

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40839
Docket No. SG-40612
11-3-NRAB-00003-0080463**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of G. L. Knuth, for payment for all time lost from April 5, 2007, until he was allowed to return to work on May 31, 2007, account Carrier violated the current Signalmen’s Agreement, particularly Rule 62, when it failed to allow the Claimant to return to work from a medical leave of absence after he was medically cleared to work with no restrictions. Carrier’s File No. 1473710. General Chairman’s File No. N 62 669. BRS File Case No. 13985-UP.”

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.

This dispute raises the issue of the reasonableness of the Carrier's delay in returning the Claimant to work following his release from a medical leave of absence (MLOA). The following provision of the Agreement is relied upon by the Organization.

RULE 62 - LEAVE OF ABSENCE

"B. Employees returning from leave of absence or sick leave may return to former position or may exercise seniority rights over any junior employee who is holding a position that has been bulletined during such absence, except that if former position has been abolished or is being held by a senior employee in the exercise of displacement rights, such employee will exercise seniority over junior employees. Employees desiring to return from leave of absence before expiration thereof must give the designated carrier officer and the employee involved five (5) calendar days' advance notice before making displacement; except, however, employees granted medical leave of absence who are released for duty to return to service before expiration thereof must give forty-eight (48) hours' advance notice before returning."

The Claimant, a Signal Maintainer, went out on a MLOA in mid-2006 as a result of suffering a stroke on his right side. During the course of his leave, his doctor provided reports concerning his condition, including in November 2006 and January 2007, indicating a concern with his left visual field neglect. Despite the Claimant's doctor's February 27, 2007, statement indicating that he is able to work without restriction, a Health and Medical Department (HMD) review of his medical records resulted in a March 13, 2007, letter extending his MLOA for an additional 60 days. On April 2, 2007, the Claimant sent a letter to his Manager informing him that he wished to return to work on April 5, 2007, supported by a doctor's statement dated May 5, 2007, indicating that the Claimant was released to return to work without restriction as of April 13, 2007. The Claimant was not permitted to work on April 5, 2007, and was told that he needed to be medically released by the Carrier's Medical Director, who decided that he needed additional medical information. That information was received from the Claimant's doctor on April 12, and the two doctors conversed on April 13, 2007, apparently agreeing that a formal visual field screening was required. The record contains a letter dated May 7 (apparently in

response to the May 5 medical note) extending the Claimant's MLOA another 30 days. The Carrier's Supervisors and Nurse conducted a Field Safety Evaluation (FSE) consisting of visual testing on May 29, 2007, the Claimant was conditionally medically released by HMD on May 30 and returned to work on May 31, 2007. This claim seeks compensation for the delay between the Claimant's requested return to work on April 5 and his actual return on May 31, 2007.

The Organization argues that once the Claimant is medically released to return to work from a MLOA, the Carrier cannot withhold him from service for more than 48 hours under Rule 62. It asserts that there was no reason to require a release from the HMD when they were not treating him, and that a delay of 47 days is unreasonable, even if the Carrier had the right to request additional medical information and conduct further testing, because all scheduling was within its control and it was given advance notice of the Claimant's desire to return to work and his ongoing medical condition, citing Third Division Award 37578.

The Carrier contends that its right to establish medical standards to assure that an employee can perform his job safely has been repeatedly upheld by the Board, relying on Third Division Awards 25013, 28299, 36725 and 38251. It contends that it is not for the Board to second guess its medical determination, citing Public Law Board No. 6302, Award 9. The Carrier states that in the face of its receipt of conflicting medical reports, the seriousness of the Claimant's medical condition, and his job duties and responsibilities, it was not unreasonable for it to request additional medical information and clearance from the HMD. It notes that scheduling an FSE is not a simple matter, and asserts that there was no violation of Rule 62 established because the Claimant was not released to return to service by the HMD until May 30, 2007, and was permitted to do so the following day.

A careful review of the record convinces the Board that the Organization sustained its burden of proving that the delay in returning the Claimant to work in this case was excessive. There is no dispute that the Carrier has the right to establish medical standards, review physician records, and require physical evaluations, when necessary, to assure on-the-job safety. See Third Division Awards 36725 and 40288, as well as Public Law Board No. 6302, Award 8. However, as noted in Third Division Award 37578, fundamental to that right is the fact that the review and determination concerning an employee's fitness to return to work must be made within a reasonable period of time. The facts of this case establish that the Carrier acted within its prerogative to require additional medical documentation

after April 5 and to have discussion with the Claimant's physician after receiving such information. This was accomplished on April 13, 2007, with the understanding that the only additional advisable step was for the Claimant to be given and pass a formal visual field screening. The Carrier determined that this would be done by means of an FSE conducted by its own employees. Other than the assertion that scheduling an FSE "is not a simple matter," no evidence has been presented explaining why it took 46 days for that test to be completed. Thus, unlike the situation in Third Division Award 36034 where the two-month delay was occasioned by the Claimant's failure to provide medical information requested and not attributable to the Carrier, in this case the entire time period between receipt of the necessary medical information (April 13) and the scheduling of the FSE (May 29) was in the control of the Carrier and could have been accomplished by promptly conducting the vision test which was the only barrier preventing the Claimant from returning to work.

What constitutes excessive delay depends on the facts and circumstances of each case. See Public Law Board No. 2960, Award 134. The Carrier has a duty to conduct its complete medical review and testing expeditiously and to return the employee to work promptly. See Public Law Board No. 6302, Award 146. Under the circumstances of this case, we conclude that a 46-day delay was excessive. The record evidence reveals that the Carrier was in possession of all pertinent medical information on April 12, and no further medical intervention was necessary once the Claimant passed the medical evaluation and he was released by the HMD. The Claimant's doctor concurred on April 13. We conclude that it would have been reasonable for the Field Safety Evaluation, that the Carrier considered necessary, to have been accomplished within five calendar days. The Claimant should have been released to return to service within 48 hours after he successfully completed the Field Safety Evaluation. See e.g. Public Law Board No. 6402, Award 67. The Claimant is entitled to compensation for the time he was held out of service after a reasonable period elapsed for the Field Safety Evaluation. Thus, we direct the Carrier to compensate the Claimant for all lost wages associated with the time period from April 20 to May 31, 2007.

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 11th day of January 2011.