SERIAL NO. 426

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 44792
DOCKET NO. SG-46472
OLD NRAB Case No. 3-210362
NEW NRAB Case No. 3-230633

PARTIES TO DISPUTE: **(Brotherhood of Railroad Signalmen**
(
(Northeast Illinois Regional Commuter Rail Corp.
((METRA)

STATEMENT OF CLAIM:

The Organization challenges the Carrier's interpretation of the Award in NRAB 3-210362 (Old Case Number).

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.

Background:

Claimant took a medical leave of absence that expired on August 10, 2019. When the Carrier determined that he had failed to provide required documentation in a timely fashion, his termination followed. A claim was filed, and on September 19, 2022, Award

44792 granted the claim as presented pursuant to the time mandates of Rule 56. The following remedy was imposed:

> ***Claim sustained. Claimant's status shall be changed to approved medical leave from the time of his termination until 30 days after issuance of this Award. He shall be offered reinstatement subject to the Carrier's established return to service policies. The Carrier has the right to condition Claimant's reinstatement upon a showing of fitness to work. Such a showing will be in accordance with the Carrier's universally applicable medical and other policies and standards pertaining to a finding of fitness to work following medical leave. As an alternative to reinstatement, Claimant may opt to continue on medical leave, subject to compliance with the Carrier's established policies and practices. Claimant's seniority and medical benefits shall be retroactively restored.***
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> ***Claimant's entitlement to back pay shall be determined by the parties based on a reasonable assessment of when he would have been cleared for work. To the extent the parties can establish that he is entitled to back pay on this basis, the Carrier shall make him whole for the time he is found to have missed despite fitness for duty, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate.***
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> ***Claimant's medical insurance shall be retroactively restored, with deduction from any backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. Any backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records. Proof of replacement insurance premiums and any claims paid under that insurance is required for reimbursement. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied. This remedy is based on the unique circumstances of the case and is not intended to serve as precedent. The Board hereby retains jurisdiction to resolve any dispute arising from implementation of this award.***

The Carrier was accorded 30 days to effectuate the Award. The parties were subsequently unable to jointly make a reasonable assessment of when Claimant would have been cleared for work, nor were they able to determine whether Claimant had

interim earnings from replacement employment. In addition to the backpay issue, the Organization contended the Carrier unreasonably delayed Claimant's return to work. The remedy was therefore submitted for interpretation.

Analysis: Backpay Issue:

On October 17, 2022, in response to a request for information regarding Claimant's status, Nurse LeeAnn Greiner from Dr. David King's office wrote the following:

> **Stephen was able to return to work on October 23, 2019 without restrictions. At that time, it was recommended that Stephen follow up in 6 months with a baseline MRI. Stephen followed up with the new MRI in July 2020 and was advised to contact our office with any follow up concerns that he had. We last evaluated Stephen on January 6, 2021 to which he was referred to our interventional radiology colleagues for additional follow up. Please contact our office with any further questions or concerns.**

The Carrier requested Dr. King's office to provide the described October 23, 2019 notes on December 1, 2022 and again on December 20, 2022. On January 12, 2023 RN Greiner reiterated the assertion that Claimant was able to return to work without restrictions as of October 23, 2019. Though she provided notes from other visits, no notes from any October 23, 2019 visit were included.

Claimant underwent surgery on August 29, 2019. With no doctor's notes of any October 23, 2019 visit, the Carrier ascertained that it lacked an adequate basis for determining that Claimant had indeed been able to work in October of 2019. Though Dr. King himself later referred to an ability to work as of October 23, 2019, no records of such a visit were provided. It was reasonable for the Carrier to anticipate review of the notes from October 23, 2019 in order to understand and verify basis for the doctor's conclusions. The Carrier was within reason to require doctor's notes as proof of the doctor's assessment, and should not be forced to rely on a simple representation that such a visit took place.

Even assuming Claimant was able to return to work as of October 23, 2019, the Carrier's uncertainty about his subsequent condition was well founded. Claimant had

two follow-up visits which seriously drew into question his ability to return to work. The notes from those visits are reproduced below: [1]

12/16/2020:

