Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32045
Docket No. SG-31853
97-3-94-3-158

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

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

STATEMENT OF CLAIM:

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

Claim on behalf of D. E. Beck for reinstatement to his position of Lead Signal Maintainer and compensation for all lost time and benefits, account Carrier violated the current Signalmen's Agreement, particularly Rules 11 and 43, when it removed the Claimant from service on November 30, 1992, on the basis of an alleged physical disability. Carrier's File No. 79-93-17. General Chairman's File No. S-AV-132. BRS File Case No. 9231-CNW."

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.

In July 1991 Claimant suffered an on-duty injury which was aggravated in a motor vehicle accident in July 1992. On October 21, 1992, Claimant's physician provided Claimant with a report on his condition. The doctor's cover letter stated:

> "Enclosed is a copy of my report following your visit of October 21, 1992. I have provided a second copy which you may forward to your employer. I believe the restrictions described are a reasonable starting point in attempting to modify your work to your medical condition. I do not know if these are feasible for your employer and have no control over the job task restructuring.
>
> The doctor's report stated, in part:
>
> ASSESSMENT: Cervical and lumbar spondylolysis.
>
> TREATMENT PLAN: Mr. Beck was referred primarily to provide job restrictions and/or accommodations to help manage his underlying condition. Efforts to restrict his bending to 30° to 45° should be beneficial to Mr. Beck. Excessive bending beyond this point tends to exacerbate his symptoms. This would essentially prevent him from bending to below knee level or lifting from below knee level. This would also include restricting from excessive digging in terms of the amount of time involved.
>
> Hopefully lifting could be restricted to 35 pounds with occasionally lifting 50 pounds. All efforts should be made to prevent this from a level below knee height as this then becomes part of the bending restrictions.
>
> The insertion and repair of the crossing gates as described by Mr. Beck is awkward and requires maneuvering with bending and twisting. Though the gates are relative low-weight, the length creates a much higher biochemical load to the muscles and spine due to the long lever arm distance, particularly when they must be held and manipulated into the holders. If at all feasible, it would be beneficial to have a second person available to assist with this job task.
>
> Lastly, the prolonged sitting while driving tends to exacerbate most individuals with back problems. This is most readily remedied by periodic

breaks in the driving where the driver exits the vehicle and walks about or changes position."

Claimant provided a copy of the report to Carrier. On November 18, 1992, Carrier's Medical Consultant wrote Claimant stating that he had reviewed the report and advising:

"Based on this information, it is my medical opinion that you can work with the following restrictions:

1. No bending forward at the waist over 45 degrees.

2. Lifting limited to 50 lbs. occasionally and 35 lbs. regularly.

3. Must have the assistance of a second person when holding and manipulating crossing gates when inserting them into the holders.

4. Must have a 5 minute period of standing or walking after each 1/2 hour of continuous sitting."

A copy of the Medical Consultant's letter was forwarded to the Signal Supervisor. Claimant began a vacation on November 23, 1992. When he returned to work on November 30, 1992, Claimant was advised by the Signal Supervisor that there were no positions available.

On December 3, 1992, Claimant's physician wrote to Carrier's Medical Consultant, in part:

"After my evaluation, I have proposed the guidelines, which you have received for Mr. Beck. These are intended to be only guidelines for accommodating him, so he may continue to perform in the company. At this time, he does not wish to be disabled, if at all possible. They are not intended to be temporary or permanent, as far as restriction. All of these recommendations deal with limiting forces upon the spine."

On December 16, 1992, Claimant's physician wrote to Carrier's Medical Consultant, in part:

> "Mr. Beck informs me he would like to return to his previous job. I do not feel he needs to be restricted from his previous job, based upon the job description of a signalman supplied in your FAX of 12/15/92. . . .
>
> Previous notes and letters were written as suggestions to prevent exacerbation of any symptoms of his spondylolysis. However, these should not be interpreted as restrictions that he cannot exceed, particularly on a periodic basis.
>
> . . . . .
>
> The intent of the evaluation of October 21st, November 30th, 1992 and the letter of December 3, 1992 was to provide suggestions which if possible may help Mr. Beck but would not restrict him from work. Restricting him from work, most likely would have more adverse effect upon his health than restricting him."

