

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 30802  
Docket No. MW-31066  
95-3-93-3-8

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Delaware & Hudson Railway Company, Inc.

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

- (1) The Carrier's decision to unilaterally remove Claimant L. Peloso from service on October 1, 1990, was arbitrary, capricious, without just cause and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be returned to his assigned position and compensated for all loss suffered as a result of the improper removal from service."

FINDINGS:

The Third 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 was employed as a B&B Mechanic. On March 24, 1988, Claimant suffered an on duty injury. He went on medical leave on April 4, 1988 and subsequently underwent back surgery.

On July 10, 1990, the Carrier notified Claimant that it required his services as a B&B Mechanic at Saratoga. Claimant indicated that he would be available.

On July 12, 1990, the Carrier's medical staff examined Claimant and found that he "continue[d] to have back discomfort" and that he needed a "statement from Dr. Heilbronner [Claimant's doctor] regarding [his] ability to do this type [B&B] of work." On August 7, 1990, Dr. Heilbronner released Claimant to "return to work. No restrictions." The Carrier's medical staff re-examined Claimant on August 21, 1990, noted the authorization to return to work from Dr. Heilbronner, and allowed Claimant to return to work on August 27, 1990. He was assigned limited duty and his supervisor advised him not to "bend, lift or strain in performing service."

Incident to changes in management and operations as a result of becoming a directed service carrier, on August 28, 1990, the Carrier directed that all employees in service or returning to service must undergo a physical examination. Claimant was examined by the Carrier's medical staff on September 5, 1990 and referred to a physical therapist, who evaluated him on September 6, 1990. Following a review of all of Claimant's medical information, the Carrier withheld him from service on October 1, 1990.

By letter dated October 3, 1990, the Carrier's Dr. Gabriel Farah described the work of a B&B Carpenter/Mechanic to Claimant's Dr. Heilbronner, and asked:

"Knowing exactly what the requirements of a B&B Carpenter/Mechanic are, could you tell us if you think that Mr. Peloso can work in that position with no restriction, and without being a risk to his own health.

Your comments will be greatly appreciated as to the ability of Mr. Peloso returning to work."

By letter dated October 24, 1990, Dr. Heilbronner replied:

". . . As you are aware, Mr. Peloso has had a long and complicated history. He is a very motivated gentleman and is extremely anxious to return to work. As you know, such motivation is unusual in these circumstances. Although Mr. Peloso has some persistent pain and discomfort in his back, he has resolved from his original injury to the extent possible. He feels he can carry on with his prior employment and is anxious to pursue this. He is aware of the risk of continued pain and a worsening of the pain, though his overall risk for reinjury would only be slightly higher than for someone who has not undergone previous back surgery."

On October 29, 1990, Claimant instituted a claim alleging that he had been improperly removed from service. By letter dated November 13, 1990, General Manager, Operations & Maintenance T. F. Waver told Claimant that pursuant to a review of his medical records by the Carrier's Medical Department, it would "not be possible for you to return to work as a B&B Mechanic." The Carrier denied the claim based on its conclusion that Claimant's physical condition precluded his return to service.

By letter dated December 19, 1990, General Chairman John Davison requested that General Manager Waver determine Claimant's physical fitness for duty under the provisions of Rule 27.2 (Board of Doctors), which provides for establishment of a three-doctor panel, with the Carrier and Organization each to select one and the two doctors to select a third, who together determine the fitness of employee and make a written report. The Rule provides that their decision is final and binding. The General Chairman selected Dr. Heilbronner as the Organization's member on the board.

By letter dated January 2, 1991, General Manager Waver denied the Organization's request for a Board of Doctors citing Dr. Heilbronner's October 24, 1990 letter to show that there was no disagreement between Dr. Heilbronner and the Carrier's medical staff; he asserted that both agreed that Claimant was "unable to return to work without restrictions."

Dr. Heilbronner wrote General Manager Waver on January 29, 1991 regarding Claimant and referring to his October 24, 1990 letter. He pointed out that, in that letter, he had released Claimant to return to work. There followed a further exchange of correspondence between Mr. Waver and Dr. Heilbronner in which the Carrier continued to refuse to allow Claimant to return to service. Mr. Waver asserted that the Doctor had not given Claimant an unrestricted release to return to work and the Doctor continued to assert that he had given a sufficient release.

By letter dated July 16, 1991, General Chairman Davison transmitted a letter from Dr. Heilbronner which stated:

"Mr. Peloso has maximally recovered from his back injury of 3/25/88 and his subsequent surgery. At this time he is ready and able to return to work with no restrictions. I trust this satisfies any questions or concerns you may have."

General Manager Waver then sent Dr. Heilbronner a job description for a B&B Carpenter/Mechanic and asked that he confirm that Claimant could perform the tasks described therein. Dr. Heilbronner replied by letter dated July 22, 1991, indicating that he believed Claimant to be capable of performing the functions of the position.

On August 9, 1991, General Manager Waver advised Claimant to appear for a medical examination. He did so and, by letter dated August 26, 1991, the examining doctor advised the Carrier's Medical Officer that Claimant was healed and no longer restricted from heavy work. The Carrier received this letter September 9, 1991 and Claimant was returned to service September 10, 1991. At issue are wages for the period of approximately 11 months Claimant was held out of service.

