

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44470
Docket No. MW-44034
21-3-NRAB-00003-200734**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 medically withheld Claimant D. Shockley from service beginning on August 26, 2015 and continuing (System File MK-1550U-601/1639050).**
- (2) As a consequence of the violation referred to in Part (1) above, Carrier shall compensate Claimant D. Shockley for all hours he was not allowed to work commencing August 26, 2015 and continuing until he 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 was a Division Truck Driver - non semi, when he took a MLOA on May 4, 2015 to have rotator cuff surgery. This claim protests Carrier's delay in returning the Claimant to service after he was released to return to work on August 26, 2015. The medical records reveal an effort to determine if a FFD exam was necessary, periods of time when Carrier's HMSD took no affirmative action to move the matter forward (September 1-14), findings made that the Claimant was not fit for his normal job, which required heavy lifting, and requests for his orthopedist to order a FCE. The documents show that between September 28 and October 9, Carrier was requesting the Claimant's orthopedist to order a FCE, which he determined was not needed, and the Claimant was released to return to full duties without restrictions on October 11. He was returned to work between October 13 and 25, but subsequently was disqualified and referred by his Manager for a FFD exam due to the Claimant's refusal to perform certain functions associated with his job. The record indicates some back and forth concerning the scheduling of a FCE, with the Claimant eventually being found medically cleared to return to work on January 28, 2016, which he did until his retirement in September, 2016.

The Organization argues that a one and a half month delay in returning the Claimant to work after he was cleared by his doctor to RTW from his MLOA was unreasonable and arbitrary. It notes that if a physically qualified employee is withheld pending a medical evaluation and is found fit without restrictions, Carrier should bear the financial consequences, and the Claimant should be compensated for lost time, citing Third Division Awards 44070, 41393, 43245. The Organization included in its claim the subsequent withholding of the Claimant from service between October 26, 2015 and January 28, 2016, under the same rationale.

Carrier contends that it has the well-recognized right to withhold employees from service for medical reasons, and that such determination should not be overturned except if found to be made in bad faith or to have been arbitrary or capricious, relying on PLB 6302, Award 8. It asserts that the Claimant was returned to work from his MLOA on October 13, 2015, which properly ends the period of this claim, and the Organization's failure to file another claim for the subsequent period is fatal to consideration of what was happening after his October 26 disqualification pending medical review. Carrier argues that it did not unreasonably delay the Claimant's return to service from his MLOA, as it was reviewing his medical records and seeking a FCE to assure that he could work safely in his position, and that the Claimant is not entitled to compensation.

A careful review of the record convinces the Board that, while Carrier had a rational basis to seek corroboration of the Claimant's fitness upon his return from MLOA, it also had a responsibility to conduct its medical review expeditiously and return the Claimant to work promptly. See, e.g. PLB 6302, Award 8; Third Division Awards 42978; 41393. In this case, the record indicates that Carrier properly requested additional medical information after his physician released him to return to duty without restrictions on August 28, but there were two distinct periods when it failed to move the process of review forward expeditiously, and its notes indicate little or no action in this regard - between September 1 and 14, and September 28 to October 9. Since Carrier eventually chose to return the Claimant to duty without having him take a FCE, it must be held financially responsible for the delay attributable to its inaction. Therefore, the Claimant shall be compensated for loss of earnings for the days he could have worked during the period September 1-14 and September 28 to October 9, 2015. The Board is in agreement with Carrier that this claim commenced on August 28, 2015 and ends when the Claimant was returned to service from his MLOA, and does not encompass a subsequent, separate disqualification.

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 10th day of June 2021.