

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36725
Docket No. MW-36590
03-3-01-3-91

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and withheld Mr. R. D. Sawyer from his assigned position of foreman on Gang No. 7245 beginning October 12, 1999 and continuing (Carrier's File 1220427 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. D. Sawyer shall now be compensated for ' . . . all hours lost at the appropriate rate from October 12, 1999 and continuing until such time as Claimant is reinstated and returned to his respective assigned position.'"**

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 established seniority in the Carrier's Track Sub-department on March 12, 1973. At the time of the instant claim, he was regularly assigned to the Foreman position on Section Gang No. 7245 on the Western Seniority District, Sacramento Division. According to the Claimant's supervisor, on June 21, 1999 the Claimant had difficulty walking two-mile distances while dumping ballast. The supervisor spent the next two days working with the Claimant and observed the Claimant having difficulty with the tasks of walking and climbing on the ballast cars. As a result, on June 24, 1999, the Carrier's Director Track Maintenance sent the Claimant a certified letter instructing him to undergo a Supervisor-Requested Examination at the Chico Industrial Medicine Center, on July 1, 1999. The letter informed the Claimant that he could continue working while his medical situation was being evaluated. The letter also instructed the Claimant to obtain a medical evaluation from his personal doctor and to have his doctor complete the enclosed Medical Progress Report, Form 16920, and forward it to the Carrier by July 15, 1999.

The Claimant was examined on July 1, 1999, as instructed. In the "Employee History" section of the "Union Pacific Railroad Internal Medical History" form completed by the Claimant during the examination, the Claimant indicated he had a health condition that affected his ability to safely perform his job. The Claimant also wrote in the "Employee Comments" section, "1997 injury to my hip." The examining physician's notes in the "Physician's Comments On History" section indicate that the Claimant's left hip was bruised and he, "has pain & cramping with prolonged walking. . . ." On the "Examining Physician's Recommendation" section of the form, the examining physician indicated that, "I defer the work fitness decision to the Union Pacific Medical Director's office in Omaha."

The Claimant did not return a completed Form 16920 to the Carrier by the deadline date of July 15, 1999. As a result, by certified letter dated

August 25, 1999, the Carrier informed the Claimant that, in order for the Carrier to determine whether the Claimant could continue to safely perform his job duties, it was necessary that the Claimant obtain updated medical documentation from his personal doctor and submit it to the Carrier no later than September 15, 1999. Because the Claimant did not submit the requested information, the Carrier sent a second certified letter dated September 24, 1999 to the Claimant stating, "because you have failed to provide the information, I am making a second request." The Claimant's deadline for submitting the requested information was October 15, 1999.

As of October 11, the Claimant had not responded to the Carrier's September 24, 1999 instructions. The Carrier's Medical Director determined that the Claimant was not medically cleared to work and that the Claimant's medical status would be reevaluated if medical information were to become available. On October 12, the Claimant was removed from service, and a letter dated October 13, 1999, was sent to him confirming his removal from service pending the Carrier's receipt of additional medical information. The letter also stated that in accordance with the Claimant's request, a blank Form 16920 had been faxed to the Claimant's doctor on that same day.

On October 20, 1999, the Carrier sent the Claimant's doctor, E. Clark, MD, a letter informing him that the Claimant had a medical condition that caused pain and cramping with prolonged walking and, as the Claimant's personal doctor, he should "address the issue of Mr. Sawyer's medical condition that may be bothering him at work." On December 6, 1999, the Carrier received signed medical documentation from Dr. Clark which read, "Chronic left hip LS pain, resolved," and recommended that the Claimant was "Clear(ed) to work without restrictions." By a memorandum dated December 9, 1999, the Carrier's Medical Director informed the Claimant's supervisors that the Claimant was "medically cleared to work with no restrictions." The Claimant returned to work as a Track Foreman on December 15, 1999.

The Organization argues that the Carrier's decision to withhold the Claimant from service was in violation of Rules 32, 43 and 45 because there was no evidence that the Claimant suffered from any "physical condition,

disease, or physical ailment," and that "de facto" discipline was imposed upon the Claimant when he was withheld from service without the benefit of due process. The Organization asserts that between July 2, and October 12, the Claimant satisfactorily performed the duties of his assignment and nothing warranted his removal from service on October 12, 1999.

The Organization charges that the Carrier failed to submit proof of any substantive change in the Claimant's medical condition at any time before, during, or after the claim period. Finally, the Organization maintains that during the claim period, the Claimant and his physician repeatedly tried to submit the requested medical information to the Carrier. The Organization asserts that the Carrier responded by requesting more medical information and that the Claimant could not obtain clarification regarding the additional information requests because the Carrier's Medical Department was "understaffed."

