

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13090

Docket No. 12897

96-2-94-2-43

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(International Brotherhood of Electrical Workers
(Local Union No. 214

PARTIES TO DISPUTE: (

(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"CLAIM OF EMPLOYEES:

1. That the Chicago and North Western Transportation Company violated the current agreement, in particular Rule 32, when it unjustly removed Claimant Robert Crittenden from service and has arbitrarily withheld him from service commencing March 1, 1993.
2. Therefore, accordingly the Chicago and North Western Transportation Company return the Claimant to service and compensate him for each day commencing March 1, 1993, until the date he is returned to service.
3. Further Claimant Crittenden be treated within the provisions of the Agreement and that Carrier's improper treatment of Mr. Crittenden cease."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimant was employed as a diesel shop electrician at the Carrier's Proviso, Illinois Motive Power Facility prior to sustaining a lumbar spine back injury in October, 1990. In December, 1990 Claimant had surgery for a herniated disc in the lumbar spine, which was apparently similar to a previous surgery he underwent in 1988. He was subsequently treated for recurring effects of this injury and resultant nerve root scarring. The record reflects that Claimant returned to work sometime in 1991, was having some difficulty with continued pain, and had medical restrictions placed upon him on October 2, 1991 including a 35 pound weight limit, no repetitive stooping or bending, and allowing him to sit for 5 minutes if standing for prolonged periods.

While there appears to be some dispute about the medical restrictions placed upon him, the record reflects a March 4, 1992 medical release with restrictions of no heavy lifting over 35 pounds, and "cannot lift heavy garbage cans", and a June 3, 1992 medical release indicating that he is disabled unless a 35 pound weight limit is adhered to. Claimant apparently reinjured himself in August, 1992. Under an accommodation worked out by the Carrier's Employee Assistance Department, Claimant returned to work as an electrician on the "dead side" at the Proviso Motive Facility on September 28, 1992 with the same weight-moving restrictions. Unfortunately, after a few days at work, Claimant experienced pain and numbness in his legs and arms and was taken by ambulance from work to the Elmhurst Hospital Emergency Room on October 1, 1992. The record reflects that Claimant was classified as disabled and unable to work by his personal physician on October 7, 1992. Correspondence from Carrier's Rehabilitation Consultant to Claimant in November, 1992, offers him the opportunity to obtain skills training and evaluation for the sedentary job of Customer Service Representative, a classification which had openings at the time.

A lawsuit the Claimant had filed against the Carrier concerning his 1990 personal injury went to trial in November, 1992, with a jury verdict rendered in Claimant's favor in December, 1992. Part of the transcript of the proceedings, including some medical testimony, was included in the record on the property. From these excerpts it appears that Claimant was arguing that as a result of his injury he was totally disabled from returning to work as an electrician since he could not perform the listed job requirements, and was seeking compensation for loss of future earnings. It also appears that, at the trial, Carrier's counsel argued that Claimant could be returned to work in his former position.

The record reflects that Claimant's personal physician released him to return to work on January 13, 1993, with the following listed permanent restrictions: no lifting/pulling over 35 pounds and no pushing over 60 pounds; restricted bending, stooping, crawling and kneeling; "must be able to sit for five minutes every hour if he has pain"; and "avoid repetitive movements." Claimant was examined by the Carrier's doctor on January 22, 1993, who agreed with Claimant's doctor's prognosis and restrictions. Carrier's Medical Department reviewed the results of the examination and requested further medical information relative to a chronic hypertension problem from Claimant's doctor; this information was received on February 27, 1993. Thereafter, Carrier's doctor cleared Claimant to return to work "without restriction", apparently overlooking the listed restrictions contained in the January 13, 1993 medical release form.

Claimant returned to work in his former position on Saturday and Sunday, March 6 and 7, 1993, and informed his foreman that he could not do the assigned work since he had restrictions and his back was hurting him. On Monday, March 8, 1993, Diesel Shop Manager Joe Lambe was shown by Claimant the list of restrictions placed upon him by his personal physician, determined that Claimant could not safely perform the essential functions of the job based upon these restrictions, and sent him home. The Medical Department reviewed Claimant's file and discovered that it had erroneously overlooked the January 13, 1993 restrictions in clearing him to return to work, and issued Claimant a letter listing his restrictions and advising him to contact his supervisor to determine if there was work available within these restrictions. A review of the essential functions of a diesel electrician was made by appropriate management, and it was determined that Claimant could not perform a majority of the essential functions of his position in a safe and effective manner. It is that determination, and Carrier's removal of Claimant from service on March 8, 1993 that is in issue in this case.

The instant appeal was initiated in writing on April 1, 1993. During its processing, much correspondence was exchanged both between Claimant and the Employee Relations Department concerning the accommodation process, as well as the Medical Department, Claimant and the Organization. The record is voluminous, to say the least. On August 3, 1993 Claimant's personal physician cleared him to return to work with a continued 35 pound lifting restriction, and noted a restriction of occasional bending, stooping, crawling and kneeling. After seeking clarification on the term "occasional", Carrier was informed that Claimant could perform those functions 20% of the work day. Thereafter, management again concluded that Carrier could not accommodate Claimant's restrictions since all electrician jobs at Proviso required a significant amount of bending and stooping, and there was insufficient work and personnel to create a new electrician position within Claimant's restrictions.

