

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31824
Docket No. MW-31299
96-3-92-3-869**

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier capriciously and improperly disqualified and withheld Mr. V. Nitz from his assigned CL-2 Operator position from April 25 through June 10, 1991 (System Docket MW2171).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. Nitz shall be compensated for all wage loss suffered."**

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 were given due notice of hearing thereon.

The Claimant had established and held seniority as a Class 2 Machine Operator at the time this dispute arose, and was assigned as such on the Youngstown Division. While on furlough, the Claimant underwent a return-to-duty physical on February 11, 1991 by Dr. Thomas, a Carrier fee for service physician. The Claimant told the doctor that he had a hearing problem. The doctor qualified him for return for duty, but noted that he had decreased pulmonary function and a hearing problem. On April 1, 1991 the Claimant returned to work. The Carrier's Medical Director, Dr. Hawryluk, reviewed the examination results and issued a disqualifying MD-40 Form on April 10, which resulted in the Claimant's removal from service on April 25, 1991. It is this removal from service which is challenged by the Organization.

On May 7, 1991 the Claimant was given a physical examination by Dr. Thomas, who found that the Claimant had decreased pulmonary function and a hearing problem. The results of this examination were that the Claimant was considered "not qualified" for service. The pulmonary function test results from the May 7, 1991 test indicated that the Claimant had a cold, but the Medical Department was advised that the Claimant's decreased pulmonary function exceeded that which could be caused by a cold.

On May 31, 1991 the Claimant saw a specialist, Dr. Packer, who found no problem with the Claimant's pulmonary test. On June 6, 1991 the Claimant was examined again by Dr. Thomas, who concluded that the Claimant was qualified for return to service. June 7-9, 1991 were rest days. The Claimant returned to his normal duties on June 10, 1991.

The Organization argues that the Carrier violated the Agreement, Rules 11, 16 and 22, by arbitrarily disqualifying the Claimant from his position during the period April 25, to June 10, 1991 because he allegedly suffered from a hearing deficiency. The Organization urges the Board to find that the Carrier failed to meet its burden of proof that the alleged restrictions would be sufficient to withhold the Claimant from service. The Organization asserts that the Claimant's physical condition was sufficiently sound for him to be assigned to his Class 2 Machine Operator position on April 25, 1991.

The Carrier defends its decision on the grounds that the Carrier was within its rights in medically disqualifying the Claimant; the medical tests and the Claimant's own responses to the doctor supported the Carrier's medical disqualification of the Claimant; and the Claimant failed to prove a violation of the Agreement.

The Organization cites Rule 11 (Overtime) and Rule 16 (Calls), but relies primarily upon Rule 22, which provides as follows:

"RULE 22 - EXAMINATIONS -- PHYSICAL AND OTHER

When examinations are required by the Company, arrangements shall be made to take them without loss of time except:

- (a) Examinations required of an employee returning from furlough, discipline, leave of absence or from absence caused by sickness or disability need not be given during the employee's tour of duty.
- (b) Employees required to take examinations, other than those covered by paragraph (a) of this Rule outside the hours of their regular tours of duty will be paid therefor under the provisions of Rules 11 or 16, whichever is applicable."

The Organization bears the burden of proving that a Rule violation occurred. In determining whether the Carrier properly determined that an employee is medically disqualified from resuming or assuming normal duties, the Board in First Division Award 19538 adopted the following analysis:

"The general question of propriety breaks down into (1) whether carrier has the right to set physical standards; (2) if so, whether said right was here exercised in an arbitrary, capricious, or unreasonable manner; and (3) if not, was the standard here applied in an arbitrary, capricious, or unreasonable or discriminatory fashion."

Third Division Awards generally have followed this or a similar analytical approach. For example, the Board stated in Third Division Award 15387:

"We will here follow the long line of Third Division Awards that through the years have held a Carrier has the right to determine the physical fitness of its employees; and in doing so has the right if not an obligation, to accept the recommendations of its Chief Medical Officer in such matters."

In Third Division Award 25417, the Board stated:

"As to the merits of the dispute, we adhere to the principle enunciated in our Awards Nos. 15357, 18512 and 22553 that the Carrier alone has the duty and the right to set and enforce medical standards for its employees, and the right to accept the recommendations of its CMO in such matters"

The Board adopted this approach in recognition of the importance of safety standards in railroad work. This principle was recognized in Special Board of Adjustment No. 1016, Award 27:

"Given the danger involved in railroad work, especially maintenance of way work, and the financial exposure of Carrier if there are accidents, it is clearly within Carrier's province to set medical standards to protect itself, as well as the employee."

The record reflects that the Carrier's Medical Director, Dr. Hawryluk, made an informed decision on April 10, 1991 to issue an MD-40 form disqualifying the Claimant from service based upon evidence in the medical record. The Carrier has the right to rely upon the medical judgment of its physician.

The Organization's position essentially contradicts the expert medical advice of Dr. Hawryluk. In order to successfully make such an assertion, the Organization has the burden to prove that the doctor's decision to disqualify was arbitrary, capricious or unreasonable. It failed to do so. When further medical examinations established medical evidence that the Claimant's condition allowed him to return to service, he was promptly allowed to return to his normal duties.

Because the Organization failed to show any violation of the specific language of Rules 11, 16 and 22, and failed to show that the Carrier's actions were arbitrary, capricious, unreasonable or discriminatory, the claim must be denied for lack of proof.

AWARD

Claim denied.

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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 26th day of December 1996.