The claim was progressed in the usual manner to Mr. Waver, the Carrier's highest designated officer. General Manager Waver responded by letter dated September 26, 1991 recapitulating the history of the claim and asserting that the Carrier's principal concern throughout had been Claimant's safety and well being, noting that Dr. Heilbronner consistently was vague and noncommittal as to the state of Claimant's health and recovery. A conference on the claim was held on December 20, 1991, at which the Carrier agreed to reconsider the Organization's claim for time held out of service. The Carrier asserts that Mr. Waver declined the claim on February 5, 1992. However, further communication was had, and a further conference held on March 24, 1992. By letter dated April 7, 1992, Mr. Waver declined the claim. On January 7, 1993, the Organization filed its Notice of Intent to submit the claim to this Board.

The Organization argues that Claimant was arbitrarily removed from service on October 1, 1990 and wrongly withheld from service until September 10, 1991. It maintains that the Carrier presented no documentation to support withholding Claimant from service following his release by Dr. Heilbronner and the Carrier's doctors. The Organization contends that the Carrier withheld Claimant because of an administrative requirement to obtain final approval from its Medical Director, not because of any medical finding. Citing Third Division Award 19484, the Organization argues that administrative delay in processing a medical examination constitutes a denial of Claimant's rights.

The Organization further contends that the Carrier was at fault for any delay in returning Claimant to service. It maintains that no medical doctor placed any restriction on Claimant after he was removed from service on October 1, 1990. The Organization

challenges the merits of removing Claimant from service on October 1, 1990, arguing that Dr. Heilbronner "was adamant about the Claimant's ability to perform work without limitation or restriction."

It denies that the claim is untimely, pointing out that the Organization submitted its Notice of Intent nine months after the Carrier's denial of the claim at the highest appellate level.

The Carrier argues that withholding Claimant from service was neither arbitrary, capricious, without just cause nor in violation of the Agreement. The Carrier contends that it has the right to set and maintain physical standards for its employees. It notes that in changing the operation of the railroad, all employees underwent physical examinations and that upon reviewing Claimant's results, he was properly withheld from service pending further medical review.

The Carrier asserts that Dr. Heilbronner failed, until July of 1991, to provide a clear statement that Claimant could return to service without restriction. The Carrier denies that it violated Rule 27.2 in refusing to establish a Board of Doctors because at the time the Organization made the request, there was no evidence contradicting the Carrier's conclusion that Claimant was not fit for duty. It rejects Dr. Heilbronner's August 7, 1990 evaluation as adequate contradictory evidence because of the intervening provision of the job description to him and his failure to provide unrestricted clearance for Claimant's return to work.

The Carrier also argues that the Board lacks jurisdiction over the dispute because Rule 24.5 requires institution of proceedings before this Board within nine months of the decision by the Carrier's highest designated officer, which it asserts took place on February 5, 1992.

The Board has considered the Carrier's assertion that we lack jurisdiction over the dispute because the Organization failed to docket the claim with the Board within nine months from February 5, 1992. We are not persuaded. Whatever may have taken place on February 5, communications between the Organization and Mr. Waver concerning the claim continued thereafter and resulted in a letter dated April 7, 1992, in which Mr. Waver declined the claim. That letter made no reference to any earlier decision. The Board concludes that the time period for appeal dated from the Organization's receipt of the April 7 letter and, from that date, the Organization's Notice of Intent is not untimely.

The Board has considered the Organization's arguments that the

Carrier wrongly withheld Claimant from service. We are not persuaded that the Carrier's initial action was improper. There is substantial evidence in the record in the form of the extensive correspondence and medical reports that Claimant suffered an injury and that in an effort to protect his well being, the Carrier sought his doctor's approval to return him to duty without restriction. There was genuine dispute whether Dr. Heilbronner's communications were sufficient and question whether Claimant was, in fact, fit for duty in the strenuous position to which he would be assigned.

A carrier's determination to hold an employee out of service on the basis of failure to meet such standards may, of course, be challenged through the claims process. Rule 27.2 of the Agreement provides, in addition, a mechanism of a three-doctor panel to resolve questions concerning medical aspects of an employee's qualifications for a position. By letter dated December 19, 1990, the General Chairman properly initiated such a procedure. The Board has reviewed the basis for the Carrier's January 2, 1991 denial of the request, which asserted that there was no disagreement between Dr. Heilbronner and the Carrier's medical staff. The Board does not believe that reflects the state of the medical opinion at that time; in any event, upon invocation by the Organization of Rule 27.2, that determination became one for the medical panel, not Mr. Waver. The Board concludes that the Carrier's failure to participate in the Rule 27.2 procedure was improper and delayed Claimant's return to work.

Ultimately, Claimant was found by the Carrier to be fit to perform the duties of his position and was reinstated. A review of the extensive correspondence indicates no significant change in Claimant's medical status over the period from October 1, 1990 until his reinstatement eleven months later. Thus, the Board believes it more likely than not that, if Claimant had been examined in January of 1991, the three-Doctor panel would have reached the same conclusion and found him to be fit for service. Indeed, in light of the apparent lack of material change, the best conclusion is that Claimant would have been fit for duty from the date he was withheld. Under such circumstances, the Board concludes that the Carrier's continued withholding of Claimant from service violated his rights under the Agreement and entitles him to be made whole for wages and benefits lost.

The claim is timely. Claimant was wrongfully withheld from service for the period from October 1, 1990 through September 9, 1991. He shall be credited with service for the period and made whole for wages and benefits lost. Claimant's records shall be amended to so reflect.

AWARD

Claim sustained.

O R D E R

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.

National Railroad Adjustment Board  
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.