

Award No. 36037
Docket No. MW-36313
02-3-00-3-550

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly removed, disqualified and withheld Mr. J.C. Peterson from service beginning June 20, 1997 and continuing until November 23, 1998 (System Files T-D-1741-B/11-99-0232, T-D-1340-B/MWB 97-08-20AE, T-D-1385-B/MWB 97-10-22AN and T-D-1405-B/MWB 97-11-19AI BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant shall now be compensated for all loss of earnings in accordance with Rule 41E."**

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.

This case is a consolidation of four separate claims filed on behalf of the Claimant as a result of his being withheld from service from June 20, 1997 until November 23, 1998.

The history of this dispute began after the Claimant returned to work on June 10, 1997 after a long-term medical leave of absence. The "Report of Work Ability" the Claimant provided from his personal physician, Dr. S. Noran, stated that there were no restrictions placed upon his return to work. The Claimant was permitted to exercise his seniority and work as a Group 2 Machine Operator in Staples, Minnesota.

The Claimant worked without incident for nine days. On June 20, 1997, he was instructed by his Supervisor to go home until the Medical Department could review his case.

On July 14, 1997, the Organization filed the first claim on the Claimant's behalf, contending that the Carrier improperly disciplined the Claimant by withholding him from service without a fair Hearing. The claim was denied on July 24, 1997 on the basis that no discipline had been assessed. The declination further stated that the Claimant "was off duty due to an on-duty injury and was informed that he could not return to work until he was given a medical release."

A second claim was filed on August 12, 1997. This claim requested that a Medical Board be established pursuant to Rule 41 of the controlling Agreement. On August 19, 1997, the Carrier's Chief Medical Officer responded that the request had been forwarded to Labor Relations. Thereafter, in a series of letters to the Organization, the Carrier advised that the Claimant's medical release was unacceptable due to the length of time he was out on disability, the fact that one of his treating physicians had diagnosed his conditions as permanent, and the multiple symptoms he had previously asserted prevented him from working. The Claimant was directed to provide comprehensive medical reports from his treating physician which specified the reason for removing the past restrictions placed upon him. The Claimant was also required to provide a medical release authorizing the Carrier to communicate with his physician if deemed necessary.

The Claimant did not fully comply with the Carrier's requests. The Organization filed a third claim alleging once again that the Claimant should have been afforded an Investigation under the discipline Rule of the Agreement. Subsequently, the Carrier in January 1998 initially denied and then concurred in the request for a Medical Board "to bring this matter to a conclusion." In February 1998, the parties each appointed their respective physician representatives for the Medical Board. Not until March 13, 1998 did the Claimant provide a release authorizing the Carrier's physician to review his medical records.

Several more months elapsed, and Dr. G. Murrey was selected on May 8, 1998 as the third physician on the Medical Board. Dr. Murrey issued a report on July 8, 1998. The entire report was not made a part of the record in this case. However, the last page of Dr. Murrey's report was provided, and it states that "there is no cognitive or psychological reason for [Claimant] to stay off work at this point in time." (Emphasis added) On August 12, 1998, Dr. Murrey issued another report in response to the Carrier's question regarding the Claimant's fitness for duty as a Carpenter in light of the Claimant's prior medical assessments in 1994 which led to a finding that he was completely disabled. Dr. Murrey stated that although the earlier diagnoses were well founded, the Claimant no longer presented with symptoms suggestive of those diagnoses.

The Claimant was informed on September 22, 1998 to participate in a return-to-work physical and drug screen. He complied. Apparently, there was a technical problem with the mandatory drug screening and it had to be run again. On October 26, 1998, the Medical Department informed the Claimant that he was medically qualified to return to work. The Claimant received instructions from Human Resources dated Wednesday, November 18, 1998 regarding his assignment and he reported for service on Monday, November 23, 1998. The Organization filed the fourth claim in this matter on December 21, 1998 seeking compensation for the Claimant from August 12, 1997 to November 23, 1998.

It is the Organization's position that when the Carrier withheld the Claimant from service following approval for his return by competent medical authority, the Carrier did so at its own peril. At no time after June 1997 was the Carrier able to show that the Claimant was withheld from service because of any medical ailment. The Claimant should therefore be fully compensated for all time lost as a result of the Carrier's dilatory tactics in this case.

The Carrier maintains that it has the right to withhold an employee from service where there is a reasonable basis for concern regarding the employee's fitness for duty. In the instant matter, the Carrier argues, it was entitled under the circumstances to question the adequacy of the Claimant's release and to request further medical information as a condition of allowing the Claimant to return to work. The Claimant chose to stonewall the Carrier's efforts to determine his fitness by refusing to comply with appropriate requests for information. In the Carrier's view, the Claimant's actions – or inactions – dictate the conclusion that he bear the consequences for the delay in his return to work.

