

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26249
Docket Number MW-26618

Edwin H. Benn, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(former Colorado & Southern Railway Co.)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier withheld **Mr. A. T. Gonzales** from service and failed to convene a Medical Board in accordance with Rule 41 (System **File C-29-82/DMWD 84-5-31**).

2. **Mr. A. T. Gonzales** shall be returned to service with seniority and all other rights and benefits unimpaired and he shall be compensated for all wage loss suffered in accordance with Rule 41."

OPINION OF BOARD: Claimant has been employed by the Carrier since December 23, 1974. During the relevant time period covered by this Claim, Claimant was employed as a Laborer at the Carrier's Rail Welding Plant in Pueblo, Colorado.

Claimant was withheld from service commencing February 2, 1982, and subsequently placed on a medical leave of absence due to a mental disability requiring psychiatric **treatment**. According to Welding Plant Supervisor, **J. DiBrito**, Claimant stated that he had religious visions, did not seem to concentrate on his work and would not converse in a normal fashion. **DiBrito** stated that other employees expressed safety concerns inasmuch as Claimant worked on a crane. The Carrier thereafter concluded that Claimant was a **danger** to himself and to other employees and Claimant was withheld from service.

On November 19, 1982, the Carrier cleared Claimant's return to service. Claimant returned **to** his former position as a Laborer on November 29, 1982. **Plant** supervisor, **R. Steffan**, stated that after a few days, Claimant "started to talk again about God and Religion, he seemed to be in some sort of daze [and] about 2:30 p.m., he wouldn't talk or say anything to anyone . . . [and ultimately] would just stare into space." Claimant was not permitted to perform his regular duties and further did not respond to instructions from Supervision. Effective December 20, 1982, Claimant was again withheld from service pending receipt of a signed medical release that he was mentally capable of returning to work and could safely perform his duties.

Claimant presented a doctor's statement dated January 24, 1983, from Dr. D. Province stating that after examining Claimant, it was felt that Claimant was able to return to service. By letter dated February 9, 1983, from the Carrier's Assistant Chief Medical Officer, Dr. R. Hart, the Carrier deferred making a decision on Claimant's request to return to service pending a report from Claimant's treating psychiatrist since Claimant's problem was long and severe and Dr. Province's release was deemed inadequate.

By letter dated March 11, 1983, Claimant's psychiatrist, Dr. B. Kraft, stated that after examining Claimant he concluded that there was "[n]o psychiatric illness" and "I see no reason to curtail . . . employment"

By letter dated May 19, 1983, Dr. Hart, on behalf of the Carrier, responded to the Organization's inquiry **concerning** the reasons Claimant was not permitted to return to service by stating that he believed Dr. Kraft made his evaluation without the benefit of complete information concerning Claimant's medical history. Dr. Hart further advised the Organization that Dr. Kraft was asked **to** review additional information. Dr. Hart stated that if Dr. Kraft continued to feel **that** Claimant had no problems that would limit employment, then the Carrier would seek resolution of **the matter** by a three doctor **panel**.

By letter dated May 17, 1983, Dr. Kraft stated that **he** reviewed further information submitted by **the** Carrier concerning Claimant's medical history and concluded, contrary to his first assessment of March 11, 1983, that Claimant "did lie about his prior psychiatric history" and actually had "Schizophrenia, Paranoid Type, Chronic In Remission." With respect to the issue of **whether** Claimant should be returned to service, Dr. Kraft concluded "[w]**hether** or not he should be kept at his present employment should be based on his current job performance."

On **June 3**, 1983, **the** Carrier, by Dr. Hart, concluded that in light of Dr. **Kraft's** revised recommendations, in order for **the** Carrier to **approve** Claimant's return to service, a competent psychiatrist who has treated Claimant over a period of time **must** first assure that Claimant is safe to his co-workers and himself.

On August 1, 1983, the Organization requested that Claimant either be permitted to return to service or that arrangements be made for the establishment of a Medical Board under Rule 41 of the Agreement. On August 29, 1983, the Carrier's Chief Engineer-Maintenance, J. R. Masters, responded by continuing Claimant on a medical leave of absence and refusing to permit Claimant to return to service until the assurances from Claimant's psychiatrist were received as previously determined by Dr. Hart on June 23, 1983. By not addressing the Organization's request for the establishment of the Medical Board, the Carrier **thus** refused to consent to submit the dispute to **such a Board**.

By letter of August 19, 1983, Claimant's second psychiatrist, Dr. H. Green, concluded that Claimant had a "**Schizoaffective Disorder.**" With respect to returning to service, Dr. Green concluded that Claimant "be allowed to return to work on a provisional basis, it being understood that he would continue to see me every two weeks for monitoring of the medication (Ascendin), which he agrees to take as prescribed." However, on September 22, 1983, Dr. Green called the Carrier's Medical Department seeking to retract his August 19 letter and expressed concern that Claimant was not safe to return to service since Claimant stopped treatment, discontinued his medication and reverted to his prior condition. Dr. Hart again concluded that Claimant should not then be permitted to return to service and sick leave should he continued.

Claimant presented another release dated December 6, 1983, from a Dr. Anderson who does not appear to be a psychiatrist. The Carrier continued to refuse to permit a return to service. On the same date, Claimant tendered his resignation. On December 23, 1983, Claimant submitted a retraction of his resignation, stating that at the time of the resignation he "was under some stress."

The Organization argues that the Carrier wrongfully refused to convene the Medical Board under Rule 41. Rule 41 states, in pertinent part:

"A. When an employee is withheld from duty because of his physical condition, the employee or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employee's physical condition by a competent physician, make written request upon his employing office for a Medical Board.

B. The Company and the employee shall each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians shall appoint a third neutral physician, who shall be an expert on the disability from which the employee is alleged to be suffering.

C. The Medical Board thus constituted will make an examination of the employee. After completion they shall make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the physical condition of the employee shall be final."

The Organization argues that Dr. Kraft's initial evaluation of Claimant was a "dissenting opinion" within the meaning of Rule 41(A), and after the Carrier refused to return Claimant to service, Claimant was entitled to the establishment of a Medical Board. The Carrier **argues** that although Dr. Kraft's initial assessment of Claimant, as set forth in his letter of **March 11, 1983**, could be considered as a "dissenting opinion" within the meaning of Rule 41(A), after Dr. Kraft was apprised of further information concerning Claimant's medical history, Dr. Kraft's letter of May 17, 1983, essentially retracted his earlier favorable opinion on Claimant's behalf and thereafter concurred with the Carrier's evaluation. Hence, according to the Carrier, no "dissenting opinion" existed to invoke the establishment of a Medical Board under Rule 41. The Carrier further asserts the same argument for the first favorable and then unfavorable diagnosis rendered by Claimant's second psychiatrist, Dr. Green.

Initially, it is clear from our review of this record that the Carrier acted properly by requiring the Claimant be examined and cleared by a psychiatrist prior to any return to service. This Board has long held that in light of the Carrier's **overall responsibilities** for the safety of the employee, its operation and the public, the Carrier has a right to require such an examination so long as such a requirement is not based upon arbitrary and capricious reasons. See Third Division Award 25634 and Awards cited therein. We are satisfied that in light of Claimant's conduct discussed above, the Carrier did not act in an arbitrary and capricious fashion in this case.

However, our close review of Dr. Kraft's psychiatric evaluations nevertheless leads us to conclude that the Carrier violated the provisions of Rule 41 after the Organization requested on August 1, 1983, that a Medical Board be convened and the Carrier refused to convene that Board. Even after Dr. Kraft changed his original favorable diagnosis on **May 17, 1983**, he did not conclude that Claimant could not be returned to service. On the contrary, Dr. Kraft stated "[w]hether or not he should be kept at his present employment should be based on his current job performance." Any plausible reading of this statement leads us to conclude that Dr. Kraft's final assessment was nevertheless a "dissenting opinion" within the meaning of Rule 41(A) thereby entitling Claimant to the convening of a Medical Board as requested by the Organization. Indeed, the Carrier admittedly recognized the need to **establish** a Medical Board under **Rule 41** when it stated in its May 9, 1983, letter that if upon review of further information Dr. Kraft continued to feel Claimant had no problems which would limit employment, a Medical Board would be necessary to resolve the matter. From either party's standpoint, Dr. Kraft's ultimate opinion concerning Claimant's return to service was ambiguous. In similar situations, where an **ambiguity existed** in a medical opinion, this Board has required that the Medical Board be convened. See Third Division Award 26204. We shall therefore order the convening of the Medical Board under the provision of Rule 41. We recognize that circumstances may have changed. Therefore, we shall, as a condition for the convening of the Medical Board, require that within a reasonable period of time after the issuance of this Award, that Claimant or the organization again requests that the Board be convened.

In the event that the Medical Board is convened and ultimately agrees with Claimant's position, we conclude that any return to service shall be without compensation for time lost. Under the unique circumstances presented, we find no basis in this record to require that the Carrier be exposed to any monetary liability for what ultimately amounts to a technical violation of Rule 41. Our reasons for such a conclusion are that Claimant was less than truthful in supplying information on which Dr. Kraft's initial medical opinion was based; Claimant was subsequently diagnosed after the Organization's request for the establishment of the Medical Board consistent with the Carrier's position and was found by his own physician (Dr. Green) to be unfit for return to service; and finally, the fact that Claimant resigned, albeit later rescinding that resignation.

With respect to the Carrier's position that the Claim should be denied due to Claimant's resignation, we must reject that argument in light of the Fact that had the Carrier convened the Medical Board as required, it is not apparent from this record that Claimant would have nevertheless resigned. Further, as noted above, Claimant shortly thereafter rescinded his resignation. Just as we have Found that subsequent events concerning Claimant's conduct mandate no liability on the Carrier's behalf For compensation for time lost, there is nothing in this record to permit the Carrier to prevail on its resignation argument when we have Found that it should have agreed to submit the dispute to a Medical Board. To sustain the Carrier's position would thereby permit the Carrier to benefit from its own contractual violation.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of March 1987.