Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45256
Docket No. TD-47971
24-3-NRAB-00003-230340

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"The Claimant was on a medical leave beginning on March 15, 2020 until he was cleared to return to work with restrictions on August 27, 2020 by his personal physician. After a review of his return to work documentation by the Carrier's Chief Medical Officer, the Carrier's Chief Medical Officer and the Claimant's personal Physician came to a mutual understanding on September 24, 2020 that the Claimant was fit for duty and that the necessary accommodation was available, to be effective October 1, 2020. Despite there being no dispute that the Claimant was not fit for service, the Carrier withheld the Claimant from service from October 1, 2020 until February 2, 2021. The Claimant must be compensated for all lost time from the time of his release to return to work until he was returned to work."

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.

On March 16, 2020, Claimant B. Haney began to miss work from his position as an Assistant Chief Dispatcher. The Claimant remained off work until February 2, 2021. This case involves the period between the date the Organization alleges the Claimant was cleared to return to service and when he was actually allowed to return, and whether the Carrier improperly delayed the Claimant's return to service.

The Organization submitted the instant claim on December 1, 2020, contending that the Carrier violated Articles 8 and 15 of the applicable agreement beginning October 17, 2020, stating that the Claimant had submitted the required form to return to work after a medical leave of absence but that the Carrier had violated Article 8(c) by not allowing him to return to his former position or to exercise his seniority. The claim alleged that the Claimant's physician had faxed a completed "Attending Physician's Return to Work Report" to the Carrier's Medical Department on August 27, 2020, but that as of the claim date, the Claimant had not been provided any reason why he had not been cleared to return to work, nor had the Medical Department made any request for additional information or medical documentation.

The claim also stated that, though the Carrier had not stated that the Claimant was physically disqualified from returning to work, any dispute as to whether a physical disqualification of a Train Dispatcher is justifiable must be promptly referred to a panel of two physicians, as required by Article 15 of the agreement. It alleged that, insofar as the Medical Department had withheld a ruling on whether or not the Claimant was physically qualified to return to work, the Carrier had failed to promptly resolve an apparent dispute regarding the Claimant's physical disqualification.

Attached to the claim was the report from the Claimant's physician. That report stated that, due to his physical condition, the Claimant was at high risk of death if exposed to COVID. It stated that the Claimant could return to work without restrictions after a COVID vaccine, or that he could return to work with requested accommodations, which were to be able to work from home or in a sheltered area.

The Carrier denied the claim, stating that the Organization had not provided any detail as to how the Carrier allegedly violated the cited rules or how the Claimant was entitled to pay. It denied being responsible for the Claimant not being back to work. It stated that the Claimant had been cleared by the medical department to return to work, and that it was the Claimant's request for special accommodations that had delayed his return. The Carrier asserted that it had been in contact with the Claimant and his doctor and that as a result of those conversations, the Carrier had developed a return to work accommodation plan and was awaiting a response from the Claimant and his

doctor. It concluded that the Organization had not supported its assertions with facts or evidence.

The Claimant returned to service February 2, 2021, after which the Organization submitted an appeal. It stated that the Carrier had informed the Claimant on August 28, 2020 that his return to work form was being reviewed by the Carrier's Chief Medical Officer (CMO), but that no update was ever provided nor was the Claimant given any response to his request to return to work. The Organization asserted that the Carrier had an obligation to notify the Claimant when he was cleared to return to work, but that this did not occur until February 2, 2021.

The Organization cited a September 24, 2020 letter from the CMO to the Claimant's physician, which confirmed a telephone conversation and which detailed their mutual understanding about the Claimant's fitness to return to service. It referred to a section therein in which the CMO stated that the Carrier-provided accommodations were medically acceptable for the Claimant to be able to return to work, but it asserted that the Claimant was not informed that he could return to work.

The appeal stated that it recognized that the Claimant's doctor had requested an accommodation and that the Carrier's Medical Department was working with the Claimant's doctor to develop a return to work accommodation plan. It stated, however, that the CMO's letter contradicted the Carrier's assertion that it was awaiting a response from the Claimant and his doctor, as the Claimant's doctor had concurred with the CMO's summary.

The Organization stated that, after it received the Carrier's claim denial and notified the Claimant of its content, the Claimant called his supervisor in the NOC on January 30, 2021, and attempted to mark up. It asserted that the supervisor told the Claimant he had not received notification of medical clearance, and that the Claimant could not mark up until the supervisor received confirmation from the Medical Department that the Claimant was cleared to return to work, which finally occurred on February 2, 2021.

