

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 44522
Docket No. 44878
21-3-NRAB-00003-180358

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 Southern Pacific
Western Lines)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it withheld Mr. L. Gutierrez from service after receiving a medical release from his physician on October 24, 2016 (System File RC-1732S-701/1679458 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Gutierrez shall now be compensated for all the hours denied, both straight time and overtime, retroactive sixty (60) days and continuing, until he is returned to full duty. Payment shall be in addition to any compensation he may have already received.”

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 Carrier's continuing to withhold the Claimant, a System Trackman, from service and not returning him to work after receipt of a medical release from a doctor on October 24, 2016. The record establishes that the Claimant went out on a MLOA commencing on September 30, 2016 for eye problems. His medical history shows that he was evaluated by ophthalmologist Dr. Thom on September 27, 2016, who diagnosed him as having optic nerve damage and cataracts in both eyes, as well as advanced stage open angle glaucoma, and he was referred to a glaucoma specialist. Dr. Thom's recommended that the Claimant have permanent restrictions of no operating equipment and no safety sensitive work requiring depth perception when he returns to work. The Claimant saw the glaucoma specialist on October 24 who diagnosed him with bilateral cataracts and glaucoma, and stated that he may return to work and must wear safety glasses at all times.

A discussion with the Claimant on October 25 is noted in his HMSD Medical Comments History indicating that the Claimant said he did not like this doctor, was not good to return to work, and would follow up with his first doctor. He was informed that they would not let him return to work if he is not safe or ready to do so. His MLOA was extended to December 31, 2016. On October 28 the Claimant indicated that he was seeking a second opinion on November 24, asked about continuation of benefits, and was told about the accommodations process in the event his restrictions could not be accommodated. After HMSD spoke with the Claimant's new clinician in early December, the Claimant was sent information about what documents and medical records were necessary to submit for medical review. A fitness for duty (FFD) evaluation was performed by Carrier's CMO, and after review of his medical records and test results, he was placed on permanent work restrictions including inability to (1) operate any company vehicles or equipment, (2) work on or near moving trains unless protected by barriers, (3) work at unprotected heights over 4 feet above the ground, and (4) work on 1 or 2 man gangs. HMSD was told to evaluate functional job demands of any job assignment the Claimant is considering to determine if he can safely perform the essential functions of the job. The Claimant was informed of these restrictions and agreed he was not safe to be working on a System Gang with his impaired vision. His Director confirmed that they are not able to accommodate him with these restrictions. The Claimant was referred to vocational

rehabilitation and counselling for resume development in early January, and began receiving sick benefits.

The Organization argues that its continuing violation claim was timely filed on January 12, 2017, and it is based upon his specialist's October 24, 2016 release to work with only a safety glasses restriction, which it notes is required to work on any job with Carrier. It asserts that Carrier abused its discretion in withholding the Claimant after it received this release to return to work, and that he should be compensated for the losses he incurred commencing 60 days prior to when the claim was initiated, relying on Third Division Award 41393 and 43587.

Carrier contends that it has the right to withhold an employee from service based on documented medical concerns, and the responsibility for the safety of its employees, citing PLB 6006, Award 127 and PLB 6302, Award 9. It maintains that Carrier carried out its review within a reasonable time frame, imposed reasonable work restrictions, and its determination that the Claimant could not be accommodated in his position on the System Gang was rationally based, noting that the Claimant agreed that he could not work his former position with his impaired vision. Carrier relies upon its right to establish and enforce medical and safety standards for employees, which should not be overturned unless they are applied in an arbitrary or discriminatory manner, relying on Third Division Awards 25013 and 41127. It argues that the Organization has failed to meet its burden of establishing a violation of the Agreement.

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 facts reveal that the Claimant was aided in the medical review process by HMSD, and that the determination of his permanent restrictions was based upon undisputed medical evidence of his severe vision issues which, admittedly, would impact his ability to be able to safely perform his job as a System Trackman. The Medical Comments History underscores the fact that the Claimant was consulted at every step, given the opportunity to work through the accommodation process and offered help with vocational rehabilitation. The record supports the finding that there was nothing arbitrary or capricious about Carrier's determination of his permanent restrictions or his inability to be accommodated in his current position, and there is no basis for this Board to find that its action in withholding him during this period was based on anything other than the Claimant's inability to safely perform his work. Therefore, the Organization has shown no basis in the Agreement for ordering compensation in this case. See, e.g. PLB 6302, Award 9; Third Division Awards 41127, 25013.

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.