

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No 31241
Docket No. SG-31707
95-3-93-3-741

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Chicago and North Western Transportation Co.

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen (BRS) on the Chicago North Western Transportation Company (CNW):

Claim on behalf of J.R. Brula for:

- (a) Payment for all time held out of service, beginning March 26, 1993, and continuing until the Claimant is reinstated;
- (b) Payment of additional medical expenses incurred as a result of improper disqualification;
- (c) Credit for vacation qualifying days and restoration of all other benefits lost as a result of carrier holding the Claimant out of service.

Carrier violated Signalmen's Agreement, particularly Rule 11, when carrier established participation in its Employee Assistant Program as a condition of reinstating the Claimant and refused to reinstate him to 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.

The parties to the dispute waived the right of appearance at hearing therein.

The dispute devolves upon whether the claimant was entitled to receive a third party doctor examination in accordance with the provisions of Rule 11, and was the Carrier correct in refusing to grant such an examination. This Rule states in its relevant part:

"Physical re-examinations will not be required, unless it is apparent that an employee's health and physical condition are such that an examination should be made. Except in an emergency, an employee will not be removed from service until it is agreed between the officer in charge of labor relations and the General Chairman that the employee is unfit to perform his usual duties. In case a dispute arises, an examination will be made by an agreed-to competent doctor not an employee of the transportation Company, and the case disposed of on the basis of his findings."

On January 25, 1993 the Claimant Signal Maintainer took a leave of absence until March 22, 1993. On March 22, 1993, the Claimant's physician, Dr. Yunez, gave the Claimant a return to work certificate without restrictions, effective that date. Dr. Yunez's report noted that the Claimant had elevated liver enzymes.

On March 26, 1993, the Claimant was examined by the Carrier's Medical Department and on April 1, 1993 the Medical Administrator wrote the Claimant that its examination showed he had signs of significant liver disease which indicated alcoholism. The letter further states that the Claimant would have to first obtain clearance from the Director of the Employee Assistance Program before the Medical Department could clear him for service. In the meantime, the Claimant would be placed on "medical hold" until he obtained these clearances.

On April 12, 1993 the Director of the Employee Assistance Program wrote the Claimant that the evaluation of the Substance Abuse Program which was completed at the Westlake Community Hospital showed significant symptoms of alcoholism even though he had minimized his use of alcohol. The Director recommended the Claimant receive intensive out patient treatment with random urine checks.

On April 19, 1993 the General Chairman wrote the Carrier's Labor Relations Officer and stated that in none of the reports submitted by the Claimant's doctors was there any statement of alcohol abuse. The letter further stated that the report from the Westlake Community Hospital that the result of the ultra sound examination of the Claimant's liver showed it was normal with respect to size, shape, and position.

The General Chairman's letter further stated that the Claimant informed him that none of the doctors treating him has ever told him that he suffered from liver disease caused by alcoholism and that the Claimant objected to being required to contact the Director of Employee Assistance before he could be restored to service.

The General Chairman stated in his April 19, 1993 letter, that since there seems to be a dispute as to whether the Claimant has a liver disease caused by alcoholism, the Organization was requesting an examination under Rule 11 and the Claimant's return to service be determined on the basis of the findings of the impartial doctor.

The Carrier's Medical Consultant wrote the Claimant on May 4, 1993, stating that the records show elevated enzymes associated frequently with liver disease. He further stated that the liver sonogram showed it to be within normal limits, and he also noted that when the Claimant was examined for a return-to-work examination on March 26, 1993 his liver was found to be very enlarged. The Medical Advisor stated that because of this he needed more information from the Claimant's doctor regarding liver disease and whether an active disease process was occurring. The Medical Advisor also requested the Claimant to confer with Director of Employee Assistance so that a final medical qualification determination could be made. He stressed more medical information was needed.

On May 25, 1993 the Organization filed the present claim alleging, inter alia, that the Carrier violated Rule 11 by continuing to withhold the Claimant from service.

On May 29, 1993 the Carrier's Labor Relations Officer replied to the General Chairman's request for a third party doctor to determine the matter of the Claimant's return to duty. The letter denied the request of for a third party doctor on the basis there was no dispute about medical findings of the doctors on either side.

