, 2005. He was released to return to work by a Physician Assistant at the office of his treating physician on March 30, 2005. He was placed on medical leave by the Carrier. This medical leave gave rise to the instant claim.

The Organization does not dispute that the Carrier has the right to require physical examinations or evaluations and to establish medical standards that are associated with job assignments. However, the Organization maintains that there was no rational reason to keep the Claimant from service after he was cleared to return to work on March 30, 2005 and such action violated the Agreement. The Organization points out first, that there is nothing in the record to support the assertion that the removal from service was the result of a medical determination and second, that there is nothing in the record that establishes a valid reason for withholding the Claimant from service. According to the Organization, nothing in the record establishes that the Claimant could not perform the duties of his job.

In support of its argument, the Organization points to the initial release from the Physician Assistant at the offices of the Claimant's treating physician, as well as a letter from the Physician Assistant dated August 10, 2005. In that letter, the Physician Assistant explains that the Claimant was released to return to work on March 31, and that Carrier's Health Services Department requested an evaluation that was performed on April 5, 2005. Following the evaluation, the Claimant was again released to return to work with sleep study results pending, diet and exercise and a prescription for Provigil.

The Organization further points out that the Carrier's "Timeline" was not provided during the handling on the property and should not be considered. Further, even if considered it is not reliable because it contains no indication of who prepared the document or who the parties to the conversation were. Moreover, it supports the Organization's argument that there were a number of conversations with the Claimant's physician, medical records, and documentation tendered.

Those documents are not part of the record and an inference should be drawn against the Carrier because of their absence.

The Carrier responds that the decision to place the Claimant on Medical Leave was appropriate given the circumstances outlined in the "Timeline." Specifically, the Carrier states in its Submission that:

"... a review of the 3/30/2005 notation suggests that the Claimant also suffered from sleep apnea and chronic tiredness. As documented in the 4/1/05 notation above, the Claimant's treating physician was totally unaware of these conditions account the Claimant never communicated them to his doctor.

* * *

The Carrier was made aware that the Claimant was suffering from sleep apnea and chronic tiredness, notwithstanding the fact that Claimant complained of chest pains. Although the Claimant's physician may have been quick to dismiss the alleged chest pains after a review of the results from the emergency room examination, the release obviously did not take into consideration the other factors. It was all of these factors that prompted the Carrier to initiate the evaluation process."

The Carrier asserts that the March 30, 2005 notation suggests that the Claimant also suffered from sleep apnea and chronic tiredness. The notations state:

"3/30/05 Lotus note dated 3/23/05 from supervisor forwarded to me to follow indicating that Mr. Duran was sent to ER with chest pain. He also expressed concerns about Mr. Duran's ability to return to work, based on observations and employee's complaints of sleep apnea and chronic tiredness.

3/30/05 Spoke with Dave Kraft - employee supervisor who identified safety concerns and requested FFD review prior to employee return to work.

3/30/05 Spoke with employee who identified several medical issues addressed by the emergency room physician and his treating physician. Informed him of what would be needed before we could return him to work. Faxed a HIPPA release to employee so that medical records from his treating physician could be submitted for review. Also sent RBB sickness benefit form and Provident forms for him to initiate his sickness benefits. (Employee received sickness benefits the entire time he was off – the medical portion of the form was completed by Health Services each time it was requested.)”

The Organization included in its letter of September 6, 2005, a letter from the Physician Assistant at the office of the Claimant’s treating physician that provided, in part:

“Mr. Duran was released to work by myself on March 31, 2005. The Health Services Department requested an evaluation in which Mr. Duran was seen on April 5 for this evaluation. At this appointment, I released Mr. Duran to work with the sleep study results pending, following a diet and exercise program to work toward weight loss, and taking Provigil daily.

I have felt that Mr. Duran could return to work since March 31, 2005, however, the Health Services Department presented with multiple concerns and continued to request evaluations and present problems.”

The Board carefully reviewed the Submissions as well as the record evidence. Initially, the Board notes that it agrees with the proposition that carriers have an inherent right to require physical examinations or evaluations and to establish medical standards that are associated with job assignments. The Board also agrees that the Carrier also has “. . . an inherent managerial right to withhold employees from employment until the question of their physical qualifications has been clarified.” (See Third Division Award 32328 and Awards cited therein.) The Board also agrees with the Carrier’s citation to Third Division Award 36725, which provides:

“ . . . Carrier determinations of an employee’s physical ability to perform work will be supported unless evidence is found that the Carrier’s determination was arbitrary, capricious, discriminatory or made in bad faith. As the moving party . . . the Organization has the burden of proving that the Carrier’s decision to withhold Claimant from service pending the receipt of medical information was unreasonable, arbitrary, capricious or discriminatory.” (Citations omitted)

As described in the “Timeline,” the Carrier became aware of the Claimant’s possible sleep apnea and chronic tiredness based on a statement the Claimant made to a supervisor. The Carrier had the right to withhold the Claimant from service pending medical information. However, the statement from the Physician Assistant that the Claimant was again released on April 5, 2005 is unrefuted.

It is important to note what this case is not – it is not a clash of expert medical opinions that a Board has no business weighing. (See e.g., Third Division Award 22050 and Fourth Division Award 3650.) The only reference to a Carrier medical determination is the letter from Nurse Rankin informing the Claimant that “the Union Pacific Health Services Medical Director has determined that you are not medically cleared to return to work at this time.” This is the only correspondence referencing a Carrier medical determination in the record. There is nothing in the record that contains the basis for the medical determination. Rather, the record in the instant matter contains the un rebutted statement from the Physician Assistant in the office of the Claimant’s physician.

According to a “Health Services Timeline” that accompanied the Carrier’s letter of October 24, 2005, a Carrier employee spoke with the Claimant on March 30, 2005 and opined that there were additional concerns about the Claimant’s health that needed to be addressed. That employee was not identified in the correspondence. The “Timeline” is just that, a timeline of events. While it references a number of conversations, evaluations and determinations, it is unattributed and unreliable.

The October 24, 2005 correspondence also incorporates previous Carrier responses to the claim that identify the actions of Nurse Rankin in this matter. Specifically, the Carrier’s initial response of July 18, 2005 details an account of what

Nurse Rankin did in the instant matter. However, there are no statements from Nurse Rankin or any other medical personnel in the record. There is nothing in the earlier correspondence to indicate that the Timeline was comprised of the notes of Nurse Rankin or any other personnel in the Carrier's Health Services Department. There is no documentation of the decision to withhold the Claimant from service – other than letter notifying him that he was withheld from service until May 7 based upon the determination of the Carrier's Medical Director. Notification is not evidence. The only attributable evidence in the record about the Claimant's medical condition comes from the Physician Assistant at the office of the Claimant's treating physician.

That evidence in the record before the Board shows that the Claimant was cleared to return to work for a second time on April 5, 2005. Accordingly, withholding him from service was unreasonable.

The Organization and the Carrier also dispute the remedy, with the Organization maintaining that the Claimant is entitled to all pay, including overtime, for the period of March 30, 2005, until he returned to work. The Carrier argues that the Claimant was compensated through the sick benefits paid to him.

As stated above, the Carrier had the right to withhold the Claimant pending an evaluation. He was cleared to return to work by the offices of his personal physician on April 5, 2005. Accordingly, the Carrier is ordered to compensate the Claimant for all hours that he would have worked from April 6, 2005 until he was eventually cleared to return to work, minus customary deductions for his sick benefits received for the period.

AWARD

Claim sustained in accordance with the Findings.

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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 1st day of March 2010.