Based on the Board's review of the record as a whole, it is clear that each party blames the other for the 17 months that elapsed between the date the Claimant was

removed from service in June 1997 until he was returned to work in November 1998. We conclude that a fair reading of the evidence compels the finding that both parties bear some responsibility for the lengthy delay.

As a starting point, we note that prior Awards have established the principles governing the outcome in this case. First, the Carrier has the right to determine the physical fitness of its employees and to withhold employees from service until it has been established that they are physically qualified to work. An employee withheld from service on these grounds is not being disciplined, and therefore the disciplinary Rules requiring Investigation are not applicable. Third Division Awards 28506 and 33627.

Second, while the Carrier has broad latitude to withhold an employee from service based on legitimate questions as to the employee's fitness for duty, its managerial rights in that regard are not unfettered and may be overturned upon a showing that its determination was pre-textual, arbitrary or unreasonable. An abuse of discretion has been shown where the Carrier has engaged in unwarranted delay in ascertaining an employee's fitness. Third Division Awards 25186, 31317 and 32338.

Third, it is also firmly established that employees must comply with the Carrier's reasonable requests for information concerning their medical status. An employee cannot refuse such a request and then argue that a determination as to his fitness to return to work has been unduly delayed. Third Division Awards 33627 and 34229.

Applying these principles to the case at bar, it is clear that the two disciplinary claims filed by the Organization are without merit. The Carrier's actions cannot be cast as disciplinary in nature, and therefore the only question is whether the Carrier's determination to withhold the Claimant from service because of medical concerns was arbitrary or capricious. After review of all the evidence, the Board finds that the Carrier did not act unreasonably when it removed the Claimant from service after his brief return to work in June 1997. Although the Claimant presented a work release with no restrictions, the parties had previously settled an FELA case arising out of a claim by the Claimant that he was totally and permanently impaired as a result of an on-duty injury and would not be able to work. The Carrier's concerns for the Claimant's medical condition were justified, particularly given the paucity of information contained in the work release he presented.

The record does not disclose why the Claimant was returned to work in the first place in light of the Carrier's determination that the release was unacceptably incomplete. However, once the Claimant was removed from service, the Carrier acted with reasonable dispatch to notify the Claimant of the specific additional information it required in order

to determine his then current medical status. No abuse of discretion or improper motive has been proven on this record.

The Claimant did not submit the information and release requested by the Carrier until March 1998, many months after the Carrier's request. Thus, the delay in proceeding with the Medical Board while the Claimant was withheld from service appears to be the Claimant's responsibility. The claim protesting the Carrier's failure to establish a Medical Board must therefore be denied on that basis.

The Organization also contends that the testing performed by Dr. Murrey after the establishment of the Medical Board merely confirmed the earlier determination of the Claimant's personal physician that he was fit for duty with no restriction. That may be true, but it does not necessarily follow that the Claimant is entitled to a retroactive award under Rule 41. Section E of that Rule provides:

"E. If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Company doctors, the original medical findings which disclose his condition at the time disqualified shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section A of this rule." (Emphasis added)

Careful consideration of the record shows that there was no finding by Dr. Murrey that the Claimant's disqualification in June 1997 was improper. All that was provided to the Board was the final page of Dr. Murrey's report which states that there was currently no reason for the Claimant to be off work. The Board cannot award retroactive relief absent evidence that the prerequisites under Rule 41E have been met.

In light of the Claimant's inactions and our finding that we are precluded from applying Rule 41E in this instance, the Claimant is not entitled to compensation for lost earnings for the period June 1997 until August 1998 when Dr. Murrey issued his final report. However, there does not appear to be any reasonable explanation for the lengthy delay in reinstating the Claimant to service once Dr. Murrey's report was issued. Three

months elapsed before the Claimant was finally returned to service. There is no question that the Carrier has the right to require an exam and a drug/alcohol screening prior to returning an employee to work. In this case, though, even the retesting of the drug screen does not fully explain why it took so long for the Claimant to be assigned. See Third Division Award 32328 (five day period is presumptively reasonable for proper medical assessment in return to work cases.)

The Board concludes that the Carrier was dilatory in processing the Claimant's return to work and that the medical exam and paperwork processing could have been completed by September 12, 1998. Accordingly, the Claimant is awarded pay for time lost for the period September 13 to November 18, 1998.

