

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 3, (Case No. 3)

**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 removed Mr. R. A. Figueroa from service on August 11, 2008 and continued to withhold him from service until October 28, 2008 (Carrier's File 1510789).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. A. Figueroa shall '...now be compensated for net wage loss, straight time and overtime, including any and all benefit losses suffered by him from August 11, 2008 and continuing until this violation ceases to exist.'
(Employees 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 record indicates that the Claimant at the time of the dispute had 44 years of service with the Carrier. Claimant was removed from duty on July 31, 2008, (but paid through August 7th) because Manager Track Programs, C. Maddex observed and believed the Claimant was having difficulty performing his daily duties. According to Maddex Claimant demonstrated difficulty hearing and problems with his coordination while performing his duties as a Trackman. As a result, Claimant was given a Manager's referral for his safety until he could be evaluated and it was shown that he was medically fit to resume his assigned duties. After multiple tests

and evaluation Claimant was subsequently advised by letter of October 22, 2008, he was returned to service, full duty.

It is the Organization's position that the record substantiates that on June 9, 2008, Claimant completed a physical exam including a hearing examination which resulted in no adverse indications or findings. According to it, all of his hearing levels were well within the stipulated ranges for his ages - at the time of the incident Claimant was 61.

The Organization argued that on August 6, 2008, Claimant was improperly removed from service pending the results of a medical review and clearance in accordance with Section 2.5b of the Carrier's Medical Rules. It stated that the Claimant immediately complied with Carrier instructions and was examined by his family physician on August 15th who noted that the Claimant was released to full duty on August 18, 2008. It argued that Claimant was unnecessarily held out of service for 82 days. It concluded by requesting that the Claim be sustained as presented.

It is the position of the Carrier that Claimant was pulled from service concerning his condition and his ability to safely perform his job functions on August 6th as he was observed by the Manager Track Programs having problems hearing and difficulty performing his duties. It argued that Claimant did not abide by the requirements of August 6, 2008, medical instructions letter. As a result of not receiving all the requested medical documentation pertaining to Claimant's medical status, Claimant was advised by letter on September 24, 2008 to supply the Health and Medical Services Department (HMSD) the information specified pertaining to his current medical status on or before October 15, 2008. Additionally, to determine Claimant's current medical status and ability to safely perform his job function, Claimant was sent a letter dated September 25, 2008, requiring the Claimant to attend an examination on October 2, 2008, after which he was returned to service 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 it has the right to remove employees from service it believes may have a physical or mental impairment for medical evaluation. There is no indication in the instant case that Claimant's physical removal from service on July 31, 2008, was ill intentioned, especially in view of the fact that the Carrier continued to pay him through August 7, 2008.

The record substantiates that Claimant was examined by Dr. M. Yaqub, at the Foothill Family Medical Clinic, on August 15, 2008. Dr. Yaqub's examination covered the four stipulated points set forth in the Carrier's August 6th letter and noted that the Claimant was in good physical and mental health except for a slightly elevated cholesterol level which was being

treated with medication. Dr. Yaqub released Claimant to return to full duty on August 18, 2008. The Carrier argued in its denial letter of the Claim on December 1, 2008, that the Claimant did not follow its directives of August 6, 2008. The Organization challenged the Carrier's contention in its appeal letter of January 12, 2009, wherein it stated the following:

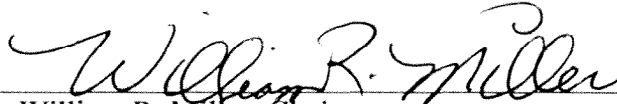
"Please see the attached document which was faxed to the Carrier immediately after the August 15, 2008 appointment and evaluation from the Claimant's doctor."
(Underlining Board's emphasis)

After the Carrier was challenged that HMSD was sent Dr. Yaqub's medical release via a fax from the doctor's office, on August 15th, it offered no statements from HMSD denying that it received the faxed release. Countless Boards have consistently ruled that unchallenged statements must stand as fact and that principle will be applied in this instance. Additionally, the record indicates that HMSD instructed the Claimant in its letter of September 25th to take another examination with one of its own medical providers, "Concentra Occupational Med Ctrs-CA", on October 2, 2008. Claimant again complied with those instructions and those doctors on October 2nd stated: **"I recommend this Employee return-to-work with no restrictions."** *(Underlining Board's emphasis)* Despite a second full release for duty, HMSD instead asserted that Claimant had missed the examination only to be advised by his Organization representative and the Labor Relations Department on October 17, 2008, that he had passed all exams on October 2nd and was considered fit for service. Subsequently, the Claimant was okayed for work by the HMSD on October 22, 2008, some 20 days after the second release. The record is clear that despite Supervisor Maddex's concerns, none of the tests performed on the Claimant including the June 9, August 15 or October 2, 2008, confirmed any of his suspicions that Claimant was having hearing or coordination problems. The record further indicates that the Health and Medical Services Department did not handle the processing of Claimant's evaluation in an efficient manner. P.L.B. No. 7194, Award No. 3 addressed a similar dispute involving the same parties to this case, wherein the Board determined that the record indicated that a reasonable processing time after a medical evaluation was three days whereas several other Boards involving the parties have concluded that five was reasonable.

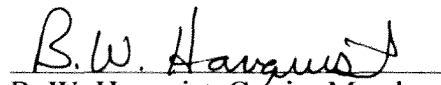
In the instant case the Claimant was initially evaluated on Friday, August 15, 2008, by his personal physician and deemed fit for service on August 18th. It was not rebutted that the medical release was faxed to HMSD on August 15th. We will not consider the day the release was faxed nor the Saturday and Sunday that followed as part of the HMSD review and process period, but we do believe that HMSD had a sufficient period of time for its review, evaluation and the processing of papers between Monday, August 18 and Friday, August 22, 2008, (five days) to return the Claimant to active duty. 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 August 22, 2008, until he was returned to active service.

AWARD

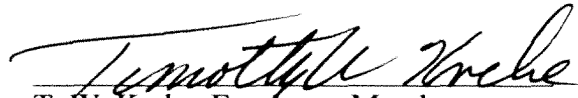
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Nov 23, 2010