

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40332
Docket No. MW-40216
10-3-NRAB-00003-070440
(07-3-440)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 Carrier’s action in withholding Mr. K. Miller from service beginning March 1 and continuing through April 24, 2006 was improper and in violation of the Agreement (System File W-0650-151/1449884).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Miller shall now be compensated at his respective and applicable rates of pay for all lost straight time and overtime hours beginning March 1 and continuing to April 24, 2006.”**

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 filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it withheld the Claimant from service on March 1, 2006, after he was medically cleared by his personal physician without any restrictions.

The Organization initially contends that the Carrier's decision to withhold the Claimant from service was unwarranted and without just cause. The Organization asserts that when the Carrier withholds an employee from service, it must demonstrate a medical basis for its action. The Organization argues that in this case, the Carrier did not establish any valid medical basis for withholding the Claimant from service, so this decision was unwarranted and without just cause.

The Organization maintains that the Carrier was entirely responsible for the delay in the Claimant's return to service. It points out that in February 2006, the Claimant's physician examined the Claimant and determined that he could return to work on March 1, 2006, without any restrictions. The Carrier received notice of this determination, as well as all requested supporting information, on February 28, 2006, yet the Claimant was not allowed to return to work on March 1. After the Carrier subsequently requested additional medical information (doing so without any explanation) this additional information was provided to the Carrier on March 8, 2006, but the Carrier still did not return the Claimant to service.

The Organization emphasizes that instead of returning the Claimant to service, the Carrier alleged that it had concerns about the Claimant's ability to perform work. On March 13, 2006, the Carrier arranged for the Claimant to attend a job-site evaluation, but it did this without ever explaining its alleged concerns or why it continued to withhold the Claimant from service. The Organization further points out that there is no evidence that a job-site evaluation was necessary or required. The Organization contends that even if the Carrier did have some valid concern or legitimate reason for withholding the Claimant from service pending a job-site evaluation, which it never articulated, there is no reasonable explanation for the Carrier's waiting to schedule that evaluation until March 21, 2006, or for why this unwarranted evaluation was not rescheduled until April 12, 2006. Moreover, there is no reasonable explanation for why it took the Carrier until April 21 to review the unwarranted job-site evaluation. The Organization submits that the Carrier caused this delay, and it did so at its own peril.

The Organization asserts that the Carrier failed to provide any evidence to support its decision to withhold the Claimant from service. It suggests that the record reveals that the Carrier belatedly reached the same conclusion that the Claimant's doctor reached on February 21, 2006, when the Carrier released the Claimant to return to service without any restrictions on April 21, 2006.

The Organization insists that because the Carrier failed to establish any rational basis for its decision to withhold the Claimant from service, its decision to do so cannot stand. It emphasizes that the Carrier could have begun arranging for the job-site evaluation as early as February 21, or at least by February 28, 2006. In addition to not establishing any reason for the Claimant to undergo a job-site evaluation, the Organization emphasizes that the Carrier was dilatory in conducting this evaluation. After a postponement, the job-site evaluation was finally conducted on April 12, 2006, some 43 days after the Claimant was medically cleared by his own doctor to return to service without any restrictions. The Organization then asserts that the Carrier's dilatory handling of this unwarranted evaluation was further compounded by the fact that the Carrier did not review the evaluation report until April 20, 2006. The Organization notes that the delayed job-sited evaluation produced the same conclusion that the Claimant's own doctor had reached on February 21, 2006. The Organization maintains that under these circumstances, the Carrier's withholding of the Claimant from service from March 1 through April 21, 2006, was without any valid support. Moreover, the Carrier's action caused the Claimant a loss of work and income, and it was in violation of the Agreement.

The Organization acknowledges that the Carrier may be entitled to sufficient time to reasonably evaluate medical information, but this does not give the Carrier carte blanche authority to withhold an employee from service for an unreasonable period of time. The Organization insists that it was unreasonable for the Carrier to withhold the Claimant from service for 52 days.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that, in accordance with prior Awards, it has the absolute right to establish and implement medical standards, and this includes the right to ensure that employees returning to work from health-related issues are able to safely perform their job duties. The Carrier asserts that it has both the right and the responsibility to concern itself with the safety of its employees in the workplace. Part of

the analysis in determining whether an employee can safely perform in the workplace is a review of complete and detailed medical information, and the Carrier has the right to request additional information that is reasonable and necessary to make such a determination.

