

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30923
Docket No. MW-28721
95-3-89-3-93

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

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

- (1) The suspension from service of Trackman J.K. Spencer on April 5, 1988, allegedly under Section III, Paragraph 2 of Form 2501, was arbitrary, capricious and in violation of the Agreement. (Carriers File 880485 MPR)
- (2) The Claimant shall be allowed pay for eight (8) hours each work day, including any holidays falling therein, beginning April 5, 1988 and continuing until he is reinstated in the Carrier's 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.

This claim challenges the Carrier's decision to withhold Claimant from service effective April 5, 1988.

Claimant entered Carrier's service in August 1978. He initially held a position as a scrap cutter at Carrier's Palestine Scrap Yard until July, 1983. Claimant then established seniority as a trackman in September 1983. He was assigned in February 1987 to fill a trackman's position on the DeQuincy Division in San Antonio.

On July 27, 1987, Claimant was withheld from service on the basis of supervisory observations that he appeared to be taking unnecessary risks to the safety of Claimant and others. On August 24 and 25, 1987, he was given a psychological examination by D.B. Feigenbaum, Ph.D. to determine the circumstances under which Claimant might continue to work for Carrier. The summary of Dr. Feigenbaum's report stated as follows:

"I conclude that because of general intellectual level as well as visual-motor and visual-perceptual levels, that it would not be wise to keep this man working at dangerous tasks which demand exacting visual-motor performance. On the other hand, there are many personality characteristics exhibited which suggest this man is a very dedicated, motivated employee who most likely will work year after year consistently in the proper position. Since he has worked for many years for the railroad, I would assume there are positions available which do not involve undue risk and in which he could do quite well."

Carrier's Medical Director then approved Claimant's return to service, effective November 9, 1987, after reviewing Dr. Feigenbaum's evaluation.

The Board notes that the Organization challenged Carrier's 1987 withholding of Claimant from service through the Parties' grievance procedure and before this Board. In Third Division Award 28506, dated August 7, 1990, this Board held that Carrier did not violate the Agreement by withholding Claimant from service on July 27. The Board held that "the medical evaluation process was properly undertaken, that the Carrier did not act unreasonably in withholding the Claimant from service pending the results of the evaluation, and that the period of the evaluation was not unduly or improperly extended by the Carrier." Award 28506, page 4.

On April 5, 1988, Claimant reported for an assignment with Gang 2842. Claimant unloaded tools from a truck as directed by a foreman. When he joined the gang, he was sent back to the truck to wait. When the Roadmaster arrived at the job site, he informed Claimant that Claimant was incompetent to hold his assignment.

On April 12, 1988, the Superintendent withheld Claimant from service effective April 5, 1988, pending a medical examination of Claimant's physical and mental condition. The April 12, 1988 letter stated that "[o]bservation of [Claimant's] job performance caused your management to be concerned over your personal welfare."

On May 20, 1988, Claimant was examined by Moshe Perl, Ph.D. The Organization filed a claim as to the April 5, 1988 decision on June 2, 1988. That Claim was denied by the Carrier and is properly before this Board.

On July 6, 1988, the Carrier's Medical Director evaluated Claimant's medical condition. He concluded that Claimant should be restricted to a job "that does not have serious or endangering aspects to it...." On August 12, 1988, the Superintendent advised Claimant that he was:

"... disqualified from service with the Union Pacific Railroad unless and/or until your condition improves to the point you are capable of occupying a position to which your seniority would entitle you."

On September 1, 1988, the Organization appealed the Superintendent's April 12, 1988 decision. The appeal was also denied on the property.

On January 10, 1989, Carrier's Assistant Medical Director, determined that Claimant was "medically disqualified" from further employment.

The Organization initially contends that Carrier violated Rule 12, Section 1(a) of the Agreement when it withheld Claimant from service effective April 5, 1988 without an Investigation. In this regard, the Organization maintains that such action was actually a suspension and that Claimant was therefore entitled to an Investigation under Rule 12.

In addition, the Organization argues that Carrier improperly disqualified Claimant under its Physical Examination Rule. In this respect, the Organization maintains that Carrier presented no evidence that Claimant's work performance changed between November 9, 1987 (when he was returned to service by Carrier's Medical

Director) and April 12, 1988, when he was again withheld from service by the Superintendent effective April 5, 1988.

