

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35739
Docket No. MW-35196
01-3-99-3-43**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 failed to allow Mr. M.A. Falcone to displace junior employee C. Spike at Rochester, New York on February 3, 1997 and continued to improperly withhold him from service for alleged medical examination and evaluation (System Docket MW-4920).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr.M.A. Falcone shall be compensated for all wage loss suffered, ‘ . . . including all overtime pay lost, rate differentials, benefits and credits, commencing on February 3, 1997 and continuing until he is allowed to return to work. ***”**

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 began his employment with the Carrier in July 1976. On October 17, 1991, he left his position as B & B Foreman and went on an extended medical leave to recover from a non-occupational coronary condition. After he went on leave, the Carrier did not receive any medical reports or have any knowledge of the Claimant's medical status until January 1997, when the Carrier's Medical Department received a note from the Claimant's physician which simply stated that the Claimant was released to return to work effective December 26, 1996. Because the Carrier had received no medical updates while the Claimant was off on extended leave, the Carrier's Medical Director sent a letter to the Claimant dated January 7, 1997, requesting that his physician complete and submit a medical questionnaire and a job analysis for the position of B & B Mechanic.

On January 20, 1997, the Claimant's physician returned the requested information and indicated that the Claimant could perform the duties listed on the B & B Mechanic job analysis. The Claimant thereafter underwent a return-to-duty physical examination in accordance with Carrier policy, and was cleared for duty on January 23, 1997.

Subsequent to his return-to-duty physical, the Claimant notified the Carrier that he planned to exercise his seniority into a B & B Foreman's position at Rochester, New York. The record reflects that, in addition to the general duties described in the job analysis which was sent to the Claimant's physician, there are duties which are specific to the Rochester B & B Foreman position. In that position, an employee is required, among other things, to climb a 45-degree embankment, to inspect the Genesee River Bridge, to use a 50-60 pound jackhammer, to break concrete apart, and to work alone in all weather conditions.

Prompted by concerns raised by Carrier Officials about the Claimant's ability to perform the physical duties required of the B & B Foreman position at Rochester, the Carrier's Medical Director on February 3, 1997 contacted the Claimant's physician concerning the issues raised by Carrier Officials with regard to the specific job duties required of the Claimant. On February 20, 1997, after reviewing the requirements of the Rochester B & B Foreman position, the Claimant's physician approved the Claimant to work this position.

The Claimant was medically cleared to return to service on February 21, 1997. He returned to service on March 3, 1997 and on March 26, 1997, the Claimant exercised his seniority into the Rochester B & B Foreman position.

The Organization asserts that there were unwarranted delays which prevented the Claimant from returning to work in a timely manner. The Organization points out that the Carrier had knowledge of the job requirements specific to all work locations that the Claimant could work. Moreover, the Carrier knew the Claimant had been on medical leave for a coronary condition and it also knew the specific medical tests which were needed to complete its medical evaluation. In the Organization's view, all medical tests could have and should have been performed at one time. With proper communication between the Medical Director and Carrier Officers, and between the Medical Director and the Claimant's physician, a minimal amount of planning and foresight would have prevented the 90-day delay in returning the Claimant to the position which his seniority entitled him to work. The Claimant should not be made to suffer the consequences of the Carrier's actions, and therefore, the Organization submits that the claim should be sustained as presented.

The Carrier argues that, based on the Claimant's five year medical leave, his coronary condition, and the additional physical requirements of the Rochester B & B Foreman position, it acted with reasonable diligence in evaluating the Claimant's ability to safely perform the functions of the position. The Carrier contends that it has the right to determine physical fitness for duty and the exercise of that right may be challenged only upon a finding that the Carrier acted in an arbitrary or capricious manner. No such finding is warranted under these facts, the Carrier submits, and therefore the claim must be denied.

As the numerous precedent Awards on this subject have stated, the Carrier has the right to assure itself of the physical condition of its employees, particularly after a prolonged leave of absence due to a medical condition as was the case here. A corollary to that right is the obligation to proceed in a diligent manner with the medical investigation so that an employee's right to return to work is not unduly delayed. See Third Division Awards 20419, 20674, 24856 and 32328.

Whether the Carrier was dilatory in completing its medical determination, depends upon the particular circumstances of each case. Here, although the Organization's claim alleges that the Claimant was improperly withheld from service

as of February 3, 1997, the Board finds no fault with the Carrier's determination to require additional medical review. It must be remembered that the Rochester B & B Foreman position which the Claimant sought to displace required additional and more strenuous physical duties than had previously been contemplated when the Claimant sought to return to his B & B Mechanic position. Stated a little differently, it does not necessarily follow that because the Claimant had been cleared to return to work as a B & B Mechanic, he should automatically have been cleared for the position of B & B Foreman, which had distinctly different job and physical requirements. The Carrier acted properly by insuring that the Claimant would be able to perform these additional job responsibilities without risking his health.

Nor are we persuaded that the length of time that elapsed between the Medical Director's request for additional information and the time that the Claimant was cleared for work amounts to an unreasonable or unwarranted delay which may be attributed to the Carrier's lack of diligence. It appears from the record that the Carrier's Medical Director on February 3, 1997 requested additional review by the Claimant's physician and a response was forthcoming on February 20, 1997. The Claimant was medically cleared to return to duty the next day. Under these facts, there is no basis for a finding that there was an excessive delay caused by the Carrier in returning the Claimant to work. See Third Division Award 33627.

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 24th day of October, 2001.