Claimant was qualified to return to service on January 14, 1993, and did return on January 19, 1993. Consequently, the Organization withdrew that portion of the claim seeking Claimant's reinstatement. The only part of the claim remaining before the Board seeks compensation for the time held out of service.

The Organization argues that Carrier acted arbitrarily in removing Claimant from service. The Organization contends that Carrier's Medical Consultant never examined Claimant and that Claimant's physician never intended to restrict Claimant's ability to perform his job. Consequently, in the Organization's view, there is no medical evidence to support Carrier's determination to remove Claimant from service.

The Organization further contends that Carrier violated Rule 11 by taking Claimant out of service without first consulting the General Chairman. The Organization maintains that there was no emergency present which would allow Carrier to act unilaterally.

Carrier contends that it has the inherent managerial right and obligation to remove employees from service when it has made a reasonable determination that allowing them to continue to perform their jobs would jeopardize their safety. Carrier contends that Claimant's physician's reports indicated that Claimant was restricted in bending, lifting and sitting and that there were no light duty assignments available which met those restrictions.

Carrier contends that it did not violate Rule 11 for three reasons. First, Carrier argues that Rule 11 did not apply, because it did not remove Claimant from service; rather it prevented Claimant from returning to service from vacation. Second, according to Carrier, Rule 11 did not apply because the restrictions which led to Claimant's removal from service were raised by Claimant's own physician. Third, Carrier contends that it was faced with an emergency because of Claimant's back problems and the restrictions that were incident thereto.

The Board has reviewed the record carefully. We do not agree with the Organization that Carrier's decision to remove Claimant from service was arbitrary or unreasonable. The report from Claimant's physician was ambiguous, at best. It did not expressly prohibit Claimant from working if the restrictions contained therein could not be accommodated. However, it did list specific restrictions on bending and lifting and stated that a second person should assist the Claimant in repairing crossing gates if at all feasible. With perfect hindsight, we can see how Claimant's physician intended the report to contain only suggestions or guidelines, rather than to restrict Claimant from performing his job. However, a reasonable person could easily interpret the report to restrict Claimant's job duties. Based on the information that Carrier had at the time, it made a reasonable good faith medical judgment to remove Claimant from service. See Third Division Award 30906.

However, we find that the manner in which Carrier implemented its judgment violated the Agreement. Rule 11 provides, in relevant part:

> "Except in an emergency, an employee will not be removed from service until it is agreed between the office 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."

In the instant case, Carrier never notified the General Chairman of its intent to remove Claimant from service. Carrier's contention that it did not remove Claimant from service, but only precluded him from returning from vacation is specious. Carrier's argument that Rule 11 did not apply because it acted on a report by Claimant's physician has been rejected by this Board previously. Third Division Award 26843.

Furthermore, we cannot agree with Carrier that it was presented with an emergency which excused it from complying with Rule 11. Our prior Awards interpreting Rule 11 suggest that an emergency exists when Carrier is faced with a traumatic injury or sudden disabling illness. Third Division Awards 28447 and 28448. Even if one were to read the term emergency more broadly, there clearly was no emergency in the instant case. Claimant was on vacation at the time that Carrier apparently determined that he was medically unfit for service. There is no justification for Carrier's failure to notify the General Chairman in accordance with Rule 11.

Our prior Awards make it clear that Rule 11 does not impose a great burden on Carrier. Once Carrier has notified the General Chairman, the General Chairman is obliged to respond. If he does not respond, Carrier may proceed to remove the employee from service. If he objects, then the matter is referred to a mutually-selected physician for a binding evaluation. See Third Division Awards 28447 and 28448.

The instant case illustrates why Rule 11 requires notice to the General Chairman. No examining physician ever determined that Claimant was unable to perform his duties without restrictions. Carrier's removal of Claimant from service resulted from its Medical Director's understandable, but inaccurate, interpretation of Claimant's physician's report. Had Carrier notified the General Chairman in compliance with Rule 11, it is quite possible that the report could have been clarified without Claimant losing any compensable time. Thus, although Carrier's decision to remove Claimant from service was not arbitrary, it was not undertaken in conformity with the Agreement and the claim must be sustained.

AWARD

Claim sustained in accordance with the Findings.

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 6th day of May 1997.