

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 1, (Case No. 1)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 undue delay in returning Claimant G. N. Holloway to duty following his medical release to return to duty without restrictions effective September 16, 2008 is unjust, unwarranted and in violation of the Agreement (Carrier's File 1512923).
2. As a consequence of the violation in Part 1 above, Mr. Holloway shall be compensated for net wage loss, straight time and overtime, including any and all benefit losses suffered by him from September 16, 2008 through November 17, 2008."

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 the Claimant a Material Foreman with over 35 years of service had surgery to repair a torn rotator cuff. Claimant obtained all of the required permissions to be off work and filed all of the necessary Leave of Absence forms. On September 8, 2008, the Claimant's physician released the Claimant to return to work on September 16, 2008, however, the Carrier refused to accept Claimant's return on that date and did not return him to duty until November 17, 2008, after having passed its medical review.

It is the Organization's position that this case involves the Carrier's arbitrary refusal to return an employee back to service in a reasonable period of time after he tendered an unconditional release from his doctor, stating that he was fit for service. Additionally, it argued

the Carrier never proved that the physical restrictions, even if they had existed would have limited the Claimant or should have kept him from the regular performance of his duties. It further argued that the Carrier erred when it required the Claimant to undergo the physical evaluation required of new hires, which had nothing to do with the reason he had been on medical leave and required him to take this evaluation at a later date, at a facility 150 miles from his home, when the same tests could have been done in his hometown. It concluded by requesting that the Claim be sustained as presented.

It is the position of the Carrier that the Claimant's initial release and return to service had a lifting restriction which stated that the Claimant could not lift anything greater than 60 pounds to waist level. It argued that that according to Track Supervisor M. Maldonado, Claimant's job handles various parts that exceed the restricted limit and his return to service would violate the recommendations of his treating physician. It further argued that Claimant was advised by letter dated October 16th his restrictions could not be accommodated and he was placed on an extended medical leave of absence until December 1, 2008. It stated on October 20th it received a full release from the Claimant's doctor after which it arranged a return to work exam to resolve the conflict in releases and it subsequently returned the Claimant in a timely manner. It closed by asking that the Claim remain denied.

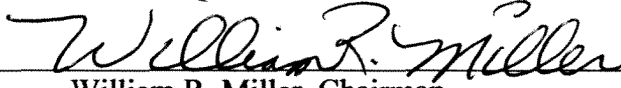
The Board has thoroughly reviewed the record and recognizes that the Carrier has a responsibility to manage its operations in a safe manner and arbitral precedent firmly stands for the principle that it has the right to withhold employees from service until the question of their physical fitness has been ascertained.

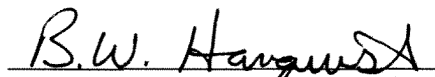
In the instant case contrary to the Organization's argument the Claimant's initial medical release contained a lifting restriction. The record contains no definitive proof that Carrier's decision not to accommodate the Claimant because of that restriction was in error. After the conditional release the record further indicates that on October 20, 2008, the Carrier received a full duty release from the Claimant's doctor. According, to the Claimant over the next seven days he repeatedly called the Carrier's Health and Medical Services Department (HMSD) asking if they had enough information to allow him to return to service or was there anything else he needed to do. On October 27th he discovered that on October 22nd HMSD had mistakenly sent a fax with further instructions for an additional evaluation to his wife's work place even though it had his fax number on file. That statement was never rebutted by the Carrier. The record also substantiates that it took until October 29th before a Return to Work exam was scheduled for November 6th and then another seven days until November 13th that a letter was sent to Claimant returning him to work on November 16, 2008. From the date of the full release by Claimant's doctor on October 20th it took a total of 27 days before the Claimant was returned to service.

A substantial number of Awards including several involving the same parties to the instant dispute have determined that five days is generally considered a sufficient period to arrange a physical examination, which was not an unreasonable request in this instance as there were two conflicting releases, and five days is usually enough time to process papers in return-to-work cases. A reasonable period of time for completing the aforementioned tasks would have been between October 21 and 30, 2008. There was no evidence presented that there were any compelling reasons as to why the Carrier needed more additional time than what is considered the norm. The Board finds and holds that the Carrier was dilatory in its handling of Claimant's return to work, therefore, all days in excess of ten after the full release were excessive. Based upon the aforementioned reasons, Claimant should be compensated at the straight time rate of pay for all days lost from October 31, 2008, until his return to service on November 16, 2008. It is further determined that there was no Agreement support offered for the additional claimed costs such as mileage and expenses incurred in taking Carrier's Return to Work Physical and they are denied.

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


T. W. Kreke, Employee Member

Award Date: Nov 23, 2010