On July 11, 1993, Dr. Yunez, the Claimant's physician, reported that the Claimant had Hepatitis "C" but was able to return to work without restriction.

On July 28, 1993, the Director of the Employee Assistance Program wrote the Claimant that based on the substance abuse evaluation received from the Westlake Community Hospital, it was necessary to complete an intensive out-patient program before the Claimant's medical qualifications can be worked out.

On August 5, 1993, the General Chairman wrote the Carrier's Labor Relations Officer reinstating his request that the Claimant be returned to duty as he was being withheld from service without cause.

The parties continued to exchange correspondence but were unable to reach agreement and the Organization filed this claim with the Board on January 14, 1994.

The Organization asserts that the claim should be sustained because the Carrier improperly disqualified the Claimant from returning to service after a leave of absence and arbitrarily denied its request for a neutral doctor, pursuant to Rule 11, to examine the Claimant's physical condition to determine whether he should be returned to service.

The Organization maintains that the Carrier was in error in contending the Claimant was not fit for service. The record shows that the Claimant's physicians found he was qualified to return to work without restrictions. The Organization admits the Carrier had the right to determine the medical qualifications of its employees, but this right is not unrestricted. The Carrier's disqualification has to be based on substantive evidence that indicated the Claimant was not capable of performing his duties or he represented a threat to the safety of others or to himself.

The Organization asserts that the record is devoid of any evidence that shows the Claimant was incapable of carrying out his job duties or that he represented any kind of safety threat.

The record indicates the Carrier suspected the Claimant had some kind of alcohol-related problem. But there is no evidence to show that the Claimant was not capable of performing his work or that he was a threat to his fellow employees, himself or the general public. The Organization adds that if the Claimant has an alcohol problem it would have been apparent before his leave of absence and would have manifested itself in his past job performance. It stresses there is no evidence that the Claimant's previous job performance was less than satisfactory or that this job performance was in any way adversely affected by an alcohol problem.

With respect to Rule 11, the Organization maintains that the Carrier breached its provisions. The record shows that both the Claimant's doctor and the Carrier's doctor recognized symptoms of liver ailments when they examined the Claimant. The Carrier maintains that Rule 11 could not be invoked because there was no dispute regarding their diagnosis.

The Organization points out that Rule 11 is concerned with conflicting opinions about the employee's fitness for duty, not about differences in diagnoses. While both doctors identified similar symptoms, they had conflicting opinions whether the Claimant should be returned to service.

The Organization states that under these circumstances the Carrier was required to accede to its request for a Rule 11 physician to determine whether the Claimant was fit to return to service, because that was the basic reason for negotiating Rule 11. The Organization asserts that there was a disagreement about the Claimant's ability or capacity to perform his duties, even though there was no disagreement between the doctors as to the symptoms. When the parties disagreed on the Claimant's ability to execute the duties of his job, that dispute had to be resolved through the Rule 11 mechanism. When the Carrier refused to comply with Rule 11, it acted in an unreasonable and arbitrary manner and was in violation of the Agreement and must pay the penalty therefor.

The Organization requests the Board to sustain the claim and order the Carrier to make the Claimant whole for all time and benefits he lost as a result of the Rule violation.

The Carrier states that the Claimant is not entitled to the compensation because he has been properly handled by its Medical Department and he has not met the requirements of the Medical Department to become qualified for service. The Carrier states that it has the right to determine an employee's right to return to service, after the employee's leave of absence, and to hold the employee out of service until the employee furnishes the requested information that will enable the Medical Department to make the determination to whether the employee is medically qualified for service. The Carrier states its return-to-work physical of March 26, 1993 revealed the Claimant was suffering from a liver disease, probably cirrhosis, and this was not denied by the Claimant or his physician.

The Carrier states that its Medical Director requested more detailed medical records and did not receive them completely until July 1, 1993. In the interim, the Claimant was asked to submit to a substance abuse evaluation which he did on April 7, 1993. The Carrier stated that this evaluation indicated the Claimant required treatment for alcoholism.

The Carrier stated that the Claimant to date has never undergone treatment for substance abuse and is medically disqualified due to his failure to obtain treatment for alcoholism. It adds it is willing to return the Claimant to service if he complies with the instructions of the Medical Department or demonstrates that he has undergone treatment for substance abuse.