The Organization also asserts that Carrier presented no evidence to support the contention that Claimant's presence could endanger his own safety and that of his fellow employees. In addition, the Organization contends that Claimant had not been medically disqualified by Carrier's Medical Director before the Superintendent stated, on August 12, 1988, that Claimant was "disqualified" from service.

The Organization then asserts that Claimant was not disqualified by Carrier's medical officials until January 10, 1989. It is the position of the Organization that Carrier did not make that determination in a prompt manner, as it was required to do. The Organization also relies on statements from several of Claimant's co-workers that he was a safe and reliable employee.

In addition, the Organization contends that several of the arguments in Carrier's Submission were not raised on the property, and are therefore "new arguments". The Organization requests the Board to reinstate Claimant with full backpay and benefits.

The Carrier argues that Rule 12 does not apply to medical disqualifications. It thus asserts that Claimant was not entitled to an investigation before the Superintendent's April 12, 1988 letter. In addition, the Carrier contends that it did not act in an arbitrary, capricious or unreasonable manner in disqualifying Claimant.

The Carrier further maintains that the Board does not have jurisdiction to overrule medical standards imposed by competent medical personnel. It is also the position of Carrier that such disputes must be resolved by a medical board established under Carrier's procedures governing physical disability cases. The Carrier notes that there is no evidence that Claimant and the Organization attempted to utilize those procedures.

The Carrier, therefore, contends that the claim is without merit and must be dismissed.

The Board has carefully considered the Parties' arguments and the record of this case, and has concluded that the claim must be denied.

The Board initially notes that the claim filed on June 2, 1988 was limited to the April 12, 1988 decision withholding Claimant from service, effective April 5, 1988, pending medical evaluation

of his fitness to perform his assignment. That claim thus did not encompass Carrier's August 12, 1988 decision to disqualify Claimant from service until he was "capable of occupying a position to which [his] seniority would entitle [him]." Nor did it cover the Assistant Medical Director's January 10, 1989 determination that Claimant was medically disqualified from further service.

The Board further notes that the Organization's Submission to the Board only challenges the April 5, 1988 "suspension." However, the Board concludes that the Parties have also fully and fairly litigated Carrier's August 12, 1988 and January 10, 1989 decisions.

As noted, the Organization filed a September 1, 1988 appeal challenging Carrier's August 12, 1988 decision. That appeal was discussed on the property. It was also part of both Parties' Submissions to the Board in the instant claim.

In addition, both Parties' Submissions to the Board argued and evaluated the validity of the January 10, 1989 medical disqualification. The Board, therefore, concludes that Carrier's August 12, 1988 and January 10, 1989 decisions are properly before the Board along with the action challenged in the June 2, 1988 claim.

With respect to the Superintendent's April 12, 1988 letter, the Board concludes that the Carrier did not violate the Agreement in withholding Claimant from service pending medical evaluation. In Award 28506, which denied Claimant's earlier claim contesting Carrier's July 27, 1987 decision to withhold Claimant from service, this Board set out the following guidelines for such decisions:

"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." (citations omitted) Award 28506, page 3. See also, Third Division Award 29925, page 2.

As such, the Board must deny the Organization's assertion that the Carrier violated Rule 12 by withholding Claimant from service without utilizing the investigation procedure. The Board notes that the instant case differs from that in Third Division Award 29925, on which the Organization relies. In Award 29925, this Board rescinded a carrier's decision to withhold an employee from

service after the carrier's medical officer had found the employee fit for duty. Id. That factor is not present in this case.

The Board further concludes, as was also determined in Award 28506, that Carrier acted reasonably in withholding Claimant from service pending medical evaluation. The Board acknowledges that the circumstances of Carrier's April 1988 decision differ somewhat from those evaluated in Award 28506. In Award 28506, this Board stated as follows in concluding that Carrier had reasonable cause for its July 27, 1987 decision to withhold Claimant from service pending medical evaluation:

"The Claimant's supervisors apparently observed him to be taking risks to his safety in working too close to machinery and to be risking the safety of others in swinging his sledgehammer close to other employees. According to the supervisors, Claimant's conduct continued even after he was warned to change his conduct." Award 28506, pages 1-2.

