

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26027  
Docket Number MS-26145

George S. Roukis, Referee

PARTIES TO DISPUTE: (Richard E. Hanson  
(  
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"The Burlington Northern violated Rules 40a, 40g, 41a, 41e, 45a, 69a, and in fact the entire scope of our Collective Bargaining Agreement by discriminating against and arbitrarily withholding me from service for no apparent reason except spite and vindictiveness."

OPINION OF BOARD: The basic facts in this case are set forth as follows: On April 16, 1984, Claimant apprised the Division Superintendent that he had been released for duty predicated upon a medical release furnished by his orthopedic physician. Claimant had suffered a back injury sustained when he was unloading ties from a rail tie car on February 7, 1983. The note supplied by his physician stated that Claimant was able to return to work as of 4/10/84, but indicated under the term "limitations", "take care with any lifting". Since Carrier perceived this comment as an implicit continuation of the limitation previously noted on a prior release note by the same orthopedic physician, it advised Claimant that it could not approve his return to service. Specifically, the Acting Chief Medical Officer informed Claimant in a letter, dated April 30, 1984, that:

"I have a different understanding of operating procedures in the Maintenance of Way Department throughout the railroad and in your area. My impression is that machine operators must be available to perform other routine maintenance of way work of any sort which is of a useful and productive nature for the supervisor if they are not needed at the time to work their machine. My impression is that all such machine operators must be qualified and physically able to safely perform regular maintenance of way work. This is precisely the type of activity that your back does not seem to be able to handle and which has resulted in repeated and prolonged problems which we are trying to prevent. I do not recommend the return to this form of labor and feel you should continue to pursue alternative vocational plans."

On June 4, 1984, Claimant notified Carrier that he would displace a junior employe on a machine, but he was precluded from exercising his seniority to this position because he had not obtained an unrestricted release from his physician. He filed the instant Claim on June 12, 1984. In the subsequent period, as the Claim progressed, his physician again wrote a medical note, dated September 10, 1984, which stated: "May return to full duty (as of April 16) as machine operator", but this note was unacceptable to Carrier. His physician submitted another note, dated October 15, 1984, wherein Claimant was cleared for "full duty, no restrictions", and no limitations were cited. Claimant was restored to service on November 1, 1984.

In defense of his petition, Claimant contends that he was given a full release to return to work on April 16, 1984, and was improperly denied his employment rights. He also asserts that Carrier violated his rights under Agreement Rule 41A when it did not accede to his request to establish a Medical Board.

Carrier avers that its actions fully comported with the Collective Agreement since Claimant had never submitted a physician's note unconditionally releasing him for full service as a Maintenance of Way employe. It observes that even on August 3, 1984, when the Claim was conferenced at the highest designated officer level, Claimant acknowledged that he still had two herniated disks in his spine. It also maintains that the Claim is procedurally defective since it was not filed within 60 days of June 8, 1983, when he was first refused return to service on a restricted basis.

In our review of this case, we concur with Carrier's position. While Claimant's physician fully cleared him for service October 15, 1984, this explicit non-limited clearance is distinguishable from the hedged clearance given on April 16, 1984. Under the designation, "limitations", Claimant's doctor wrote, "take care with any lifting", which under the circumstances of Claimant's injury was not perfunctory advice. On June 6, 1983, the same doctor wrote, "return to regular duty - take care with bending forward", which was unacceptable to Carrier. Previous to this note, Claimant was advised by the Division Superintendent that upon full release by his physician he could arrange to return to his assignment. Within the context of the May 19, 1983, letter and Carrier's consistent position that an unconditional release was an absolute precondition of his return to service, its actions following Claimant's April 16, 1984, employment request were not unreasonable. It would have been easy for his physician to unequivocally state "no limitations". In effect, rather than engage in subtle word play, Claimant should have forthrightly obtained an unqualified release from his physician in April, 1984. Upon the record, we find no plausible logical basis for concluding the Collective Agreement was violated, and accordingly, the Claim is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1986.