

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

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

1. That the Grand Trunk Western Railroad violated the controlling Agreement between the International Association of Machinists & Aerospace Workers and the G.T.W. Railroad dated September 1, 1949, when they improperly and unjustly withheld Machinist Helper Dan Crouch from service beginning February 1, 1988, until March 14, 1988, due to his alleged physical restrictions.

2. That the Grand Trunk Western Railroad be ordered to make Machinist Helper Crouch whole for any and all wages and benefits he may have lost due to being improperly withheld from the service.

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.

Most of the facts in this dispute are uncontested. Claimant was employed at the Diesel Facility in Flat Rock, Michigan. Claimant was out of service from December 16, 1981, until December 26, 1984, as a result of an on-duty injury to his leg. Claimant then reinjured his leg in 1985. After being recalled from furlough on January 26, 1987, he was released for full service on February 2, 1987, by the Carrier's Chief Medical Officer.

Claimant had filed a lawsuit against the Carrier alleging continuing and permanent disability from the injuries to his leg. On January 18, 1988, Alice R. Shanaver, D.O., Claimant's physician, submitted the following statement as evidence in this legal proceeding, which was scheduled for trial in February 1988:

"[Claimant] was examined in my office on January 15, 1988. He has severe tenderness in the posterior knee of his left leg. He has had severe injury to the knee, occurring during his occupational duties at the Grand Trunk Railroad in 1981. He has also had surgery with partial relief of the neuropathy in the area.

His current duties sometimes cause swelling in the injured leg. This is especially true following prolonged standing or after squatting. He should have freedom to extend and elevate the affected leg for about twenty minutes when he experiences swelling. The occupational injury and surgery have resulted in an apparent venous insufficiency of the popliteal fossa. He is otherwise completely capable of performing full duties of his job."

On or about January 26, 1988, Claimant's lawsuit was settled and calculated on the basis of Claimant's allegations of a continuing disability. Also on or about January 26, 1988, Claimant's Foreman observed him during working hours in a seated position, with his leg elevated. Claimant then produced the January 18, 1988 notice from Dr. Shanaver, when the Foreman asked him why he was not working. The Foreman then instructed Claimant to see the Carrier's Chief Medical Officer if Claimant was not physically fit for service. After examining Claimant on February 1, 1988, the Chief Medical Officer wrote the following on February 2, 1988:

"This man was seen and examined by me on 2/1/88. He has a statement from his physician, dated 1/18/88, which states that he should elevate his left leg for 20 minutes when it is swollen. In view of this restriction it is my recommendation that he be held out of service until this restriction is lifted by his physician."

On February 8, 1988, Dr. Shanaver submitted the following statement:

"[Claimant] has suffered permanent damage to his left leg in an occupational injury. He is released to perform the routine duties of his job as a Machinist Helper for the Grand Trunk Railroad without restrictions."

On February 24, 1988, Dr. Shanaver submitted another statement which repeated the information in the statement dated February 8. However, this third statement concluded that "It is unlikely that leg elevation or other health care measures will be necessary during his working hours." The Carrier then determined that Claimant could return to work, and Claimant did so on March 14, 1988.

The Organization contends that the Carrier improperly denied Claimant the opportunity to work his regular assignment from February 1, until February 24, 1988. It argues that the Carrier's actions did not comply with Rule 124 of the applicable Agreement. The Organization maintains that the Claimant was actually withheld from service in retaliation for the settlement of his on-duty injury.

The Carrier argues that it withheld Claimant from service because Dr. Shanaver's January 18, 1988 statement contained restrictions which prevented Claimant from fully returning to work. The Carrier notes that no light duty positions existed in this facility. According to the Carrier, it allowed Claimant to return to normal duties as soon as his physician lifted that restriction. The Carrier maintains that its actions were not unreasonable, since it did not seek to prevent Claimant from returning to work after this same physician had certified that Claimant's injury resulted in a partial permanent disability.