The Board then noted that Dr. Feigenbaum's subsequent psychological examination "confirm[ed] the existence of Claimant's mental and physical conditions, some of which reasonably impact the Claimant's ability to perform the duties of his assigned position." Id., page 3.

The instant record contains generalized, rather than specific, supervisory observations of Claimant's work performance. The Superintendent's April 12, 1988 letter stated that "[o]bservation of [Claimant's] job performance caused your management to be concerned over your personal welfare."

While the instant claim presents a closer issue than that assessed in Award 28506, the Board concludes that Carrier had reasonable cause to withhold Claimant from service effective April 5, 1988. The Superintendent's decision states that it was based on management observations and concerns. The Organization has presented no contemporaneous evidence from employees at that work site to counter the Superintendent's statement.

In addition, as was the case in Award 28506, the Superintendent's concerns in April 1988 were confirmed by subsequent medical evaluations. Dr. Perl's May 28, 1988 clinical examination concluded that Claimant had a "short attention span" and tended "to be impulsive." He further noted that Claimant would "perform best at jobs involving repetitive tasks and simple instructions. It is unclear whether his tendency to be forgetful or impulsive would affect the specific job he is doing."

Dr. Perl's diagnoses included "possible" attention deficit disorder as well as borderline intellectual functioning. He suggested that Claimant consider taking medication to alleviate his short attention span and impulsivity.

Dr. Perl also concluded that Claimant's work ethic would make him an "excellent worker ... in the right job." He recommended that "[a] resolution to [Claimant's] current work difficulties be found soon" and that Carrier "would do well to try to keep him on as an employee."

The Medical Director's July 6, 1988 evaluation also supports the April 12, 1988 decision to withhold Claimant from service, effective April 5, 1988, pending medical evaluation. He stated that:

"[Claimant's evaluation] reveals only that he has borderline intelligence for functioning and although he has functioned for the Union Pacific Railroad for a period of 11 years, at this point I think it is time to accommodate him in some job that does not have any serious or endangering aspects to it because of his inability to coordinate all of the functions that need to be done at a time."

It would seem to me that after discussing with the employee assistance program, he would be best suited for yard work with small tasks that can be done with relative ease and do not require a lot of attention span." (emphasis added).

The Organization asserts the absence of medical evidence that Claimant's condition had changed from November 9, 1987, when Carrier's Medical Director had approved Claimant's return to work. In this regard, the Organization emphasizes that Carrier made its November 9, 1987 determination despite Dr. Feigenbaum's recommendation that Claimant not be assigned to "dangerous tasks which demand exacting visual-motor and visual-perceptual levels."

However, Dr. Perl's May 20, 1988 assessment differed from that of Dr. Feigenbaum. Dr. Perl concluded that Claimant had a tendency to be impulsive. He also included "possible" attention deficit disorder as a diagnosis.

The Board also notes that the Medical Director's July 6, 1988 assessment was premised on Dr. Perl's evaluation. These medical decisions, which were issued subsequent to November 9, 1988, demonstrate that Carrier had reasonable cause to withhold Claimant from service effective April 5, 1988.

The Organization also relies on the positive statements in the record on Claimant's behalf from numerous of Claimant's fellow employees. The Board agrees with the Carrier that these statements are not determinative, however, because they were given in October 1987, prior to Dr. Perl's examination.

As a result, the Board concludes that the Carrier had reasonable cause to withhold Claimant from service effective April 5, 1988, pending medical evaluation.

On August 12, 1988, Carrier determined that Claimant was disqualified from service "unless and/or until your condition improves to the point you are capable of occupying a position to which your seniority would entitle you." This action must be evaluated under the following standards set out in Award 28506:

"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. ... The burden is on the Carrier to establish the legitimacy of its actions in accordance with those standards...." Award 28506, page 3.

The Board concludes that Carrier met these standards with respect to its August 12, 1988 decision. The Organization contends that the August 12, 1988 disqualification was not based on a medical determination as to Claimant's capabilities to perform his assignment or others within his seniority.

