

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12959
Docket No. 12877
95-2-94-2-51

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

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
(
(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM:

- "1. The Bessemer and Lake Erie Railroad Company violated the provisions of the current and controlling agreement, in particular Rules 28, 31, and 33, when they arbitrarily, capriciously and unjustly withheld Machinist R. F. Snyder from the service of the Carrier for the period of April 9, 1992 through and including June 1, 1992.
2. That accordingly, the Carrier be required to compensate Machinist R. F. Snyder 304 hours pay at the pro-rata rate, representing all pay lost while improperly held out of service for the period of April 9, 1992 through June 1, 1992."

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 waived right of appearance at hearing thereon.

Claimant is employed by the Carrier as a Machinist in its facilities at Greenville, Pennsylvania.

As a result of an annual physical examination on March 24, 1992, Claimant was advised that he had a slight weakness - hernia - on the right side. Claimant promptly scheduled an examination with a Greenville, Pennsylvania, surgeon for April 9, 1992.

In compliance with federal regulations for a commercial drivers license, Carrier scheduled a physical examination for Claimant on March 26, 1992, with a physician in Greenville, Pennsylvania. During the course of the examination, Claimant informed the physician of the prior findings of a slight weakness - hernia - on his right side. The earlier findings were confirmed and Carrier's Medical Director was advised thereof. He was also advised of Claimant's scheduled examination by a surgeon on April 9, 1992.

Both examining physicians released Claimant for work without restrictions, and he continued to perform the duties of his assigned position through April 8, 1992.

On April 6, 1992, Claimant informed his supervisor that he would have to leave work at 1:00 PM on April 9, 1992, to keep his appointment with the surgeon. He also advised his supervisor that he would like assistance if he were assigned to servicing journal box roller bearings which weigh approximately 90 pounds.

On April 9, 1992, Claimant reported for work and was advised that due to his condition - hernia - it had been decided to remove him from service and that he would not be allowed to return to service until approved by his surgeon and Carrier's Medical Director. On the same date, Carrier sent a list of questions along with a copy of its Machinist job description to Claimant's surgeon by courier.

Claimant reported for examination by his surgeon, who confirmed prior findings of a slight weakness - hernia - that was causing no immediate physical problem and released him for work with no restrictions. The surgeon responded to Carrier's questions by letter dated April 9, 1992, reading:

"April 9, 1992

J. L. Neis, Superintendent Mechanical
Bessemer and Lake Erie Railroad Company
135 Jamison Lane P.O. Box 68
Monroeville, PA 15146

Re: Ralph F. Snyder

Dear Mr. Neis:

Mr. Snyder was seen in the office today. I find that he has a small right inguinal hernia which is nontender. It is not causing any significant disability at the present time. I believe that repair of this is an elective procedure and does not have to be performed as an emergency or does not need to be repaired immediately. However, the hernia unquestionably is a result of repeated physical work. Therefore, if he is not scheduled at the present time for surgical repair, I believe that he can return to work without restriction. I do not believe that his work will significantly aggravate the hernia. However, with the usual history of this type of hernia, it will of its usual course gradually enlarge and over a period of time, most likely he will desire to have repair.

I hope this information will be helpful to you.

Very truly yours,

Bruce R. Wolff, M.D., F.A.C.S."

On April 10, 1992, Carrier directed Claimant to report to the Medical Director's office where he was examined by a staff doctor. Upon completion, Claimant was advised by the staff doctor that he agreed with the surgeon's findings but would recommend a 50 pound weight restriction. On April 16, 1992, Claimant was advised by Carrier's Medical Director that he would not be allowed to return to work without repair of the small hernia. Claimant proceeded to promptly schedule surgical repair for April 21, 1992. Claimant was approved for return to service effective June 1, 1992.

Claim was filed by the Organization on Claimant's behalf on June 8, 1992, requesting compensation for time lost during the period April 9, 1992, through June 1, 1992, alleging violation of Rules 28(a), Investigations, 31, Help to be furnished, and 33(f), Neutral doctor procedure for deciding an employee's physical fitness for service. Claim was processed in accordance with the terms of the agreement. Failing to obtain satisfactory resolution, the Organization filed with this Board for final adjudication.

Study of the record submitted to this Board persuades us that no disciplinary action was taken by Carrier against Claimant. The fact that Claimant requested assistance, in the event assigned to heavy work, just prior to being withheld from service is not sufficient to support the allegation that Claimant was disciplined. Rule 28(a), Investigations, was not violated.

Rule 31 was not violated. No evidence can be found in the record that Carrier failed to furnish help or that Claimant was assigned to work requiring help prior to April 9, 1992, the date he was withheld from service.

The Organization argues that Carrier violated Rule 33(f) by its failure to invoke the provisions thereof by contacting Claimant's surgeon to select a third independent medical doctor to examine Claimant and pass on the question of Claimant's qualifications to perform the work of the Machinist craft.

This Board is not impressed by such argument. We say this because the decision to withhold Claimant from service until his hernia was repaired was not made by the Medical Director until April 16, 1992, following examination of Claimant by a staff doctor in his office on April 10, 1992. Prior thereto, Claimant was being withheld from service on decision of supervision, and not the Medical Director. Rule 33 came into play with the Medical Director's decision to withhold and at that point the burden fell squarely on Claimant's shoulders to accept or reject. If he desired to contest the Medical Director's decision it was his responsibility or that of his Organization to invoke the provisions of Rule 33. The record does not reflect that subsequent to the Medical Director's decision the Claimant, his Organization or Claimant's surgeon contacted the Medical Director rejecting his decision and requesting a three doctor Board. Failing to do so, no grounds exist for finding a violation of Rule 33.

The record reveals that Claimant elected to accept the Medical Director's decision rendered April 16, 1992, and proceeded to have his hernia surgically repaired on April 21, 1992, and that he was approved for return to service effective June 1, 1992. No question exists concerning Claimant's physical fitness to perform service April 17 through June 1, 1992, and the claim for that period is denied.

A different situation exists for the period April 9 through April 16, 1992. Different doctors found Claimant physically fit for service on March 24, 1992, and March 26, 1992, without restrictions. Claimant's surgeon found him physically fit for service on April 9, 1992, with no restrictions. The record indicates that the decision to withhold from service was made by supervision, not by any doctor or Carrier's Medical Director.

In Third Division Award 28506, the Board held:

"It is well established that a Carrier has the right, upon reasonable cause, to subject an employee to appropriate medical evaluation to determine his fitness to perform the duties of his position in a safe and responsible manner. It has also been held that the Carrier may, in proper circumstances, withhold the employee from service pending the results of such evaluations. Such suspensions are not disciplinary in nature; and the disciplinary rules requiring Investigation are not applicable. See, e.g., Third Division Awards 18710, 25186, 25417, 25801 and 27729....

The Carrier's action disqualifying the 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."

On the basis of the record before us, we are convinced that there were no proper circumstances present to justify withholding Claimant from service April 9 through April 16, 1992. Such action was arbitrary and premature. We will, therefore, award compensation except for time necessary for Claimant to keep his appointment with his surgeon on April 9, 1992.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 18th day of September 1995.