The Carrier emphasizes that in this case, its Health Services Department (HSD) determined that it needed to review the “clinic notes” taken by the Claimant’s physician, and that a job-site evaluation was necessary before it could determine the Claimant’s ability to return to work. The Carrier insists that there is no evidence that the Carrier’s decision in this regard was arbitrary, capricious, or purposefully impeding. The Carrier points out that after it reviewed these notes and completed the job-site evaluation, the Claimant was returned to work in an expedited manner. The Carrier asserts that there is no evidence that it violated the parties’ Agreement in any manner.

The Carrier insists that the mere fact that an employee’s own physician has rendered an opinion on the employee’s fitness to return to work is not dispositive of the issue or binding on the Carrier’s decision regarding when to allow the employee to return. The Carrier contends that it processed this case in a diligent and expedient manner. The Carrier points out that it asked for the clinic notes on March 2, received them on March 8, and then scheduled a job-site evaluation for March 21 after a review of the clinic notes raised concerns about the Claimant’s ability to perform his job. The Carrier emphasizes that a snowstorm caused the postponement of the job-site evaluation, which was rescheduled for April 12. The Carrier asserts that the evaluation report was completed and submitted to the HSD on April 18, and the HSD reviewed the evaluation on April 20 and approved the Claimant to return to work on April 21. The Carrier argues that it made every attempt to return the Claimant to work in an expedited manner, and there is no evidence that the Carrier was purposefully attempting to delay the Claimant’s return to service. Pointing to a prior Third Division Award, the Carrier contends that the little more than one month that the Claimant was held out of service after March 1 is not an excessive period of time.

The Carrier goes on to argue that the Organization clearly failed to meet its burden of proof. It asserts that the Organization has done nothing but assert that Agreement Rules were violated, but the Organization failed to provide any evidence that shows that the Carrier violated these Rules. The Carrier insists that there is no validity to the Organization’s contention that an entity other than the Carrier can release an employee to return to service. The Carrier emphasizes that it has the right

to establish and maintain its own medical standards, thereby determining when an employee is fit to return to work.

The Carrier submits that when it has legitimate concerns about the medical documentation that it has received and the employee's status, it has the obligation to further inquire into the matter until it has enough information to make a reasoned decision about the employee's return to work. In the Claimant's case, the Carrier's decision to require the clinic notes and a job-site evaluation did involve extra time. The Carrier contends, however, that the time spent making these inquiries was by no means inordinate, and its decision to withhold the Claimant from service until these inquiries were concluded was not arbitrary or capricious.

The Carrier asserts that once it had the information necessary to make a reasoned return-to-work decision in the Claimant's case, it made that decision swiftly. Under these circumstances, the Carrier argues that the Organization failed to meet its burden of proof.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record, and although the Board agrees that the Carrier has a right to establish and implement its own medical standards and have its own medical personnel evaluate an employee before putting him or her back to work, the Carrier simply took too much time performing that process in this case. The record reveals that the Claimant was on a medical leave of absence for hip surgery and his own doctor determined that he could return to work without restrictions on March 1, 2006. The Claimant contacted the Carrier on February 21, 2006, and told the Carrier's Medical Department of his release to return to work. The Carrier wanted additional information and subsequently desired the Claimant to have an on-site job evaluation to be able to determine if he could perform the work. All those were legitimate requests of the Carrier. The problem with this case is that the Carrier took too much time in performing all of those tasks and unreasonably delayed the Claimant's return to work.

Although the record reveals that there was a snowstorm that delayed matters to a certain degree, there is simply no excuse for the Carrier to take 52 days after the Claimant was released to work by his own doctor to actually put him back on the job.

Once the Board has determined that the Organization met its burden of proof that the Carrier delayed in returning the Claimant to work, we next must turn our attention to the type of relief sought. The Organization is seeking backpay from March 1 through April 24, 2006. There is no basis for that request. First of all, Rule 50, the Rule on which the Organization relies, states, in part:

“If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section (a) of this rule.”

The record reveals that the Organization filed the claim on April 5, 2006. Consequently, the Board orders that the Claimant shall be awarded backpay from April 5 until April 24, 2006, when he was finally returned to work.

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 1st day of March 2010.