Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42828
Docket No. MW-43180
17-3-NRAB-00003-150414

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Mr. J. Littlefield was unreasonably withheld from service beginning on May 14, 2014 and continuing (Carrier's File MW-14-25 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Littlefield shall be allowed '. . . any and all time and work performed by employee Michael McKenney as a Trackman and B&B Mechanic between the dates of Wednesday, May 14 and inclusive until Mr. Littlefield is returned 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 and Mr. M. McKerney, both on furlough, were Trackman in Seniority Zone 3, with the Claimant senior to Mr. McKerney. The latter received his return-to-work physical four hours after the Claimant on May 5, 2014 but was assigned to a Trackman position on May 14-15, 2014 and to a Bridge & Building (B&B) Mechanic position beginning May 16, 2014. The Claimant was not offered either position and thus denied an opportunity to exercise his seniority.

The Organization asserts that the Carrier violated the contract as relative seniority is unchallenged. The Claimant lost wages being on furlough at times relevant. The Carrier has not proven its affirmative defenses and actions of the Carrier's agent do not excuse the Carrier's violation of the Claimant's seniority rights. There was no medical reason to withhold the Claimant from service.

The Carrier insists that the Organization has not provided substantial evidence of a contract violation and has not substantiated damages. The long-established return-to-work process was followed; physicals were scheduled in order of seniority. The Carrier cannot be held responsible for the medical review process that can vary for a number of reasons and cannot ensure that employees are medically cleared for work in order of seniority. No delays, let alone unreasonable delays, have been shown. Article 4.3(b), providing for seniority zone designation, does not give one employee preference over another to cover an open position. Mr. M. McKerney was medically cleared and thus qualified before the Claimant. Public Law Board 5606, Awards No. 59-64 support the Carrier's position.

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 Mr. McKenney, that when recalled from furlough the Claimant took a return-to-work physical on May 5, 2014 at 11 AM, that Mr. McKenney, also recalled from furlough, took his back-to-work physical on May 5, 2014 at 3:00 PM and that the junior Trackman was found physically qualified and put into service prior to the Claimant. It took seven days to return Mr. McKenney to service but 17 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 and 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 Mr. McKenney. 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.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42828 - DOCKET NO. MW-43180

(Referee I.B. Helburn)

The Board erred in its application of Article 8. Paragraph 8.1 states in full, "*In the assignment of employees to positions under this Agreement,* ***qualifications being sufficient*** *seniority shall govern*." (Emphasis added here.) For the Organization to establish a violation of paragraph 8.1, it was necessary for the Organization to show not only that the Claimant was senior to the other employee, but also that the qualifications of the Claimant were sufficient. It was an uncontested fact that the Claimant's qualifications were not sufficient and thus, his seniority alone was not the governing factor in the case. This Award states, "*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 Award completely ignores half of paragraph 8.1 (i.e. "***qualifications being sufficient"***). It is an elemental concept that all of the language contained in paragraph 8.1 of Article 8 should have been given full force and effect by the Board.

It should be clear from the foregoing that it was improper for the Board to conclude that the Organization established a prima facie case that paragraph 8.1 was violated. After having made that improper determination, the Board next committed the error of shifting the burden of proof to the Carrier to establish that there was no unreasonable delay involved in the return to work process. First and foremost, it was not the Carrier's burden to prove a negative, (i.e. that there was no unreasonable delay.) Second of all, the Board imposed a non-contractual standard on the Carrier by merely referencing an Award involving other parties (First Division Award 26373) and then drawing the unsubstantiated conclusion that the time involved in returning the Claimant to work in the instant dispute was unreasonable, based on that Award. Even more problematic is the fact that the Board ignored existing arbitral precedent from this property that was cited by the Carrier (PLB 5606, Award Nos 59-64), which demonstrated that the process followed in the instant dispute was entirely consistent with those prior on-property disputes. For these reasons, this Award should carry no weight in future disputes of like kind.

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

December 12, 2017