

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41500
Docket No. MW-41414
13-3-NRAB-00003-100295**

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 removed Mr. J. Kirk from service on April 3, 2009 and continued to withhold him from service through June 2, 2009 (System File D-0950U-202/1520274).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Kirk shall now be compensated at the respective and applicable rate of pay for all straight time and overtime hours he was not allowed to work commencing on April 3, 2009 and continuing through June 2, 2009.”**

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 Organization argues that the Carrier improperly withheld the Claimant from service for arbitrary and capricious reasons. The Organization asserts that, based upon the Claimant's Fitness for Duty Examination, there was no medical basis to withhold him from service. The Carrier Manager simply sought to eliminate the Claimant from the assignment when the Claimant commented that he needed some help and was not as fast as the younger employees were.

Conversely, the Carrier contended responds that its decision to withhold the Claimant from service was based upon a legitimate concern about the Claimant's ability to perform his duties. The Claimant was having trouble performing his duties. He was ultimately returned to work with permanent restrictions. He could not have been returned to work with those restrictions unless he was evaluated.

The record evidence establishes that the Claimant's Manager on Gang 6197 contacted the Health and Medical Department regarding the Claimant's abilities. The Claimant and his Manager spoke with a nurse from the Health and Medical Department (HMD). A Field Safety Examination was performed. The nurse and two Managers noted that the Claimant had difficulty with the test in that he was not able to bend his knees or squat, was very rigid, and unstable while handling tools. The reviewers noted that the Claimant was not capable of safely performing all functions of the job. The Organization's representative noted that the Claimant performed the examination without incident.

The Claimant was removed from service following the examination. He was then scheduled for and performed a Functional Capacity Examination.

The Claimant was later cleared to return to work with permanent medical restrictions on lifting, crawling, crouching, and kneeling. The Claimant returned to work in June on a position that accommodated his restrictions.

The Board carefully reviewed the record evidence. The Claimant's Manager contacted HMD and the Claimant was evaluated. He was removed after his performance during the examination indicated that he could not safely perform the functions of the job. The Carrier had legitimate concerns about the Claimant's ability to perform his job. Those concerns are borne out by the Claimant's permanent medical restrictions. The Carrier did not act in an arbitrary, capricious, or discriminatory manner by removing the Claimant from service.

Thus, the Board finds that Organization failed to meet its burden of proof and the claim will be denied.

AWARD

Claim denied.

ORDER

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 19th day of February 2013.