

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO 7426

AWARD NO. 6, (Case No. 6)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

VS

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: September 22, 2010

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier continued to withhold Mr. M. F. Magallanes from service beginning on June 25, 2009 until being released to return to duty by letter dating August 4, 2009 (Carrier's File 1523872).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. F. Magallanes shall '...now be compensated for net wage loss, straight time and overtime, including any and all benefit losses suffered by him from June 25, 2009, and continuing until such time as he is returned to the service of the Carrier.' (Employee's Exhibit 'A-1')."

FINDINGS:

Public Law Board No. 7426, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The undisputed facts are that Claimant holds seniority in the Track Sub-department, Sacramento Division, Western Seniority District and was assigned and working as an Assistant Foreman for online System Gang 8583 prior to the date the events surrounding this dispute arose. Claimant was on Medical Leave of Absence beginning May 13, 2009, due to heart related problems and high blood pressure. On June 25, 2009, the Claimant's personal physician released him back to work. Subsequently, the Carrier returned Claimant to service on August 4, 2009.

It is the Organization's position that there was a substantial and undue delay in returning the Claimant to duty following the June 25th medical release. It argued that when the Carrier requested additional information from the Claimant's doctor regarding his release it was furnished by the doctor on June 30th. Additionally, it argued that under date of July 7, 2009, Dr. P. Guthrie confirmed that he had done a psychological examination of the Claimant and deemed him fit for service and despite being okayed by a medical doctor and psychologist he was not returned to service until August 4, 2009. It concluded by requesting that the Claim be sustained as presented.

It is the position of the Carrier that in the instant dispute the doctor's release on June 25, 2009 did not contain all the required information from the treating physician to properly allow the Claimant to return to work. Occupational Health FFD Nurse R. Ross sent the Claimant's personal doctor a letter requesting medical information pertaining to his conditions. In addition, a Fitness for Duty Assessment was scheduled to evaluate the Claimant's alcohol related condition on July 6, 2009. The Carrier argued that its actions were reasonable and done in a timely manner and it closed by asking that the Claim remain denied.

The Board has thoroughly reviewed the record and recognizes that it is well established by arbitral precedence that the Carrier has a right to withhold employees from duty for medical reasons. The issue in this dispute is whether or not the Claimant was withheld from duty for inordinate amount of time without good cause.

The record substantiates that Claimant was released for duty by his personal physician, Dr. Montano, on June 25, 2009, however, the Carrier requested additional information regarding medications, vital signs etc. By letter of June 30th Claimant's doctor responded to the Carrier's concerns. On July 6, 2009, the Claimant underwent a "fitness for duty" assessment with a psychologist, Dr. P. Guthrie, Ph.D. and by letter of July 7, 2009, he advised Carrier EAP Manager K. Thrall the following:

"It is my professional recommendation that Mr. Magallanes is ready to return to his safety sensitive position with the Union Pacific Railroad...."

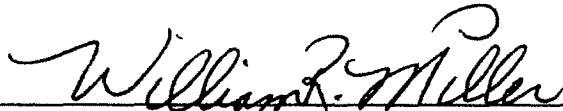
According to the Organization, assuming, arguendo, that the Carrier was justified in withholding the Claimant beginning on June 25, 2009, which it did not concede, it argued that the Claimant should have been released within three to five days of July 7, 2009; the date Dr. Guthrie determined that the Claimant was fit to return to duty. We do not disagree with that argument in principle, as in most cases five days would be a reasonable period for review. However, in this instance Dr. Guthrie did not release the Claimant on July 7th as he had a caveat to the aforementioned comment which followed in the very next sentence and stated:

"I am recommending that Mr. Magallanes complete a physical examination and specifically evaluate if his blood pressure is normal and to rule out any medical concerns." (*Underlining Board's emphasis*)

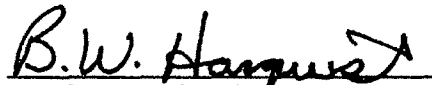
Based upon that recommendation the Carrier was correct in requiring another medical examination of the Claimant. On July 10, 2009, Claimant was again examined by Dr. Montano who forwarded his findings which included the Claimant's cholesterol level to the Carrier on July 14, 2009. Five days after those findings were rendered was a sufficient time to analyze the results and process the paper work for Claimant's return to service. We will not consider Tuesday, July 14th as part of the HMSD review and process period nor Saturday and Sunday July 18th and 19th. The five days for the reasonable review period concluded on July 21st, therefore, the Board finds and holds that the Claimant is to be made whole at the straight time rate of pay for all days lost after July 21, 2009, until he was returned to active service.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member

Dissent



T. W. Kreke, Employee Member

Award Date: January 18, 2011