In its defense, the Carrier argues that management possesses a right to determine whether an employee is physically able to work and unless such a determination is found to be unreasonable or arbitrary, it cannot be seriously challenged. As a result, the Carrier asserts that the only question confronting the Board is whether the Carrier's action in the instant case was arbitrary or unreasonable. The Carrier points out that after the Claimant's supervisor noticed the Claimant having difficulty walking and having observed that the Claimant was in pain, the Claimant was instructed to undergo a physical examination during which the physician noticed a large bruise on the Claimant's left hip. The Claimant was also instructed to have his own doctor examine him and to provide the Carrier's Medical Department with a report. The Claimant ignored the Carrier's request. Indeed, on August 25, and September 24, 1999, the same written instructions were issued to the Claimant and no information was furnished.

The Carrier maintains that its decision to remove the Claimant from service on October 12, 1999 was justified because neither the Claimant nor his doctor provided the information it needed in order to make a determination regarding the Claimant's physical fitness for duty. The Claimant was promptly restored to service when the Carrier received

sufficient information from the Claimant's doctor. Any delay regarding the Claimant's return to service was attributable to the Claimant, who either ignored or half-heartedly complied with the Carrier's request for medical information.

The Board thoroughly reviewed the parties' Submissions, supporting documentation, cited case precedent and the oral arguments made at the Hearing. The Board finds that at the crux of this case is the question of whether the Carrier possessed a rational basis for withholding the Claimant from service while it attempted to determine the Claimant's physical fitness for duty; the Board answers that question affirmatively.

Previous Boards have repeatedly held that Carrier determinations of an employee's physical ability to perform work will be supported unless evidence is found that the Carrier's determination was unreasonable, arbitrary, capricious, discriminatory, or made in bad faith. As the moving party here the Organization has the burden of proving that the Carrier's decision to withhold the Claimant from service pending the receipt of medical information was unreasonable, arbitrary, capricious or discriminatory. See Third Division Awards 14173, 14249, 16579 and 28299, on-property Awards 8 and 9 of Public Law Board No. 6302, and on-property Awards 31682, 31824, 32197, 33971, 35626, 36034, and 36056.

The Board holds that the Organization failed to prove that the Carrier's decision to withhold the Claimant from service was unfounded. Here, the record indicates that, beginning on June 24, 1999, the Carrier specifically requested that the Claimant take the appropriate medical form to his doctor, obtain a medical examination, and have the form completed and returned to the Carrier. When information from the Claimant's doctor was not forthcoming, the Carrier sent the Claimant two more letters reiterating the information requests. Before December 6, 1999, the Carrier deemed any information received from the Claimant's doctor as incomplete. Once the Claimant's doctor furnished complete information to the Carrier, immediate steps were undertaken to return the Claimant to service without any medical restrictions.

It is the Board's conclusion that, given the circumstances of this case, the Carrier had a duty to request and carefully evaluate the medical information furnished by the Claimant's doctor. When that information was not forthcoming, then in order to ensure the Claimant's safety and that of his co-workers the Carrier properly exercised its right to remove the Claimant from service. Regarding matters of employee medical conditions and qualifications, this Board will not substitute its judgment for that of competent medical professionals. Again, the burden falls upon the Organization to prove that the Carrier's Medical Director acted inappropriately with respect to the Claimant's situation. As stated above, the Board finds no evidence to support the Organization's position. Finally, the Organization provided no specific documentation to prove its allegation that a shortage of staff within the Carrier's Medical Department caused the Claimant's case to be mishandled or its disposition otherwise delayed, and the Board finds nothing in the record to support that allegation.

According to the record, it was not until December 6, 1999 that the Carrier received a signed report from the Claimant's doctor stating that the pain in the Claimant's left hip had been resolved and that the Claimant should be permitted to return to work without restrictions. The Board finds no Carrier violation of the Organization's cited Rules. With respect to Rule 32, a request for a panel of doctors was unjustified. First, none appears to have been requested by either the Claimant or the Organization and, second, such panel would have been unnecessary because there was no disagreement between the Carrier's doctor and the Claimant's doctor. Likewise, Rule 43 does not apply. While the bruise to the Claimant's hip might have been related to the 1997 injury, there is no evidence that in June 1999 the hip pain experienced by the Claimant was triggered by a new on-duty injury. Finally, the Board disagrees that the Claimant's removal from service pending the receipt of information from the Claimant's own physician was tantamount to discipline without due process, in alleged violation of Rule 45. Rather, the Claimant's removal from service was predicated on the Carrier's proper application of the Carrier's Medical Rules, specifically Section 2.5(b).

In sum, the Organization failed to establish that the Carrier's decision to withhold the Claimant from service until it received complete and verifiable medical

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information from the Claimant's personal physician was in violation of the Agreement, or that the Claimant's return to service was otherwise unduly delayed. Accordingly, the claim must be denied.

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 17th day of September 2003.