The Organization cited Article 15, and it stated that the CMO and the Claimant's doctor had come to a mutual understanding regarding the Claimant's fitness to return to work and the agreed to accommodations. It stated that the understanding became effective seven days after the CMO's September 24, 2020 letter, and it requested that the Claimant be paid for lost work opportunity from October 1, 2020 until the day he returned to service due to delays attributable to the Carrier.

The Carrier denied the appeal, again maintaining that no violation of the cited agreements had been established. It asserted that the Claimant was not on a medical leave of absence, but that the Claimant voluntarily made himself unavailable for service due to fears of contracting COVID-19. The Carrier stated that at no time did it withhold the Claimant from service between June 2020 and February 2021.

The Carrier set forth a chronology of events leading to the Claimant's return to work, which included dates pertaining to the Claimant making himself unavailable and utilizing FMLA leave to cover absences beginning June 4, 2020. The Carrier cited an email from the General Chairman to the Labor Relations department dated June 18, 2020, which stated that the Claimant had submitted a request for accommodations under the ADA. The Carrier included emails which stated that the Claimant had been notified by the Medical Department that he did not have an active illness preventing him from working, that his request for accommodations was not a medical issue, and that his request for accommodations could not be granted by operations.

The Carrier stated that its denial of the Claimant's request for accommodations resulted in the Claimant filing a complaint with the Carrier's Ethics Hotline on or about July 5, 2020, and that regular phone discussions were held with the Claimant over a period of months in an effort to address his concerns and to return him to service, since nothing prevented him from working. The Carrier stated that the Claimant's request to work from home was denied due to technology issues, but that his request to be able to work in a private space was explored. It stated that the intricacies of the system and limited building space required planning and time to facilitate any accommodations, but that at no time during this process did it prevent the Claimant from returning to work.

The Carrier rejected the argument that the Claimant had not been provided updates after he submitted the return to work form on August 27, 2020, stating that it had been in constant contact with the Claimant regarding his request for accommodations. It also stated that the return to work form did not list a return to work date, but rather it made a request for accommodations to address his fear of contracting COVID-19. It concluded that the Organization had not articulated how the Claimant was entitled to compensation for a period in which the Claimant chose to remain unavailable due to those concerns, and that there was no evidence to support the alleged rule violations.

The parties discussed the matter in conference, and each of them provided additional correspondence supporting their respective positions. The Organization

asserted that the Carrier's timeline was inaccurate, as the Claimant had been off work since March 15, 2020 due to medical issues, not June of 2020, noting that the Claimant had received short term disability benefits. It stated that, as there was no indication that the Claimant's FMLA leave was associated with care for a family member, he must have been on a medical leave of absence. It also stated that the fact the Claimant was required to submit the return to work form was confirmation that the Claimant had been on a medical leave of absence.

The Organization stated that there was no evidence in the record to substantiate the Carrier's assertion that it had informed the Claimant of events after the Claimant submitted the return to work form. It denied that there was any evidence in the form that the reason for the Claimant's absence was fear of contracting COVID-19 or of the grounds for restriction for return to work placed by his physician. The Organization asserted that the involvement of the Carrier's CMO in the matter belied the Carrier's claim that it was not a medical issue, and it stated that any disagreements regarding accommodations necessary to address work restrictions were resolved prior to the CMO's letter to the Claimant's physician.

The Organization stated that the Carrier's responses were unsubstantiated, and that they were insufficient to establish what it deemed to be an affirmative defense. It also argued that, if the Carrier did not view the Claimant as being on a medical leave, the Carrier would have been required by agreement to provide the General Chairman with a written copy of approval of a voluntary leave of absence. The Organization stated that there are no other circumstances in which employees have been allowed to voluntarily make themselves unavailable for service for such an extended period, further supporting its position that the Claimant had been on a medical leave of absence. It concluded that the Carrier had improperly withheld the Claimant from service until February 2, 2021, after he was released by his physician effective October 1, 2020.

The Carrier replied, disputing the Organization's characterization of the events. It stated that the Claimant's short-term disability benefits were initially allowed pursuant to the applicable agreement, but that they ceased after May 29, 2020. The Carrier stated that, if the Claimant was actually on a medical leave, all time absent would have been covered by STD payments.

The Carrier also stated that the Claimant had submitted a note from his physician on June 10, 2020 stating that he had medical conditions that put him at significant risk of death due to COVID-19 should he contract this illness, and that the Claimant was requesting an accommodation allowing him to work from home until he

had been successfully vaccinated for COVID-19, and it noted that vaccinations were not available at that time. It asserted that the CMO reviewed the physician's notes and determined that the Claimant did not have an active illness preventing him from working and that his request therefore did not have a medical basis. The Carrier stated that a nurse from the Medical Department called the Claimant to inform him of that decision and that the Carrier was following CDC guidance to ensure his safety at work.