This Board has concluded that the Carrier did not violate the applicable Agreement when it withheld Claimant from service. As an initial matter, the Board agrees with the Carrier that this dispute is limited to the period of time from February 8, 1988--when Dr. Shanaver first stated that Claimant was suitable for unrestricted service--through March 14, 1988. While the Organization initially requested backpay as of February 1, 1988--the date on which he was examined by the Chief Medical Officer--it changed that time period in its March 28, 1988 appeal to the Carrier's Assistant Director of Labor Relations. This Board agrees with the Carrier that the Organization cannot alter its position at this late date.

This Board has further determined that the Carrier's actions did not violate the applicable Agreement. Rule 124 applies when an "employee disqualified for service as the result of the findings of Carrier's Medical Department ...feels such disqualification is not justified...." That Rule does not, however, limit the Carrier's authority to disqualify such employees from service. Rather, Rule 124 establishes the procedures that must be followed if that employee disagrees with that determination. This Board therefore disagrees with the Organization's assertions that Claimant was improperly withheld from service merely because that decision was based on restrictions placed on Claimant by Dr. Shanaver, and not by the Carrier's physicians. While the impetus for the Chief Medical Officer's decision may be unusual, it is not unreasonable given the rather unique circumstances of this case.

The Carrier's actions in this case must be upheld unless they are arbitrary, capricious, discriminatory or unreasonable. This Board has concluded that the Carrier's decision regarding Claimant passes muster under this

standard. As the Carrier stresses, the Mechanical Department did not have any light duty positions. The Carrier was therefore legitimately concerned when Claimant used Dr. Shanaver's January 18, 1988 statement--that Claimant "should have freedom to extend and elevate the affected leg for about twenty minutes when he experiences swelling"--to justify resting his leg during working hours.

The Board has concluded that the Chief Medical Officer acted reasonably in examining Claimant on February 1, 1988, and in disqualifying him from service until Dr. Shanaver completely removed the restriction in her January 18, 1988 statement. The Carrier is correct that had its Medical Department not taken that step, it would have tacitly agreed to that restriction. The Chief Medical Officer was also justified in viewing the January 18, 1988 statement with skepticism, since its ultimate conclusion that "[Claimant] is otherwise completely capable of performing full duties of his job", certainly appeared to contradict Dr. Shanaver's earlier conclusion that Claimant would be permanently disabled on a partial basis.

The evidence also supports the Carrier's contention that it told Claimant that it was withholding him from service because of the ambiguity of his physician's January 18, 1988 restriction, and its inconsistency with her earlier pronouncements. The Organization acknowledges that officials of the Carrier informed Claimant on February 2, 1988, that it required an unrestricted release for his return to work. The Organization further recognizes that the Carrier told Claimant that the February 8, 1988 statement was not sufficient to meet that requirement.

In the judgment of this Board, the Carrier acted with reasonable dispatch in evaluating Dr. Shanaver's February 24, 1988 statement, which stated that "[i]t is unlikely that leg elevation or other health care measures will be necessary during his working hours." This Board has concluded that any delay between February 8 and 24, 1988, is attributable to Claimant, who was on notice as to the steps needed to lift the restriction. The cases cited by the Organization on the "five (5) day rule" thus do not apply to this case, since Claimant was himself in control of the speed with which his own physician removed the restriction she had placed on his return to work.

The reasonable nature of the Carrier's actions is further demonstrated by its decision to return him to service effective February 24, 1988--the date of Dr. Shanaver's last statement--and, its decision to allow Claimant to return to work after the restriction was effectively lifted. This Board notes that the Carrier could have asserted that Claimant was estopped from returning to work by the apparent inconsistency between his physician's assertions in the litigations, and the January 18, 1988 release. See Second Division Award 11464.

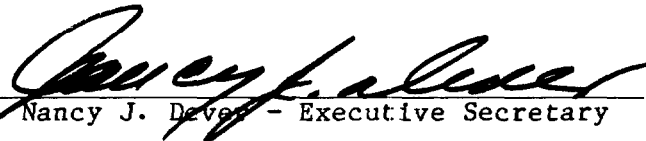
This Board has therefore concluded that this Claim must be denied in its entirety.

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 11th day of September 1991.

