

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 2, (Case No. 2)

**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 undue delay in returning Claimant P. Henshaw to duty following his medical release to return to duty without restrictions on July 16, 2008 is unjust, unwarranted and in violation of the Agreement (Carrier's File 1510787).
2. As a consequence of the violation in Part 1 above, Mr. Henshaw shall be compensated for any and all lost straight time and overtime wages for the days of August 4, 2008 through and including September 16, 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 Foreman with over 27 years of service was off work on Medical Leave of Absence, due to a heart condition. On July 16, 2008, Claimant's personal physician released him to return to work to full duty, but the Carrier refused to accept Claimant's return on that date and did not return him to duty until September 17, 2008.

It is the Organization's position that Claimant had been placed on a Medical Leave, due to a heart condition. It argued that on July 16, 2008, Claimant was released to full, unconditional duty by his doctor (Dr. J. Gundry). The Carrier, however, refused to return Claimant to service at that time, alleging that Claimant's heart condition had been related in some manner to alcohol

abuse and because of that the Carrier referred Claimant to the Employee Assistance Program (EAP) for further evaluation.

On September 17, 2008, Claimant was cleared to return to work, following the EAP assessment.

The Organization argued that once the Carrier had a full duty release from Claimant's doctor, it was obligated to either return the Claimant to work forthwith, or present countervailing medical evidence that Claimant was not fit for an immediate return to service. It concluded that the Carrier did neither, thus abusing its discretion and because of that it requested that the Claim be sustained as presented.

It is the position of the Carrier that a review of the Claimant's medical release contained attached documentation from the Oregon Cardiology, PC (Claimant's doctor) which stated in pertinent part the following: **"Incidentally, he has managed to stop alcohol altogether (recall, from the hospital evaluation he was drinking at least 48 ounces of beer a day prior to that admission)."** It argued that because of those comments and its concerns for the Claimant's health the Associate Medical Director for the Health Medical Services Department (HMSD) ordered an assessment of the medical findings with the Carrier's EAP. It further argued that it was incumbent upon the Carrier not to allow the Claimant to return to work until his medical condition had been properly evaluated by the Health Services Department and Employee Assistance which according to it was done 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 operation 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.

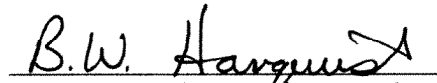
Contrary to the Organization's argument, the Carrier had reason to be concerned about the Claimant's health because of Dr. J. Gundry's March 21, 2008, aforementioned Chart Note coupled with the fact that the record indicates that the McKenzie-Willamette Medical Center had checked the Claimant for a dilated cardiomyopathy, possibly related to alcohol. Based upon those comments the Board finds that it was not unreasonable for the Carrier to require the EAP to review and evaluate the Claimant's medical release. However, the EAP's assessment was not made until September 12th and on the 17th he was released for duty by the Carrier, confirming Dr. Gundry's release. It must be noted that the Carrier's concerns emanated from the Claimant's personal physician's evaluation that were made approximately four months before that same doctor okayed the Claimant to return to work without restrictions. There was no evidence

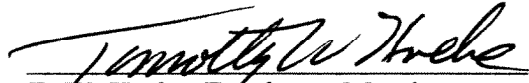
proffered as to why it took nearly two months until September 12, 2008, for the EAP to re-evaluate the Claimant's fitness for duty. The Board finds and holds that the Carrier was dilatory in its handling of the Claimant's return to work and the Claim is sustained at the straight time rate of pay for all days lost from August 4 through and including September 16, 2008.

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