

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44476
Docket No. MW-43385
21-3-NRAB-00003-200733**

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 removed and withheld Mr. J. Sewell from his assigned section foreman position on Gang 4793 beginning on August 18, 2014 and continuing (System File J-1450U-501/1612959).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Sewell shall “***be allowed compensation for all hours he was not allowed to work commencing August 18, 2014 and continuing until he is returned to service. This shall include all hours he would have been entitled, both straight time and overtime, had the violation not taken place.”**

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 service as a Section Foreman on August 18, 2014, after two Managers' observations of behavior that questioned his ability to safely perform his job (unsteady walking, difficulty climbing, staggering, shortness of breath and fatigue) under medical Rule 2.5(b), Supervisor Requested Evaluation. The Claimant's removal from service was pending medical evaluation. His medical record reveals that a Fitness For Duty evaluation (FFD) commenced on August 25, with information furnished by the doctor revealing a return of Atrial Fibrillation (A Fib), and a referral to a cardiologist prior to completion of the FFD. The Claimant was found not fit to return to duty until further testing results were received from the cardiologist. The cardiologist cleared the Claimant to participate in a Functional Capacity Exam (FCE) and Spirometry testing, which were completed on September 17, with results forward to the Carrier's HMSD on September 25 and 29. The Claimant was set up for, and received, a Functional Field Evaluation (FFE) on October 17, and was released to return to work on October 20, 2014. He returned to his position on October 22, after taking two personal days leave.

The Organization argues that the Claimant was removed from service without cause, since there was no evidence provided that he could not safely perform his duties. It asserts that since he was released to return to work by his cardiologist at the end of August, and he was eventually found fit without restriction, the Carrier must bear the burden of compensating him for the excessive time lost between then and when he was returned to service on October 20, 2014, citing Third Division Award 44070 among others. The Organization takes issue with the continued additional testing required by the Carrier, delaying the Claimant's return to work date.

Carrier contends that the Claimant was properly removed from service under HMSD Rule 2.5(b), and the supervisors noted the physical issues that gave them concern about the Claimant's ability to safely perform his job. 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 asserts that the Claimant's medical assessment found medical concerns, which necessitated further medical specialist intervention, new medication, and proof of the safety of having him resume the required FFD and FCE testing before it could be completed. It maintains that, once the proper tests were administered, results forwarded to Carrier, and medical review released him to work, the Claimant was returned to service without any additional delay.

A careful review of the record convinces the Board that the Organization has failed to sustain its burden of establishing a violation of the Agreement in this case. Carrier's withholding the Claimant from service was done in compliance with the procedures set forth in HMSD Rule 2.5(b), and its decision to do so was rationally based. See, Third Division Award 29818. The fact that the Claimant was found to have a potentially serious medical condition requiring medication and follow up treatment confirms that Carrier's initial decision was not arbitrary. The record in this case reveals that various medical appointments and testing was being performed expeditiously during the period that the Claimant was withheld from service, and that Carrier acted promptly in moving the FFD and FCE processes forward upon obtaining medical confirmation that it was safe to do so. We can find no excessive delay in the Claimant's return to service in this case.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of June 2021.