

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(Duluth, Missabe and Iron Range Railway Company

Dispute: Claim of Employes:

1. That the Carrier violated our Current Agreement, particularly Rules 8, 15, 20, 23 and 33 when they arbitrarily removed Claimant W. W. Wallen from service effective 11:00 AM December 16, 1983.

2. That, accordingly, the Carrier be ordered to compensate Carman W. W. Wallen in the amount of four (4) hours for December 16, 1983 and eight (8) hours for each work day and holidays commencing December 19, 1983 through and including January 11, 1984 at the pro rata rate for his case.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant had been off work due to a heart condition since August 29, 1983. On October 31, 1983, he returned to his regular assignment as a Carman/Lead Welder. On December 16, 1983, due to a minor derailment, Claimant was reassigned to a position made vacant by member of the wrecking crew. The position required heavy lifting. Claimant indicated that he had returned to service with a heavy lifting restriction which prohibited him from working the temporary reassignment without risk to his health. His Supervisor consulted with the Safety Department and pulled him from service.

The Organization argues that the Claimant was to avoid heavy lifting. It maintains that the restriction was imposed by the Claimant's physician and was known to the Carrier. The Claimant had returned to work resigning "his position on the wrecking crew to avoid extra heavy lifting," but could and did perform his Lead Welder position for six weeks. The Carrier arbitrarily removed the Claimant from his position in violation of his seniority and particularly Rules 20 and 33. Those Rules provide in pertinent part that:

"Rule 20(a) Assignment of Employees to Light Work

Employees, who have given long and faithful service in the employe of the Carrier and who have become unable to handle heavy work to advantage, will be given preference to such light work in their line as they are able to handle.

Rule 33 Physical and Visual Examinations

(a) In the interest of safety and welfare, employees within the scope of this Agreement may be required to take physical and visual examinations. Such examination . . . may be required, if . . . a physical or visual condition exists which in the judgment of the Carrier necessitates additional examinations.

* * * *

(b) If, as a result of such physical and visual examination, an employee should be declared unfit for service by the Carrier's physician, . . . "

The Organization maintains that the Claimant was removed from service after six weeks without first requesting a medical evaluation by the Carrier's physician to show he was incapable of performing his duties. It further maintains that the Claimant should have been permitted under Rule 20 to stay on his Lead Welder position which was light work he was clearly able to perform.

The Carrier denies any Agreement violation. It argues that the Claimant removed himself from service when he indicated he could not safely perform the job assigned due to a weight lifting limitation of "40-50" pounds. The Carrier's Chief Surgeon had cleared him to return to work without restriction or limitation. Carrier records lacked any information to corroborate Claimant's allegation that his personal physician had returned him to work with restrictions. Claimant was removed pending a letter from his personal physician and a physical reexamination.

As a preliminary point the Carrier has included exhibits, materials and ex parte arguments which were not a part of the record on property and under Circular No. 1 were not considered by this Board.

As to the merits, the Organization has the burden of proof to establish a Rule violation. Central to that burden in the instant case is the allegation that the Carrier was aware of the weight lifting restriction imposed by the Claimant's physician. This Board has carefully reviewed the Rules and the evidence at bar. The Carrier removed the Claimant when it

became aware of a possible medical problem. There is no evidence of record that the Chief Surgeon was ever aware of the alleged weight restriction imposed by the Claimant's personal physician. The Claimant may have informed his Supervisor when he returned to work, but such restriction was not in the Carrier's files and not a part of the Carrier's medical decision to return the Claimant to service. Claimant was returned to service without restriction.

Rule 33 does not require the Carrier to leave the Claimant in service while it awaits the results of a requested physical. Given the serious issue which arose as to the Claimant's ability to perform not only the temporary reassignment, but his Carman/Lead Welder duties, his removal from service was sufficiently grounded. The Carrier has a responsibility to take reasonable actions to protect the safety of the Claimant as well as its other employees and property. The Board finds no violation of Rule 33 in Claimant's removal from service.

Inasmuch as probative evidence of a lifting restriction was not a part of the record, Rule 20 has no application. The Carrier requested and the Claimant did not provide that evidence on the property. This Board cannot find, in the absence of authoritative documentation of a weight lifting restriction known to the Carrier, that it was obligated by Rule 20.

Therefore, the Board finds no violation of the Agreement in the circumstances at bar. The Carrier's actions in the instant case were not arbitrary and we must deny the Claim. This Award is consistent with similar decisions of the Board (Second Division Award 11058; Third Division Award 25329).

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of November 1987.