The Carrier also noted that on June 18, 2020, the Claimant made a similar request via his union representative, who reached out to Labor Relations. It cited the email response which said that Labor Relations had consulted with the Medical Department and with local management, and that it was determined that the Claimant could not perform his dispatching duties from home.

The Carrier also offered details regarding a representative from Employee Relations reaching out to the Claimant to further discuss his request to be able to work from home. The Carrier went into considerable detail regarding the Employee Relations representative's interactions with the Claimant, including exploration of use of one desk in the NOC, which was more removed from the other desks. It asserted that the Employee Relations representative and the CMO called the Claimant regarding that option on September 11, 2020, and that the Claimant said he would consider the offer and get with his physician. The Carrier points out that the Claimant sent a follow up email to the CMO on September 12, 2020, asking if was being withheld from service medically, to which the CMO replied, "No, you are not being held out of service medical. Your physician has prevented you from returning to work."

The Carrier stated that the Claimant's response came September 21, 2020 in an email to Employee Relations, stating that he and his doctor believed the only appropriate accommodation was to telework or otherwise work in isolation. It states that on September 24, 2020, the CMO called the Claimant's doctor to discuss the request, which resulted in the letter cited above confirming the discussion.

The Carrier stated that the Claimant then filed a charge of discrimination, after which the Carrier agreed to enter into mediation via the EEOC, after which the Claimant communicated with the company through the EEOC. The Carrier stated that, as part of that process, the Claimant agreed to meet with a vocational counselor at the NOC to tour the accommodations the Carrier was offering and address any further concerns, but that the Claimant then declined the tour on January 11, 2021. It states that the Claimant then accepted an offer of a virtual tour, which took place on January 15, 2021, but that he again declined to agree to work, indicating he wanted to consult

with his physician. The Carrier cited a January 19, 2021 letter from the CMO to the Claimant's doctor, which provided an updated accommodation plan, and which the Claimant's doctor signed off on. It stated that the Claimant sent an email to the CMO on January 29, 2021, stating that he had spoken with his doctor and that his doctor believed the accommodations were adequate. The Carrier asserted that, upon the Claimant's agreement to return to work, it immediately began upgrading the desk in question for the Claimant's exclusive use, and that he returned to service on February 8, 2021.

The Carrier again asserted that the Claimant was not out on a medical leave, but that he was out because he wanted a private office space, a private bathroom, and other accommodation requests that were unfeasible. The Carrier stated that, while the Claimant had the right to make personal decisions regarding his health, the decision he made in this instance did not create an obligation for the Carrier to pay him during the time he decided to remain off work.

The parties were unable to resolve the dispute on the property, and the matter now comes to us for resolution.

The parties' positions before us are essentially the same as those set forth in the on-property handling described above. The Organization maintains its stance that the Carrier violated the agreement when it failed to return the Claimant to service following a medical leave of absence. It argues that the September 24, 2020 letter from the CMO to the Claimant's physician established a shared understanding between the two doctors that, with the precautions outlined in their discussions, including a desk separated from other employees, temperature screenings, mandatory face coverings, and additional protocols, it was medically acceptable for the Claimant to return to work effective October 1, 2020. The Organization argues that the Carrier did not inform the Claimant of that mutual decision nor did the Carrier notify the Claimant or his supervisor that he was medically cleared to return to service.

The Organization states that Article 8(c) of the agreement is unambiguous, and that a Train Dispatcher returning from a temporary absence will be permitted to exercise seniority to his former position of any bulletined during his absence. It asserts that, despite the Claimant providing all required documentation to the Carrier, and the concurrence between the CMO and the Claimant's physician that it was medically acceptable for the Claimant to return to work, the Carrier failed to allow the Claimant to return to work for another four months.

The Organization disputes the Carrier's position that the Claimant was not being held out of service due to a medical issue. It notes that the CMO informed the Claimant that his physician was withholding him from service, and it argues that the CMO expressed that, without the Claimant's physician's agreement, the Claimant would not be allowed to return to work.

The Organization further contends that the Carrier's position that the Claimant voluntarily withheld himself from service is contradicted by the evidence. It states that the return to work form completed by his physician indicates that return to work restrictions were required due to underlying medical conditions. The Organization contends that the Carrier's assertion that the Claimant chose to absent himself from work out of fear of contracting COVID-19 is an affirmative defense. Citing prior awards, the Organization states that, in the absence of evidence to support that defense, it must be rejected. The Organization contends that the Carrier in this instance failed to substantiate the need for the Claimant to be withheld from service for the period it did, and it urges that the claim be sustained.

