

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44517
Docket No. MW-45270
21-3-NRAB-00003-190029

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 (former Missouri Pacific)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier improperly withheld Mr. P. Posas from service beginning on May 8, 2017 and continuing (System File UP531JF17/1692451 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Posas shall now be compensated for ‘... eleven (11) hours each day at his respective straight time rate of pay, and any and all overtime at the Claimant’s respective overtime rate of pay (at least 6 hours) and any and all holidays, to begin on May 8, 2017, through and including continuous basis until this matter is settled...”

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 Carrier's withholding the Claimant on May 8 and delay in returning him to service until September 14, 2017. The Claimant was a Ballast Regulator assigned to work a night schedule on Gang 9059, and had a history of Type 2 diabetes. The May 8 Manager referral for a FFD exam was the result of a conversation with the Claimant regarding night vision difficulties. The Claimant's personal physician submitted a note on May 15 returning him to work without restrictions, and indicating that his diabetes was under control. After an initial review of the Claimant's medical records on May 19, which the HMSD doctor found had legibility issues, he requested an ophthalmology exam and determined that the Claimant was not fit for duty for night work. The Claimant's Medical Comments History reveals occasional entries between the end of May and June concerning review by other Carrier medical professionals, resulting in the scheduling of two specialist appointments, on July 10 and 12, 2017. Reports from the testing performed by specialists on those dates were received by July 15, and opine that the Claimant can work without restriction, but recommend progressive bifocals with anti-reflection coating. These reports were forwarded to CMO Holland on July 19, and to his occupational and ophthalmology consultant, who issued his report on August 10, as acknowledged in CMO Holland's August 30, 2017 medical memorandum, which basically finds that the Claimant can work as long as he wears his corrective lenses, which the Claimant had been given a prescription for on July 12, and is subject to ongoing medical monitoring for diabetic retinopathy. All of the medical reports reviewed reveal no real vision impairment impacting the performance of his job. The Claimant was returned to work on September 14, 2017.

The Organization argues that Carrier was unjustified in removing the Claimant from service because he complained about the insufficient lighting at his work location, and withholding him from service after his release to return to work on May 15. It asserts that the Claimant was fully cooperative and communicative, attended the medical appointments made by Carrier, and timely furnished required documentation. The Organization contends that the delay between the Claimant's removal from service on May 8 and receipt of his unrestricted RTW medical note on May 15, and the scheduling of specialist appointments by Carrier for July 10 and 12, as well as the delay in reviewing and processing the findings of these specialists, was

not caused by any action on the Claimant's part, and there was no justification shown by Carrier for such lengthy delay, relying on PLB 7426, Awards 2 & 3. The Organization contends that Carrier should bear the financial burden suffered by the Claimant as a result of its delay in returning the Claimant to work, especially where the medical findings supported his return to work promptly without restriction and only a recommendation that he wear glasses, citing Third Division Awards 44070 and 41393.

Carrier first contends that it has the well-recognized right to withhold employees 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, citing PLB 6302, Award 8; PLB 6006, Award 127. It maintains that the delay in returning the Claimant to service was caused, in part, by the difficulty in getting the Claimant appointments to see specialists, and the internal review of all medical reports and opinions necessary to assure he was safe to perform his work. Carrier argues that it should not be held financially responsible for this delay, and that any request by the Organization for overtime payments is speculative and punitive, and not countenanced by this Agreement, as shown in PLB 7426.

A careful review of the record convinces the Board that, while Carrier was well within its rights to remove and withhold the Claimant to assure that he could safely perform his job functions at night, once it had done so, it had a duty to conduct the medical review expeditiously, and return him to service promptly. See, e.g. PLB 6302, Award 8. A review of the Claimant's Medical Comments History shows large periods of time when HMSD took little or no action to move the matter forward, especially since it determined that it would not accept the Claimant's doctor's medical release without restrictions received on May 18, and required him to see certain specialists. The fact that their first referral was unsuccessful (allegedly due to some nonpayment issues on Carrier's part) is insufficient to explain an almost 2 month delay in obtaining the appointments. It is reasonable to expect some delay when dealing with specialist appointments, but not a 2 month delay.

Additionally, in this case, the specialists submitted timely reports recommending that the Claimant could be returned to work on unrestricted duty, and indicating that the Claimant had been given a prescription for corrective lenses on July 12, which were the only thing recommended to aid his vision while working at night. HMSD had these reports by July 15, and apparently they were sent to their consultant for review, but the record does not clearly indicate how long that took, or

why it was August 10 before the consultant issued his report, again only recommending glasses and medical monitoring. It apparently took CMO Holland an additional almost 3 weeks to receive and review this report, and Carrier another 2 weeks to finally return the Claimant to work. While the Organization bears the burden of proof in this case, Carrier must provide evidence that the reason for failing to return the Claimant to work has some medical validity. See, e.g. Third Division Award 42978; 43587. As noted in PLB 7426, Awards 2 and 3, when Carrier fails to handle the processing of an employee's evaluation in an efficient manner, or is dilatory in doing so, it must be held accountable for such delays.

In this case, the Board affirms Carrier's right to remove the Claimant from service based upon his Manager's referral on May 8. However, we find that the time between when the Claimant was released by his doctor without restriction on May 18, and the actual scheduling of specialist appointments for July 10 and 12 and sending the referral letters, was overly excessive, even considering the difficulty inherent in obtaining a specialist appointment, and that time was not really adequately accounted for or explained in the Medical Comments History. Thus, the time period between May 19 and when the actual appointments were attempted to be scheduled on June 21, is attributable solely to Carrier's inefficient manner of processing. The Board believes that the time period for processing and reviewing the resulting medical evaluations from receipt of the reports by July 15 (which were forwarded to the CMO on July 19) and the eventual medical memorandum completed by CMO Holland on August 30 is also excessive, especially since both doctors found the Claimant fit for unrestricted work, albeit with a recommendation for prescription glasses. In PLB 7426, Award 3, it was determined that five days would be a reasonable processing time after a medical evaluation. Here, the matter was sent to another Carrier consultant in the interim, which we cannot conclude was unreasonable, but his report was not issued until August 10, or acted upon by the CMO until August 30. It took an additional 2 weeks to return the Claimant to work.

Even countenancing the interim review, we conclude that the period between July 24 (five days after CMO Holland's receipt of the specialist reports) and September 14, 2017, when the Claimant was returned to work with the prescription glasses restriction, is primarily attributable to Carrier's handling of the matter, and not to any conduct or inaction on the Claimant's part. There is no reason to believe that the Claimant would not have scheduled his ophthalmologist appointment to obtain his glasses immediately in July if he were informed of the requirement earlier, since it appears he did so immediately upon receipt of CMO Holland's August 30

conclusions. In fact, there is no indication that the delay in returning the Claimant to work was necessary for him to obtain his corrective lenses.

Accordingly, the time it took for Carrier to actually take action in scheduling the specialist appointment - May 19 to June 21 - and to evaluate the specialist reports and process the Claimant's FFD assessment and return him to work - July 24 to September 14 - were attributable to Carrier's excessive and arbitrary delay, and is compensable. See, Third Division Awards 43587; 44070; 41393. However, there is no Agreement support for inclusion of overtime in such calculation. See, PLB 7660, Award 82 (Interpretation of Award 19); PLB 7426, Awards 2 and 3. The Claimant shall be compensated for his straight time hours for the two time periods mentioned above (May 19 to June 21, and July 24 to September 14).

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 29th day of July 2021.