

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44518
Docket No. MW-45353
21-3-NRAB-00003-190165**

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. Owens from service beginning on May 11, 2017 and continuing (System File A-1750U-002/1697057 UPS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Owens shall now be compensated for all workdays and holidays lost beginning May 11, 2017 and continuing until the violation ceases.”**

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 on May 11, 2017, based upon his Manager's referral for a Fitness For Duty (FFD) exam due to the observation that he was struggling to maintain his balance while walking on ballast, was fatigued and weak, had shortness of breath and deteriorating performance, including walking into a backhoe operator's "red zone." HMSD requested and reviewed the Claimant's medical history records, and referred him for a FFD evaluation which was held on June 29, 2017, as the Claimant requested not to be scheduled during his vacation time off between June 15 and 21. The report from such examination was received July 7, 2017, and revealed a number of different health issues and work limitations, and recommended that the Claimant undergo a Functional Capacity Evaluation (FCE). The FCE was conducted on August 2, 2017, and the report was received on August 24, 2017, noting several weight lifting restrictions. The Claimant requested, and was paid for travel expenses to attend these evaluations. HMSD was notified at the end of August that the Claimant was scheduled to have bilateral carpal tunnel surgeries in September, and would be out on MLOA until October or November. While the test results were being analyzed, HMSD was notified that the Claimant retired effective September 1, 2017, so that the return to work process was not completed.

The Organization argues that the Claimant was withheld from service without justification or cause. It asserts that he was released to return to work and found fit with workable restrictions after his FCE. The Organization contends that the Carrier must bear the burden of compensating him for the time lost between his removal from service on May 11, 2017 and the effective date of his retirement, citing Third Division Award 44070 among others, asserting that the Claimant retired due to the prolonged process and uncertainty of when he would be able to return to work.

Carrier contends that the Claimant was properly removed from service based upon his Manager's observations of his physical difficulties while working, calling into question his ability to work safely. 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 maintains that the Claimant was scheduled for his FFD and FCE evaluations promptly and without unnecessary delay, and that those tests showed that the Claimant had medical issues that limited his ability to perform his job without restrictions. It notes that the Claimant's FFD process was still ongoing when he retired from service, thereby ending the continuation of such evaluation. Carrier also asserts that the remedy

requested by the Organization is excessive and unwarranted, citing PLB 5579, Award 1; PLB 6302, Award 23; PLB 7660, Award 82.

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 response to his Manager's observations questioning his ability to safely perform his job, and 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. In accord with Carrier's responsibility to assure the safety of its employees, the medical assessment the Claimant was required to undergo was reasonable and relatively prompt, and the Claimant was compensated for traveling to attend these evaluations. The record makes clear that the Claimant retired during the ongoing FFD process, and while he had outstanding carpal tunnel surgery scheduled. There is no evidence that his failure to be returned to work was attributable to any delay on Carrier's part. Therefore, the Organization has shown no basis in the Agreement for ordering compensation 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 29th day of July 2021.