

PUBLIC LAW BOARD NO. 7194

AWARD NO. 3
CASE NO. 3

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained in part

STATEMENT OF CLAIM:

1. The Agreement was violated when Carrier removed and withheld M. Magallenes from service on September 26, 2006 and continuing (Carrier's File 1465364).
2. As a consequence of the violation referred to in Part (1) above Claimant M. Magallenes shall ' . . . now be compensated for net wage loss, straight time and overtime, including any and all benefit losses suffered by him from September 26, 2006 and continuing until such time as he is returned to service.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on May 19, 1997, and held seniority rights in various classes of the Track Sub-Department. He was temporarily removed from service pending medical review results on September 26, 2006, and returned to work without restrictions on December 11, 2006.

Claimant had an attack of gout on September 19, 2006, and was unable to complete his shift as a fuel truck driver on Gang 9042. He returned to work the following day and was authorized four days of vacation following his rest days for the period September 21-28. He was contacted by a supervisor on his rest days and told not to return. He received a letter dated September 26, from Director of Track Maintenance Deb Schaefer advising that Carrier Health and Medical Service Department ("HMSD") would assist in conducting a review and clearance per the provisions of Section 2.5b of Carrier's Medical Rules. She notified Claimant he was temporarily removed from service pending medical review results, and directed him to have his treating physicians mail or fax current medical records to Carrier.

By fax dated September 25, Claimant's physician sent Carrier his notes and authorization signed by Claimant to disclose healthcare information. By letter on October 18, 2006, HMSD staff acknowledged receipt of the faxed information and correspondence from Claimant directed to Ms. Schafer, all of which had been received by Organization General Chairman on October 11. The October 18, letter advised Claimant that additional medical documentation was required and that his doctor had been sent a medical record request.

Carrier received another copy of Claimant's correspondence and the faxed medical information on November 10, 2006, apparently from Organization. By letter dated November 20, 2006, Organization submitted this Claim on behalf of Claimant stating that Claimant had complied with all requests and still had not been released by Carrier's doctor to return to work.

By letter dated November 27, 2006, Ms. Schafer repeated the requests she made on September 26, advising Claimant that continued failure to comply might result in discipline. She did not acknowledge Claimant's earlier submissions or Organization's Claim.

On December 8, Carrier Medical Director concluded Claimant was conditionally medically cleared to work without restrictions "based on medical documentation available to (HMSD)". By letter dated December 11, Ms. Schafer, returned Claimant to work without restrictions. There is no evidence that Carrier contacted Claimant's physician per his authorization or that Carrier received additional medical evidence following Ms. Schafer's November 27, letter.

Organization argues Carrier violated numerous provisions of CBA when it prohibited Claimant from working for medical reasons. It argues Claimant was removed from work without proper reason, and that he was diagnosed with a condition which does not keep him from work. Organization argues Carrier improperly disciplined Claimant under Rule 48, and was not timely in providing its medical assessment of Claimant. It argues Claimant is entitled to be compensated for all lost opportunity to work beginning September 26, 2006, to the date of his return.

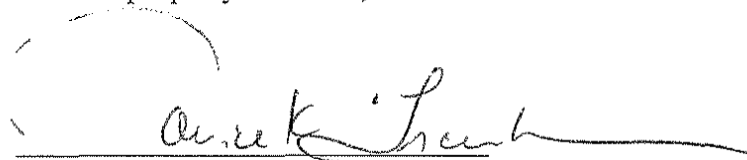
Carrier argues it did not violate any provision of parties' CBA and that Organization has failed to demonstrate that Carrier arbitrarily removed Claimant from work. It argues that its medical rules permit removing Claimant to determine his fitness for duty and that he was returned to work when proper medical documentation had been provided. It argues that Claimant's loss of work opportunity was due to his failure to provide requested information.

Organization has failed to demonstrate arbitrary or capricious action by Carrier in removing Claimant from service pending medical review and determination of his fitness for work. Rule 2.5b expressly provides Carrier with discretion to take the action. However, Carrier has not provided substantial evidence in support of its removal of Claimant for 76 days. Based on close review of the facts detailed above, Carrier had sufficient information on October 18, 2006, to return Claimant to work but did not take action to return him until Organization submitted its claim on November 20, after faxing the same medical information to Carrier on November 10, which Claimant had submitted in late September and early October, 2006. Claimant complied with Carrier's initial request to mail or fax information to Carrier in Omaha.

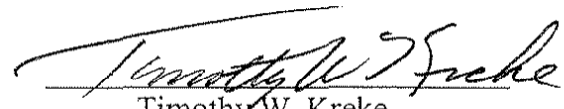
Carrier was dilatory in its processing of this matter. The circumstances support Claimant's Claim to the extent Carrier could reasonably have returned Claimant to work. Carrier returned Claimant to work in December, three days after receiving HMSD direction, following review of the medical documentation in its possession. It is reasonable to assume that processing time would have been the same in October, 2006. It is, therefore, appropriate to sustain this Claim in part and direct Carrier to pay Claimant for thirty days, which reasonably accounts for missed opportunities to work his assigned position and rest days for the period October 21 – December 11, 2006.

AWARD

Claim sustained in part. Carrier shall compensate Claimant for thirty days net wage loss, which was denied him when he was improperly removed, consistent with this Award and Part 2 of this Claim.


Janice K. Frankman, Chairperson
Neutral Member


Dominic A. Ring
Carrier Member
Oct 9, 2008


Timothy W. Kreke
Organization Member
Oct. 9, 2008