However, the Superintendent's August 12, 1988 letter to Claimant clearly states that the disqualification was based on the "Medical Director's evaluation of your case." As noted, the Medical Director concluded on July 6, 1988 that Claimant should be restricted to a job that "does not have any serious or endangering aspects to it because of his inability to coordinate all of the functions that need to be done at a time."

In the judgment of the Board, Carrier has met its burden to establish the "legitimacy" of its August 12, 1988 disqualification decision. The burden then shifts to the Organization to rebut the Carrier's evidence.

The Board concludes that the Organization has not met that burden. The Organization has not provided any evidence that Carrier's August 12, 1988 decision was arbitrary, discriminatory or in bad faith. The Organization has not provided any medical evaluations to contradict those of Dr. Perl and the Medical Director. Nor is there any evidence that Claimant followed Dr. Perl's suggestion to explore the possibility of taking medication to control his short attention span and his tendency to be impulsive.

The Board thus concludes that the Carrier's August 12, 1988 decision did not violate the Agreement. In reaching this conclusion, the Board does not rely on Carrier's argument that Claimant did not use the Carrier's internal procedure to challenge the Superintendent's August 12, 1988 determination. The Board agrees with the Organization that this contention was not discussed on the property and is therefore a "new argument" that cannot be presented to the Board for the first time.

The Board further concludes that the Assistant Medical Director's determination that Claimant was "medically disqualified" did not violate the Agreement. On January 10, 1989, he informed the Superintendent as follows:

"I am responding to your correspondence requesting a recommendation on [Claimant's] case. Based on the information that you provided me that you are unable to accommodate [Claimant] with the restrictions that we have placed upon him, in that there are no jobs available within his craft and seniority, I would consider him medically disqualified. He should make arrangements with the Railroad Retirement Board to receive whatever benefits may be due to him. He should be maintained on a leave of absence until such time that the Railroad Retirement Board has made a final decision."

The record does not contain any specific evidence to contradict the doctor's statements. In particular, the record does not demonstrate that Claimant's seniority as a Trackman entitled him to any assignment within the restrictions placed on him by the Carrier's Medical Director.

The Organization asserted in its September 1, 1988 appeal that Carrier did not accept Claimant's bid on a gang in the Palestine yard that included trackmen. However, the record does not contain evidence that these jobs were within Claimant's craft and seniority.

The Board recognizes that both Dr. Perl and the Medical Director commented positively on Claimant's dedication and motivation, and that both recommended that Carrier attempt to find Claimant a job compatible with his medical limitations. The Board reiterates that there is no evidence that Carrier acted arbitrarily, discriminatorily or in bad faith in determining that Claimant was medically disqualified from performing those jobs to which his seniority and craft entitled him.

The Board emphasizes that its only authority is to determine whether Carrier's decision to medically disqualify Claimant violated the Agreement. As such, this Board's decision must be based on Carrier's contractual obligations, and not on any rights

that Claimant may or may not have had outside the Agreement. The Board, therefore, concludes that the Carrier's January 10, 1989 decision did not violate the Agreement.

The Board further concludes that Carrier did not violate its obligation to "diligently and promptly ... carry out its examination and determination. If the Carrier is delinquent, it is obligated to make the employee whole for time to which the employee would have been entitled, but for the delay." Award 28506, page 4.

Dr. Perl examined Claimant on May 28, 1988. There was thus a seven week time span between April 5, 1988 and Dr. Perl's May 28, 1988 examination. However, the record contains no evidence that the delay was attributable to lack of diligence by Carrier.

The Medical Director's July 6, 1988 determination followed Dr. Perl's report by approximately five weeks. The Superintendent's August 12, 1988 decision also followed the Medical Director's determination by five weeks. There is no evidence that Carrier unduly delayed these decisions.

The Organization emphasizes that the Assistant Medical Director medically disqualified Claimant on January 10, 1989, almost five months after the Superintendent's August 12, 1988 decision. However, there is no evidence in the record that the Carrier was not being diligent and prompt in determining that Claimant's craft and seniority did not entitle him to be placed in any assignments within his medical limitations.

The Agreement was not violated.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.