> **HPI:**
> **Stephen comes in for an urgent appointment due to increase in his left shoulder pain. He is status post a very significant resection of his extensive multifocal vascular malformations back on 8/29/19. He has been frustrated with his slow recovery and was hopeful that he would have a better result. It sounds like he was doing better in physical therapy and getting his strength and function back but not the size of his shoulder, which certainly bothers him. Unfortunately, insurance said he was no longer eligible for additional therapy which certainly does not make sense to me or him given he was making steady progress. For whatever reason, yesterday he had a dramatic increase in his left anterior shoulder pain. This was painful enough to bring tears to his eyes and he was unable to lift it. He was really having difficulty sleeping last night and reports that his arm feels very heavy. His wife gave him a patch to try on it that sounds like it may have some local anti-inflammatories and he put ice on it. He does not report overdoing it. He did some driving with that arm but had no acute pain while driving. He has not noted any new masses. His last MRI was in July. He has only taken Tylenol from a medication standpoint. He does report that this morning when he woke up the pain was better and it is certainly better than it was yesterday at this point.**
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> **PHYSICAL EXAMINATION:**
> **On physical exam, Stephen points to the anterior aspect of his shoulder as the area of discomfort. This is different from the previous posterior shoulder pain that he was experiencing. He continues to have decreased size of his left shoulder compared to the right which is fairly dramatic. His incision is well-healed. He has a small potential vascular bleb associated with it near the skin that I can palpate but is not the pain generator for him. He has somewhat diffuse and localized tenderness to deep palpation near the distal pectoralis major just medial to where his biceps tendon was that reproduces his pain. He experiences significant discomfort with external rotation of his shoulder. He is neurologically intact distally with no distal swelling or edema currently.**

[1] Statements of import have been highlighted.

ASSESSMENT/PLAN:
Stephen was doing better with therapy although he still is not really happy with how he has recovered and certainly the size and girth of his shoulder which is quite different from his opposite side and the rest of his body, which is quite muscular. I told him that based on the MRI that we obtained previously, there was no evidence of muscle wasting or nerve damage but we will certainly keep an eye on that. His wife had told him not to take anti-inflammatories since he is on two blood pressure medications. I told him that I felt that in this case for a short period of time it would not be a significant concern and I think it will significantly help his pain to take 400mg of Aleve twice a day for the next 5 days. I also urged him to continue the Tylenol and the ice and then consider the topical patch as well.- We will get him in for a new MRI and see if there is something that is going on in there and whether there is something acute that happened. I actually think that the anti-inflammatories may be enough to settle this down to get him back to baseline and then hopefully he get back into some physical therapy with his new symptoms. Stephen was comfortable with the plan. I will see him back with the MRI to see if it has changed or grown since the previous MRI and we will discuss treatment options at that time.

On January 6, 2021 he was again seen with the following documentation:

HPI:
Stephen presents for further evaluation of his extensive left shoulder multifocal vascular malformations. He underwent resection of some of the larger areas back on 8/29/19 and frankly has been disappointed in his recovery. He was making progress with his recovery and then had a significant exacerbation of his pain. In addition to the discomfort, he is a very concerned about the fact that he has not been able to regain the size and strength of that muscle group. When I saw him a few weeks ago he was really miserable. I had him take Aleve around-the-clock which he reports helped him significantly. He is markedly improved with regards to his pain at baseline but is still limited in his activities. He says that he cannot do push .. ups anymore due to pain in the anterior shoulder and is not able to really work out the way he would like to or rehab the left shoulder due to the discomfort. Most of his discomfort is in the anterior shoulder near the coracoid moving toward the pec insertion. We ordered a new MRI today to evaluate whether things have gotten bigger or there are any other shoulder issues to address.

PHYSICAL EXAMINATION:
On physical exam, Stephen has improved range of motion of his shoulder but is still limited to full active forward flexion and abduction. He continues to have decreased size particularly of the anterior shoulder and anterior deltoid musculature and decreased size of the left pec compared to the right. His incision is well-healed overall. He does not seem to have any focal tenderness on the posterior shoulder where he has some other lesions nor in the scapular area or in the more mid to proximal third of his arm. The majority of his tenderness and discomfort is in the anterior aspect of the proximal arm and shoulder area into the chest near the coracoid.

RADIOGRAPHS:
His MRI demonstrates multifocal masses again most of which have not changed significantly in size. As noted in the physical exam, a portion of the posterior shoulder, scapular, and more proximal arm masses including the area near the suprascapular nerve do not appear to be symptomatic at this point. Interestingly, he does not have significant denervation atrophy of any of the muscles despite his inability to rehab them currently, which I am pleased with. He has disease along the axillary nerve as well as the suprascapular nerve which clearly are going to be a little bit limited as far as resection or even sclerotherapy. The area of a large bulky vascular malformation that we resected back in 2019 has not recurred which is good news for Stephen. He does have disease tucked around the coracoid anteriorly where he is experiencing pain. I think that is likely to be his pain generator at this point.

ASSESSMENT/PLAN:
I explained to Stephen that my recommendation would be to talk to Dr. Hohenwalter from interventional radiology who has treated Stephen in the past to discuss additional sclerotherapy localized to that anterior symptomatic area. I would certainly start there and if that is not able to get him adequate relief we could do a more focused approach to that area with resection, Certainly Stephen is somewhat deflated from this process and l think going into the bigger surgery that he had a year ago or so was hoping that that would take care of it for him. I think he is starting to realize this is more of a chronic issue that we have to manage over time and optimize with bouts of recurrent discomfort, I explained to him that that was typical the way it went although it is a good sign that he has not had recurrence of the disease that we removed previously. I think we should just keep working on

> **it and told him that he is a young man and has a lot of life left and that we will continue to work and get him decreased pain and allow him to rehab that shoulder more fully. I do think that once we get his pain better controlled he will begin to build active strength and he is also optimistic about that I will reach out to Dr. Hohenwalter and we will get him in to see him for further evaluation.**

It is noted that Dr. King, in his progress notes on February 9, 2023, stated "We had previously indicated that he could return to work with no restrictions on 10-23-2019 and I will fill out a new form that says he can return to work with no restrictions beginning 2-8-2023." Though this appears to confirm that Claimant could have returned to work in October of 2019, Dr. King described Claimant's condition as "more of a chronic issue" "with bouts of recurrent discomfort." This was indeed the case given his appointments on Dec. 16, 2020 and January 6, 2021, which establish that after his October 23,2019 assessment, he was experiencing pain and disability, and was referred to interventional radiology. Indeed, On December 16, 2020, the doctor noted that he was unable to lift his arm. It is clear that he would not have been working at that time. It is therefore evident that while Claimant could have returned to work on October 23, 2019, he was subsequently disabled. The problem here is that the duration of his ability to work and subsequent disability are indeterminate.

On December 20, 2022, the Carrier wrote Dr. King and specifically requested the following:

> **(4) In your opinion, was Mr. Glenn cleared/able to perform all assistant signalman job duties without restrictions for the entire period from October 23, 2019 to present? If so, on what do you base your opinion?**
> **(5) If the answer to question 4 is no to any extent, please indicate for what periods he was, and what periods he was not, cleared/able [sic] all his job duties. For those periods he was not cleared/able to perform his job duties, please provide all information, documentation, etc., on which you base your opinion.**

Dr. King never accommodated these critical requests. The Carrier cannot be held accountable for this lapse. It was denied the information it needed for its consideration of back pay after October 23, 2019. Hence, it was not possible for the

Carrier to identify any specific period of time during which Claimant was able to return to work prior to February 8, 2023. A remedy cannot be awarded based on conjecture. A back pay award for any work missed between October 23, 2019 and February 8, 2023 cannot be accurately calculated from the evidence submitted, and therefore cannot be granted.

Even if the Board were to consider Claimant eligible for backpay from October 23, 2019 to December 16, 2020, backpay cannot be calculated without the proof of interim earnings required in the Award: "Any backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records." It was Claimant's decision not to provide his tax information, because he chose to protect his wife's privacy. This was his choice to make, but the Carrier cannot and is not expected to calculate backpay without the tax records.

Analysis: Delay

The Organization asserts undue delay in Claimant's return to work and argues this constitutes noncompliance with the September 19, 2022 Award. That award required the Carrier to effectuate the remedy within 30 days. On October 11, 2022, the Carrier contacted Claimant requesting documentation. He provided documentation on October 17, 2022. Then 64 days passed until on December 20, 2022 the Carrier asked questions. On January 12, 2023 Claimant's orthopedic clinic sent in a response. On January 24 the Carrier made a further request for information. Claimant underwent medical examination on February 8 and was returned to work on February 22, 2023.

The standard of review for the Carrier's handling of administrative and/or discretionary actions is whether it acted in a way that was arbitrary, capricious, unreasonable or discriminatory. We find that the Carrier was reasonably prompt in its actions with the exception of the 64-day interim between receiving requested documentation on October 17, 2022 and asking for more information. Though the Carrier was reasonable in finding the documentation provided on October 17 to be inadequate, it bears the responsibility to communicate its findings of inadequacy within a reasonable period of time. This Board finds a 64-day delay to be unreasonable and arbitrary. Certainly, the Carrier should be afforded a period of time during which to formulate its position. We find the Carrier responsible for

Claimant missing 54 calendar days of gainful employment when he was able and ready to work.

AWARD

Claim granted in part. Due to the Carrier's arbitrary delay, Claimant missed 54 calendar days of employment. As a result, he will be compensated for the pay he would have received had he worked from December 31, 2022 to February 22, 2023. The parties are referred to the original remedy accorded on September 19, 2022 in the event further disputes arise regarding implementation of that award. The calculation of this remedy is restricted to the facts of this case and is not intended to be cited as a means of calculating other remedies in claims between the parties.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award partially favorable to the Claimant(s) be made. The Carrier is ordered to make this 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 13th day of February 2025.