

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD No. 7163**

Brotherhood of Maintenance of Way)	
Employees Division, IBT Rail Conference)	
)	
vs.)	Case No. 112
)	Award No. 112
)	
CSX Transportation, Inc.)	

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

1. The Agreement was violated when the Carrier refused to allow Mr. H. Barnes to return to service on August 16, 2010 and continued to withhold him from service until October 26, 2010 (System File B17811810/2011-084106).
2. As a consequence of the violations referred to in Part 1 above, Claimant H. Barnes shall now be compensated "...a total of (40) hours per week at the appropriate Track Foreman straight time rate of pay in effect beginning August 16, 2010 and continuing, and any and all overtime, time and one half, and double time he would be entitled to receive had he been allowed to work until this violation stops. We request the days listed, be credited toward vacation and retirement purposes. ***' (Employees' Exhibit 'A-1')".

[BMWE Submission at 1]

Findings:

Public Law Board No. 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute, and (3) the parties to the dispute were accorded due notice of the hearing and participated in this proceeding.

This claim dated August 30, 2010 was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest designated officer.

Claimant sustained an injury to his shoulder in 2009; he returned to work the next year but left for further medical treatment and rehabilitation on April 21, 2010. Claimant's physician released him for duty on August 10, 2010 but with restrictions in perpetuity such as no lifting more than 50 pounds, no grinding work, no spike driving and no rail lifting. The Carrier informed Claimant it could not accommodate his physical restrictions.

Three days later (August 13, 2010) Claimant's physician issued another assessment that provided unrestricted medical clearance for Claimant to perform all physical tasks required of Track Department employees effective August 16, 2010, although the physician noted that Claimant's prognosis for recovery to full physical capacity was questionable. The Carrier did not allow Claimant to return to duty since the August 13 assessment conflicted with the August 10 assessment; Claimant chose another physician for an assessment.

On September 1, 2010 the second physician issued a medical release that cleared Claimant for all physical tasks and rendered a prognosis of complete physical recovery. In response to an inquiry from Claimant's attorney the Carrier advised on September 3, 2010 that a definitive explanation from Claimant's first physician regarding the medical assessments of August 10 and 13, 2010 was needed to enable the medical department to render a decision on Claimant's fitness for duty.

The medical department has final approval for Claimant's return to duty but the divergent assessments of August 10 and August 13 raised concerns - - August 10 restricted Claimant's physical activity forever and August 13 cleared Claimant for unlimited physical activity. After consulting with Claimant's physician and obtaining a medical assessment form a 3-physician panel, the medical department cleared Claimant on October 25, 2010 to return to duty effective October 26, 2011.

BMW observes that Claimant was allowed to return to work only after the Organization invoked Rule 27-Determination of Physical Fitness on September 16, 2010 even though Claimant's physician released him for duty effective August 16, 2010. Since the Carrier refused to allow Claimant to report for work on August 16, 2010 Claimant must be compensated for August 16 – October 25, 2010 given his seniority right for this loss of work opportunity.

Since the parties did not resolve this claim in the usual and customary manner, the record established in this proceeding is before the Board for adjudication.

In assessing Claimant's fitness for duty the Carrier has broad latitude to withhold him from service based on legitimate medical concerns. The record shows conflicting assessments by Claimant's physician issued within a compact time (August 10, August 13) with a prognosis of little, if any, physical recovery and the September 1 assessment by another physician chosen by Claimant with a prognosis for total or complete restoration of physical abilities. Based on the three assessments the medical department's concern about Claimant's fitness for duty is well-founded and not arbitrary or capricious.

Rule 27 addressed these assessments. A 3-physician panel examined Claimant with each physician rendering a separate opinion; the medical opinions affirmed Claimant's medical clearance for return to duty. The process deployed by the Carrier to confirm Claimant's physical fitness for duty is not an abuse of its discretion and there is no showing of an unwarranted delay in Claimant's medical clearance for return to duty effective October 26, 2010.

The Organization asserts that Claimant must be compensated from the date that his physician released him for duty (August 16, 2010) until he reported for duty (October 26, 2010). Instructive on this matter is Third Division Award 31363 wherein it states that a "Carrier is privileged to withhold employees from service when it has a valid basis" - - competing assessments - - and "is relieved of responsibility for any wage loss occurring during the time withheld from duty so long as it acted in good faith and with prompt dispatch."

The Board finds that the Carrier acted in good faith and, in the circumstances of this claim, with prompt dispatch.

As for the alleged violations of the Scope of the Agreement and Rules 1, 3 and 17, such violations are not established.

Award:

Claim denied.



Patrick J. Halter

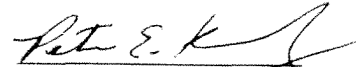
Neutral Member

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Carrier Member

Robert A. Paszta



Organization Member

Peter E. Kennedy

Dated this 27th day of June, 20 12