

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44475
Docket No. MW-44881
21-3-NRAB-00003-180361**

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 Carrier violated the Agreement when it improperly removed and withheld Mr. B. Louis from service beginning on October 26, 2016 and continuing through December 28, 2016 (System File A-1750U-001/1679477 UPS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Louis shall be compensated ‘... the total amount of work days and holidays lost from October 26, 2016 through December 28, 2016.’”**

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.

This claim protests the Claimant's removal from his job as a Track Inspector on October 26, 2016, based upon his Manager's concern for his physical well-being due to his multiple days absence for illness and hospitalizations, and his overall deterioration in performance, confusion, weakness, shortness of breath and slurred speech. His Manager referred the Claimant for a FFD examination. HMSD reviewed the voluminous medical records that had been submitted by the Claimant over the past year for his multiple medical conditions, two of which were subject to ongoing monitoring, requested additional updated documentation, and referred the Claimant for an Occupational Medical evaluation. That appointment was held on November 10, 2016, and, despite requests from HMSD, the results were not received until December 6, and recommended that the Claimant undergo a FCE. The FCE was conducted on December 7, and after review of medical documentation, the results were submitted on December 15, 2016. The Claimant was found fit to return to full duties with what appears to be a continuation of his electric and magnetic field (EMF) restrictions due to his pacemaker. The Claimant and his work unit were notified that he was medically cleared for full duties on December 28, 2016.

The Organization argues that the Claimant was withheld from service without justification or cause. It asserts that since he was released to return to work and found fit without additional restrictions, the Carrier must bear the burden of compensating him for the time lost between his removal from service and when he returned to work, citing Third Division Award 44070 among others.

Carrier contends that the Claimant was properly removed from service based upon his Manager's observations. It argues that Carrier 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. Carrier notes that it acted reasonably in referring the Claimant to both the FFD and FCE evaluations, and that, due to his lengthy medical history, it took longer to receive the results of these exams and discuss the appropriate and safe course to follow. It asserts that there was no undue delay in its treatment of the Claimant, or in returning him to service.

A careful review of the record convinces the Board that the Organization has established undue delay in this case. Carrier's withholding the Claimant from service was done in response to his Manager's observations questioning his ability to safely

perform his job, and in compliance with the procedures for a Manager's referral for a FFD, and its decision to do so was rationally based. See, Third Division Award 29818. In accord with Carrier's responsibility to assure the safety of its employees, the medical assessments the Claimant was required to undergo were reasonable and scheduled relatively promptly, and any delay in returning the Claimant to full duties was attributable primarily to the length of time it took HMSD to receive the report of the Claimant's Occupational medical evaluation (November 10 - December 6) and the FCE (December 7 - 15). Based upon a review of the medical notes from HMSD, it appears that Carrier repeatedly requested the completed Occupational medical evaluation report, and that the delay in its receipt was not attributable to any fault or inaction on Carrier's part. Although unexplained, it is possible that the delay in reporting was a result of the Claimant's extensive medical history and voluminous number of documents that required review at all stages of the process.

However, the medical records reveal that HMSD understood by December 17, 2016 that the Claimant's evaluations indicated that he was capable of performing his job without any new restrictions. Considering the unfortunate delay in obtaining test results, we believe that it was incumbent upon the Carrier to move the process forward expeditiously. Since it did not do so, the Carrier must be held responsible for the time it took to issue his medical clearance. Third Division Award 43245. Therefore, the Claimant shall be compensated for the period he would have worked between December 18 and 28, 2016. See, e.g. Third Division Award 44070.

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.