

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42827
Docket No. MW-43179
17-3-NRAB-00003-150413**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when Mr. H. Frederick was unreasonably withheld from service beginning on May 6, 2014 and continuing through May 9, 2014 which resulted in the Carrier assigning junior Trackman B. McIntyre to a trackman position in Rumford, Maine (Carrier’s File MW-14-24 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Frederick shall be allowed ‘Thirty-two (32.0) hours Straight Time (\$764.16) as well as any overtime accrued by employee Bradley McIntyre during his wrongful assignment to this position.’ (Emphasis in original).”**

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 holds a higher seniority rank on Seniority Zone 3 than Mr. B. McIntyre does on Seniority Zone 2. On May 6-9, 2014 the Carrier recalled Mr. McIntyre and assigned him as a Trackman in Seniority Zone 3. The Claimant, on furlough at the time, was not offered the position.

The Organization notes that there is no dispute that the Claimant is senior to Mr. McIntyre and contends that Claimant's critical seniority rights were violated and that he lost wages being on furlough at the time. The Carrier has not justified the delay in returning the Claimant to service once the physical found him fit for duty. The actions of the Carrier's agent do not justify the contract violation.

The Carrier contends that the Organization has failed to prove the claim by substantial evidence, with no contract violation shown and no damages substantiated. The long-established return-to-work process was followed, with physicals scheduled in order of seniority. The Carrier cannot be held responsible for the MRO review process that can vary for any one of several reasons. The Organization has not shown the existence of delays, let alone unreasonable delays. Article 4.3(b), zone designation, does not give an employee preference over another to cover an open position, as the Organization alleges. Mr. McIntyre was medically cleared and thus qualified before the Claimant. Public Law Board 5606, Awards 59-64 support the Carrier's position. Because the Claimant was not qualified to work on the days in question, damages were not established.

For reasons set forth below, the Board sustains the claim. Article 8.1 provides the critical language for this case, stating that "In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern" (Carrier Exhibit J-1). There is no dispute that the Claimant was senior to Trackman McIntyre, that when recalled from furlough the Claimant took a return-to-work physical on April 25, 2014, that Trackman McIntyre, also recalled from furlough, took his back-to-work physical on April 29, 2014 and that the junior Trackman was found physically qualified and put into service prior to the Claimant. It took six days to return Trackman McIntyre to service but 18 days to return the Claimant to service. This establishes the Organization's prima facie case that Article 8.1 has been violated. This is not a de minimis or inconsequential violation, as seniority is a critical job element that goes a long way toward determining an employee's earnings. See First Division Award 15128, Second Division Award 2910 and Third Division Awards 20310 and 32328.

However, the analysis cannot end here, as the burden of persuasion shifts to the Carrier to justify the initial failure to place the Claimant in service prior to Trackman McIntyre. The Board does not fault the Carrier for not scheduling the physicals at an earlier date because there is no established past practice that would require such scheduling and PLB No. 5606 Awards 59-64 show that the Carrier was not obligated to do so. But, the Carrier's contention that it cannot be held responsible for the MRO review process is not persuasive. The MRO is an agent of the Carrier. See Second Division Award 6642. The legitimate and appropriate use of the MRO does not relieve the Carrier of its obligation to comply with the terms of the Agreement. For the Board to find otherwise would have the effect of modifying the language of Article 8 so that seniority would govern only under some, but not all circumstances. This is not what the parties negotiated.

That does not mean that there may not be circumstances that justify the recall of a junior employee before the recall of somebody more senior. The Carrier notes that it is possible that the MRO review process may vary and legitimately take longer for the senior employee. The Board acknowledges the above-noted possibility and is not asking or requiring that the Carrier justify the recall of a junior employee with reference to medical conditions, diagnoses, or data that are protected by law. The Board is requiring that there be some more general explanation or justification for the seeming failure to recall the senior employee before his or her junior counterpart. The justification falls on the Carrier because the Organization has made the prima facie case and because the information that would comprise the explanation or justification is within the Carrier's grasp, not the Organization's. In Claimant Frederick's case, no explanation has been provided for the 18 day delay between his physical and his return to work. If circumstances justified the delay, they remain unknown.

The Carrier asserts that no unreasonable delay occurred, but there is arbitral authority for considering anything past five days as an unreasonable delay. See First Division Award 26373. In the final analysis, the Carrier has not rebutted the Organization's prima facie case; thus the Board finds that the Organization has met its burden of proof.

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 12th day of December 2017.