The Carrier asserts the Organization has based the claim solely on a Rule 11 violation because the Carrier refused the request for a third party physician. The Organization contends that there is present a medical dispute concerning the Claimant's liver disease. The Carrier asserts that the Organization relies on the fact that none of the Claimant's doctors made reference to his liver disease being caused by alcohol and therefore there was no cause for the Claimant to undergo a substance abuse evaluation and treatment.

The Carrier states that after the March 26th return-to-work physical indicated a possible liver disease and the Claimant was told to stop his alcohol intake. In addition to being asked for his complete medical records, the Claimant was also asked to contact the Director of Employee Assistance for an evaluation. After the Claimant was examined at the Westlake Community Hospital, he was told by the Director of the EAP that he required intensive out-patient treatment.

The Carrier denied the Organization's request for a Rule 11 third party doctor examination because there was no dispute as to whether the Claimant was medically qualified for service. The Carrier adds that both doctors agree that the Claimant has a liver disease. A follow up examination found that alcohol was a factor. No doctor has found otherwise. Neither the Claimant nor the Organization has disputed the medical results. The Carrier maintains that in order for the third party doctor rule to become effective, the Organization must show that the Claimant's physician disagrees with the Medical Department's findings.

The Carrier admits that the Claimant's doctors did not admit the Claimant's condition was caused by alcohol. These doctors never addressed the cause of the Claimant's liver disease. They remained silent on the subject even though the Carrier's Medical Department informed the Claimant from the first examination that his liver condition appeared to be caused by alcohol. The Carrier states that the idea of a medical dispute has been conjured up solely by the Organization and not by any of the Claimant's physicians. The facts are that the doctors on both sides agree that medical information reveals that the Claimant had a liver disease. The Carrier states the Organization has only disputed the right of the Carrier's examination of the Claimant's for substance abuse.

The Carrier stressed its Medical Department has the final and controlling decision as to an employee's medical qualifications returning him to work. The Medical Department has the right to require whatever information it needed to make such a determination.

The Carrier states that once its Medical Department had received information on April 7, 1993 from the evaluation of the Westlake Community Hospital that the Claimant was suffering from alcoholism, it could insist that the Claimant would not be returned to service until he received treatment for alcoholism. The Carrier adds that it was the Claimant's failure to address this problem that was responsible for his not being returned to service. The Carrier adds that once the Claimant complies with the instructions of the Medical Department or demonstrates that he had received treatment, it is agreeable to return him to service.

The Board finds that the Carrier erred in relying too heavily on the fact that the Claimant had a liver disease. He was diagnosed as having "Hepatitis C" with inflammation of the liver. However, not every person who has hepatitis is an alcoholic. The Claimant's doctors confirmed the fact that the Claimant has a problem with his liver but all recommended that he could return to service without any restrictions.

It is understandable why the Claimant chose not to enter the Employee Assistance Program. To do so would have branded him as an alcoholic, even though he believed he was not subject to such a dependency. It would indeed be a heavy burden that the Claimant would have to carry all of his life, if he believed in good faith that he was not an alcoholic. This refusal of the Claimant to enter the Carrier's EAP was not contumacious conduct, but rather an attempt on the part of the Claimant to preserve and maintain his reputation and good name. The Claimant was entitled to follow a course of conduct, if he believed in good faith, it would avoid his being stigmatized as having an alcoholic dependency. It is noteworthy that when a Sonogram was made of the Claimant's liver on May 18, 1993, and compared to a Sonogram made on February 10, 1993, the latter showed that the Claimant's liver was within the upper limits of normal to slightly prominent, but no allegation of distention due to alcohol.

However, it is important to keep in mind that the core issue in this case was whether the Claimant was fit to return to work, while the Carrier's Medical Department stated he could not until he underwent the treatment offered by the EAP. The Board finds that this is a classic example to invoke Rule 11 and let a neutral doctor determine whether it was safe to allow the Claimant to return to service.

On the facts before us, the Board finds that the Organization's approach was reasonable and fair while the Carrier's approach was arbitrary and unreasonable. The Board finds that there was contractual remedy available to the parties but the Carrier arbitrarily rejected the proposed solution to the instant problem. The Board finds that the Carrier rejected a prescribed contractual remedy, thus subjecting the Claimant to unnecessary harm and stress.

AWARD

Claim sustained.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 1995.