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 21st day of May, 2002.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 36037, DOCKET MW-36313
(Referee Kenis)

The rather unique circumstances surrounding this particular dispute were adequately set forth within the body of this award and it would serve no purpose to regurgitate them here. In this case, the Board determined that the claim should be sustained, however, it did not award back pay to the Claimant from the date that a Medical Board pursuant to Rule 41 was requested. Since the award was sustained in part, the small concurrence required is only to the extent that the Claimant was finally reinstated and compensated from September 13 through November 18, 1998. However, the Organization is compelled to dissent to the Board's determination that the Claimant was not entitled to back pay from the date a Medical Board was requested.

The Majority's reasoning for limiting the back pay portion of the claim is due to the findings of Dr. Murray's assessment of the Claimants physical condition, i.e. "there is no cognitive or psychological reason for [Claimant] to stay off work at this point in time". (Emphasis added) The problem here is that the Carrier never raised this argument during the on-property handling of this dispute. Rather, the Carrier alleged in its submission that a Medical Board was not required because there allegedly was no dissenting medical opinion regarding the Claimant's physical condition. However, once the provisions of Rule 41 are invoked by the Organization and such is acted upon by the Carrier, the parties are bound by the clear and unambiguous language of the Rule. The determination of a remedy in this case should not have been torturous. The language of Rule 41E. clearly states:

"E. If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the company doctors, the original medical findings which disclose his condition at the time disqualified shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section A of this rule."

While it is true that Dr. Murray found no reason to withhold the Claimant from service "from this point in time", the full text of the paragraph wherein the above-cited quote was gleaned, states:

"Overall my impressions are consistent with the previous evaluation by Dr. Krupp in that there does not appear to be any evidence for an acute or chronic organic-based cognitive deficit. He appears to be functioning both cognitively and psychologically at his premorbid level and well within the normal to high normal limits. There is no cognitive or psychological reason for him to stay off work at this point in time. I would recommend that he be approved to return to work if physically approved to do so." (Emphasis added)

A review of the above, reveals that Dr. Murray concurred with the prior findings of Dr. Krupp that the Claimant was fit for duty. Hence, the Medical Board did find that the Claimant was improperly disqualified, inasmuch as Dr. Krupp made a finding prior to the examination by Dr. Murray.

Finally, the Board alleged that Dr. Murray made his findings in August 1998. Clearly, Dr. Murray rendered his findings on July 8, 1998, not August 1998. Given this fact, there is no reason to limit the Claimant's monetary relief. Under the circumstances, it is simply unconscionable that the Claimant should be made to suffer monetarily because of the Carrier's success in stonewalling the timely resolution of this claim. For the above reasons, I respectfully dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with a large initial "R" and "C".

Roy C. Robinson
Labor Member

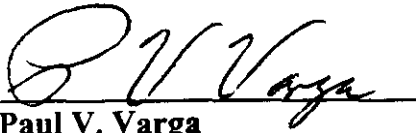
**Carrier Members' Response to
Labor Member's Concurrence and Dissent
to Award 36037 (Docket MW-36313)
Referee Kenis**

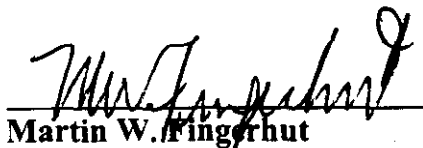
It is a poor compliment for the Dissenter to note that the "unique circumstances surrounding this particular dispute "were set forth in the body of Award 36037. Pages 2-3 of the Award is a concise synthesis of four (4) separate but intimately related claims filed by the Organization concerning Mr. Peterson, an individual who had a long history of medical problems.

Dissenter objects that Claimant was not accorded payment from the date the Medical Board was requested citing the provision of Rule 41E.

However, Dissenter ignores the fact that: 1) This Board was only provided the last page of Dr. Murray's report. Such does not substantiate the impropriety of Carrier's action based on Claimant's unknown condition in 1997. Further, this minuscule documentation does not support the Organization's assumption that the Carrier was in error. If Dr. Murray's report did conclude that there was no basis for the Carrier to withhold Mr. Peterson from service in 1997 it was its burden to provide it in the record submitted to this Board. 2) As is noted there was a long delay, caused by the Claimant, in providing any medical records upon which to review Claimant's medical status.

Stonewalling was the "modus operandi" of the Claimant and this Organization while asserting multiple claims on a variety of postures that did nothing but compound the complexity of what should have been a straight forward process. While it appears that there was some confusion in securing the necessary documentation for Mr. Peterson's return to duty, the matter of Claimant's physical ability could have been resolved in July-August 1997, but for Claimant's and this Organization's blunderbuss tactic of multiple actions dealing with the same situation


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik