

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45087
Docket No. MW-47234
24-3-NRAB-00003-220205**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly withheld Mr. T. Davidson from work after he was cleared by his physician to return to work without restriction beginning November 3, 2020 and continuing through November 23, 2020 (System File S-2009K092/BMWE 18/2021 KLS).

2) As a consequence of the violation referred to in Part (1) above, Claimant T. Davidson shall now “* be compensated all straight time, overtime and double time hours lost due to the Carrier continuously holding him out of work, all per diem payments, safety payments, as well as all credits for vacation and all other benefits ***” as detailed in the December 18, 2020 claim letter.”**

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.

Factual Background:

On November 2, 2020, Claimant notified the Carrier that his physician had deemed him eligible to return to service without restriction the following day. He was returned to service on November 23. The Organization maintains the 20-day interim was excessive and an abuse of the Carrier's discretion. The resulting claim was duly processed through the parties' grievance procedure to consideration by the instant Board.

Position of Organization:

Claimant was not provided with a Carrier-mandated return to work physical until November 10, 2020. The Carrier and its facility then took another twelve days to issue Claimant's clearance for work, finally returning him to service on November 23, 2020.

The Carrier attempted to defend against the instant claim by asserting that Claimant's return to work physical was scheduled on the next available date at the clinic. However, the Carrier failed to provide any evidence whatsoever to support this defense. The record is entirely void of any evidence which would show that the Carrier tried to schedule Claimant for the first available appointment or that Claimant's appointment was in fact the earliest available. Furthermore, the Carrier chose the clinic/facility in question and is therefore responsible for its inability to schedule.

As the Organization sees it, the Carrier has attempted to cloud the record by stating that the employee should contact Human Resources Department about his or her intent to return to work fully two weeks prior to the anticipated return date. Although this would be ideal, no employee can predict medical eligibility to return to work; this is a medical determination that can only be made by a physician. Arbitral precedent in the industry establishes reasonable processing times in return-to-work cases that are much shorter than involved here. As the Organization sees it, there is no excuse for choosing a painfully slow clinic/facility partner.

Position of Carrier:

Keolis FMLA Policy states: “An employee should notify the Human Resources Department of his or her intent to return to work, two (2) weeks prior to the anticipated date of return, or of any medically necessary changes in the date of return.” Claimant disregarded that policy and instead waited until the very last minute to inform the Carrier that his physician had cleared him to work. As a result of Claimant’s delay in notifying the Carrier of his return clearance, the first available appointment for a return-to-work physical not until November 10, 2020. After the physical, it took nine days for the results of Claimant’s drug and alcohol screening to be processed, which is a typical turnaround for this type of test. Accordingly, on November 23 Claimant was duly returned to work. This was the nearest possible time and was therefore reasonable.

In the Carrier’s view, there is no right, contractual or otherwise, to expedited processing of a return-to-work physical. Under the law and the Carrier’s policy, Claimant was required to have a return-to-work physical before he became eligible to go back to work. Until such time as this requirement was met, he was not eligible for any shifts, let alone overtime shifts. The Carrier denies any contractual violation.

Analysis:

The Organization bears the burden of proving that the Carrier abused its discretion by acting in a manner that was arbitrary, discriminatory or unreasonable. By letter dated February 17, 2021, Chief Engineering Officer L. Gros stated that Claimant’s physical was scheduled the same day his doctor’s note was received, for the first available appointment.

There is no evidence in the record that the Carrier neglected to schedule Claimant’s physical, sat on Claimant’s drug testing result when it came in, or otherwise failed in its obligation to process Claimant’s return to work. To the contrary, the Carrier acted promptly in scheduling Claimant’s physical.

The Carrier’s policy establishes a two-week notice period prior to return to work. This sets up an expectation of at least two weeks to process a return to work after an absence in excess of 30 days. In this instance, the process took three weeks. Though inconvenient and in excess of the norm, we do not find three weeks to be unreasonable.

under the circumstances. There is no adequate basis in the record for the conclusion that the Carrier was delinquent in its processing of Claimant's return.

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 31st day of October 2023.