The Carrier, on the other hand, maintains its position that no violation of the cited agreements has been established. It states that the Organization must present evidence to establish that an agreement violation occurred, but that none was offered in this case. It states that the Claimant voluntarily withheld himself from service, and that there is no evidence that the Carrier ever physically disqualified him.

The Carrier asserts that the Organization's characterization of the facts is grossly inaccurate, and that it does not substantiate a violation of the cited agreement provisions. It denies that the Claimant was on a medical leave of absence during the period in question, noting that his payments under the STD place ceased as of May 30, 2020, and it asserts that it he had been on medical leave, he would have received STD payments the entire time.

The Carrier reiterates the statements made on the property regarding the Claimant having made multiple requests for accommodations, including the request to be able to work from home until he was vaccinated, but which could not be granted for reasons set forth above. It cites the communication between the CMO and the Claimant as confirming that the Claimant was not on a medical leave, as well as the September 2020 letter from the CMO to the Claimant's physician which confirmed that the Carrier had taken reasonable precautions that would permit the Claimant to return to work. The Carrier further cites the January 19, 2021 letter from the CMO to the Claimant's physician, which provided an update to the accommodations which could be offered.

The Carrier cites prior awards which confirm that the Organization, as the moving party, has the burden of proof to provide evidence that a violation occurred, and it submits that the Organization's mere assertions are not sufficient to constitute proof. The Carrier states that there is no evidence that it prevented the Claimant from returning to work. It concludes that there is no proof to establish an agreement violation, and that the claim therefore must be denied.

We have carefully reviewed the record, including the correspondence, attachments, and citations of authority, and we find that the Organization has not established the Claimant is entitled to the requested payment. Although the Organization argues that many of the Carrier's assertions regarding the timeline of events are not supported by actual evidence, and to an extent the Organization is correct on that score, we do not believe that the evidence which is properly in the record supports the claim that the Carrier improperly withheld the Claimant from service or delayed his return.

First, no documentation has been presented which affirmatively states that the Carrier had placed the Claimant on a medical leave of absence. There are several pieces of evidence, however, which indicate that the Claimant's absence from work was not initiated or required by the Carrier. We initially note that, when the Claimant specifically asked the CMO "Am I being withheld from work medically at this time?" the CMO replied, "*No, you are not being held out of service medical*. Your physician has prevented you from returning to work." (emphasis added.) We find nothing after that communication which would indicate a change of position on the part of the Carrier. The undisputed fact that the Claimant did not receive short term disability benefits after May 30, 2020 is also inconsistent with the claim that he was being withheld by the Carrier for medical reasons.

We also find it noteworthy that, consistent with the Carrier's description of events, the documentation of record indicates that the Claimant made a request for a reasonable accommodation under the ADA prior to June 18, 2020. At that time, the Organization sent an email stating its belief that the matter was not within the scope of the applicable agreement, and we concur with that assessment. The communication between the Organization and Labor Relations on that matter also contains confirmation, from both sides, that a nurse from the Carrier's Medical Department had called the Claimant, as the Carrier alleged, to inform him he did not have an active illness preventing him from working. Such communication is, in our view, consistent with the Carrier's position that, while the Claimant was requesting conditions to enable him to work, it did not consider that it was withholding the Claimant from service.

The fact that the CMO was involved in the matter throughout does not indicate to us that the Claimant was being withheld from service on a medical leave of absence. To the contrary, the record indicates that the CMO consistently took the position that the conditions available at the workplace would enable the Claimant to work and that there was no medical reason for the Claimant to be off. And while the Organization contends that the record does not contain confirmation of the efforts allegedly made by the Carrier to address the Claimant's requests, we note that the CMO's second letter to the Claimant's physician, dated January 19, 2021, contains considerable detail about the ongoing interactions. Of particular note is the CMO's description of the vocational rehabilitation team providing a video tour of the space being offered to accommodate the Claimant's requests, but that the Claimant had reported that the space was not satisfactory. The Claimant's doctor signed off on that letter, apparently concurring with the description of the facts, and it is clear from that letter that the CMO did not believe there was a reason for the Claimant to remain off work. The fact that the Claimant continued to reject the proposed accommodations even into January 2021 belies the argument that he would have worked beginning in October 2020 if only the Carrier had told him he could.

We have also reviewed the arbitral authority submitted by the Organization, and we do not believe it requires a different conclusion. Those cases involve instances in which a Carrier did not support its assertions with actual evidence, and in this case, we find adequate documentation, including the communications addressed above, to support the Carrier's position. The evidence clearly confirms that the Claimant himself was unwilling to return to service until certain accommodations could be made, and we find no evidence to indicate that those accommodations were improperly delayed. In these circumstances, we cannot find a basis to award the requested payment.

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 28th day of March 2024.