The Organization argues that Carrier violated Rule 32 of the Agreement when they arbitrarily and unreasonably removed Claimant from service on March 8, 1993. Rule 32 provides that if an employee is "... disqualified after examination by the Company's physician and feels that such disqualification is not warranted, the matter may be handled directly with the Director of Labour Relations (Non-Operating)." If the matter is not settled at that level, it goes on to provide a procedure for a neutral third physician to determine the physical condition and give an opinion on the Claimant's fitness to continue in his regular employment, if there is a dispute between the Claimant's and Carrier's doctor. Rule 32 concludes by stating:

"If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, and the employee shall be returned to service."

The Organization contends that Carrier was aware of the extent of Claimant's restrictions since October, 1991, and that they were not changed dramatically in January, 1993. It relies upon the fact that Claimant was returned to his electrician job with accommodation in 1992, that Carrier took the position in November, 1992 at the trial that Claimant could return to his former job, and that he actually returned to work for three days in March, 1993 without incident in concluding that his removal from service was improper.

The Carrier initially raises certain procedural objections which the Board finds unconvincing. On the merits the Carrier contends that it has the sole right to determine an employee's fitness and ability to perform the duties of a particular position, citing numerous Board awards, and argues that its determination that Claimant could not safely and effectively perform the duties of a motive power electrician considering his medical restrictions was not unreasonable or arbitrary. The Carrier notes that it had the safety obligation to remove Claimant after it discovered that he had been erroneously cleared by the Medical Department and returned to unrestricted work on March 6, 1993. It argues that Rule 32 is not applicable here, since there was no dispute between physicians about Claimant's medical condition or the appropriate restrictions to be placed upon him. The Carrier agrees with Claimant's counsel's statements at the trial in November, 1992 that a review of the job requirements of Claimant's position, and the fact that pulling, lifting, stooping, crawling and pushing are a major component of the electrician's job, reveal that his medical restrictions prevent him from doing that position.

A careful review of the record convinces the Board that Carrier's determination that Claimant was unable to perform the essential functions of the Motive Power Electrician position due to the restrictions placed upon him by his personal physician on January 13, 1993 was neither unreasonable nor arbitrary. The Statement of Job Functions for Claimant's position sets forth clearly that as part of his essential functions a Motive Power Electrician must be able to perform work activities that require making quick or repeated flexing movements (e.g. bending, stretching, twisting, reaching) with arms, legs or body, as well as bending, stooping or crawling. Regardless of whether Claimant had repetitive stooping and bending restrictions placed upon him in October, 1991, the fact remains that none of his medical release forms in 1992 contain any restrictions other than weight limitations, which have apparently been continuous. When Claimant attempted to return to work after his August, 1992 reinjury, he was unable to safely perform his assigned job functions with these weight restrictions, since he had to be taken for Emergency Room treatment within a few days after he came back. Thereafter, the record clearly indicates that he was disabled from work until his January 13, 1993 release with restrictions.

It was not unreasonable for Carrier to read the January 13, 1993 medical return to work form as containing more encompassing restrictions than those to which Claimant had been previously subject while working in 1992. In fact, the form indicates that these restrictions are permanent. Carrier's doctor apparently agreed with Claimant's personal physician with respect to his prognosis and restrictions, and thus, there was no dispute between physicians necessitating recourse to the neutral third physician procedure contained in Rule 32 of the Agreement. Unfortunately, when reviewing Claimant's medical file at the end of February, 1993 after receipt of additional medical information on his hypertension, Carrier's doctor overlooked the January 13, 1993 medical restrictions and mistakenly cleared Claimant to return to work without restriction. An error in judgment by the supervisor in allowing Claimant to return to work in early March, 1993 is an insufficient basis for finding that Carrier was obligated to keep him in his job after learning about his restrictions and determining that he could not safely perform the work. Rather, we agree that Carrier's safety responsibility required it to remove him if it felt that he would be jeopardizing his own, or other employees' safety. See Third Division Award 14881.

The appropriate standard of proof in cases of this sort was noted in Third Division Award 28506:

"The Carrier's action in disqualifying Claimant must, if challenged, be supported by proof that it acted reasonably and not arbitrarily, discriminatorily, or in bad faith. See, e.g., Third Division Award 22379. The burden is on the Carrier to establish the legitimacy of its action in accordance with those standards. See, e.g., Third Division Award 26056."

In this case, the Board finds that the record supports the conclusion that Carrier's action in removing Claimant on March 8, 1993 was reasonably related to valid safety considerations. Its subsequent determination that there were no electrician positions which he could safely and effectively perform in Proviso under either his January or August, 1993 restrictions, with or without accommodation, also meets the above-noted standard of proof. With respect to Carrier's contention that its attempts to accommodate Claimant have been thwarted by his lack of cooperation, and the Organization's allegation that Carrier is in violation of the Americans with Disabilities Act and Rule 31(n) of the Agreement, this Board has previously pointed out that we are not empowered to interpret or enforce state or federal statutes, and our authority is limited to interpreting or applying Agreements between Carriers and their employees. Second Division Awards 12149, 11624.

Under all of the circumstances of this case, we find no violation of Rule 32 or any other section of the Agreement in Carrier's removing Claimant from service on March 8, 1993 and withholding him from his position of Motive Power Electrician thereafter. The claim is therefore denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 30th day of December 1996.