

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 44520  
Docket No. MW-45596  
21-3-NRAB-00003-190502

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 improperly withheld Mr. D. Foster from service, beginning on April 11, 2018 through May 15, 2018 (System File MK-1850U-601/1706994 UPS).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Foster shall now “\*\*\* be allowed compensation for all hours he was not allowed to work starting on the date that the Carrier withheld Claimant from performing his regular assigned duties between April 11, 2018 and May 15, 2018. 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 Carrier's delay in returning the Claimant to service from a MLOA due to an on-the-job injury. The Claimant was a Backhoe operator/Class A Truck Driver, who was released by his doctor to return to work on April 11, 2018. His medical records were reviewed by the HMSD and he was cleared to return to work on April 24, 2018. During his MLOA the Claimant's DOT qualifications had expired and he was no longer in the active FMCSA pool for testing. In order for him to return to his position, the Claimant had to renew his DOT physical and submit to a return to work drug test, in accordance with government regulations. He and the Organization were advised that such process could take up to 10 business days to complete, and that the Claimant could exercise his seniority rights to other positions, including Track Inspector, and return to work on April 24, but Carrier was informed that the Claimant wanted to wait until he was fully cleared to return to his former position. Carrier stated that he did so at his peril, but agreed with the request to a bump clock extension so he could be in his former position when he prequalified as a DOT driver. The Organization submitted emails and correspondence asserting that the Claimant was told by a medical department nurse that he should not take his medical examination to re-qualify while he was on MLOA, and that is the reason his DOT qualifications expired. Carrier disputes this allegation.

The Organization argues that Carrier was unjustified in withholding the Claimant from service after his release to return to work on April 11. It asserts that the only reason the Claimant did not take his DOT qualification test before its expiration was because he was following the guidance offered by Carrier's medical department, and that he should not be required to take a different position he did not feel comfortable performing after Carrier released him to return to work on April 24. The Organization blames Carrier for the undue delay between the Claimant's initial release to return to work on April 11 and his eventual return to his position on May 17, 2018, and contends that it should bear the financial burden suffered by the Claimant as a result, citing Third Division Awards 42978 and 44070.

Carrier contends that it is not responsible for the delay caused initially by the Claimant letting his DOT license lapse, and later by the Claimant choosing not to exercise his seniority to a position he was qualified to assume when he was released to return to work on April 24, 2018. It contests the Organization's assertion that the

Claimant was informed that he could not take his physical while he was still out on MLOA, maintaining that, at best, the Organization has presented an irreconcilable dispute of fact that cannot be decided by the Board, and requires dismissal of the claim for failure to meet its burden of proof, relying on Third Division Awards 37204 and 36977. Carrier points out that it agreed to a bump clock extension for the Claimant to be able to maintain his preferred position, when it was not required to do so, thereby attempting to accommodate his desire to wait out of service until his DOT qualification was updated. It stresses that any delay in the Claimant's return to work was of his own doing, and is not attributable to any inaction on Carrier's part.

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. The Organization has not shown that Carrier's actions were responsible for causing the Claimant's DOT qualifications to lapse, or that it acted inappropriately in concluding that without a valid DOT license the Claimant could not assume his prior position as a Backhoe Operator/Class A Truck Driver. The record establishes that Carrier made the Claimant aware that he was able to exercise his seniority into a Track Inspector or other position when he was medically cleared to return to work from his MLOA on April 24, but that the Claimant chose to delay his return by opting to wait until his DOT qualifications were updated so he could assume his former position, which occurred on May 17, 2018. We are unable to find that the delay in returning the Claimant to work after he was medically released was attributable to Carrier, or that compensation for that period is appropriate. See, e.g. PLB 6302, Award 8.

**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 29<sup>th</sup> day of July 2021.