Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40248
Docket No. MW-38394
10-3-NRAB-00003-040300
(04-3-300)

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly withheld Mr. S. Geertz from service beginning February 27, 2003 through April 17, 2003 and then failed and refused to compensate him for his loss of earnings in said period (System File C-0350-102/1366614).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Geertz shall now '. . . be compensated for all hours that he was denied the opportunity to work while he was removed from service pending medical evaluation. Specifically, Claimant must be compensated for all straight time and overtime hours he would have worked from February 27, 2003, through April 17, 2003, if he had not been removed from service.'"

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 is a Rules case. The Organization disputes the Carrier's decision to withhold the Claimant from service from February 25 through April 17, 2003 citing Rule 50(e) of the Agreement. Moreover, it complains that once it was clear that the Claimant was not disqualified and was able to return to work, the Claimant should have been compensated for all straight time and overtime that he was not allowed to work while the Carrier had him removed from active service. The Carrier asserts that the Claimant was not able to perform the essential functions of the job and was rightfully pulled from active service until it could be ascertained that he could perform the job without injury. The Carrier further asserts that the Claimant's being withheld from service was the result of the Claimant's own statements and, therefore, Rule 50(e) of the Agreement was not violated. The Carrier argues in the alternative that the Agreement was not violated and that the Claimant failed to assert a valid claim.

At the time of this claim, the Claimant had been with the Carrier for approximately three years. He was returning from a medical leave recovering from knee surgery. It was uncontroverted that during the Claimant's medical leave, the Carrier was continually updated on the Claimant's progress. Dr. B. Conroy oversaw the Claimant's recovery, and on December 27, 2002 he released the Claimant to return to work and "regular duty" without any restrictions. The Claimant did not possess sufficient seniority to allow him to displace onto a position on his seniority district at the time that he returned to work. He remained out of work for this reason until February 2003 when he bid and was assigned to an Assistant Foreman position on Gang 5307 at Gering, Nebraska.

On February 25, 2003 the Claimant reported for duty under the supervision of the Manager of Track Maintenance ("Manager"). When the Claimant was asked why he elected to work in the Gering, Nebraska, area instead of closer to the Omaha, Nebraska, area, he explained and revealed that he was returning from a medical leave of absence following knee surgery. When the Manager asked the Claimant if he felt 100 percent, the Claimant replied, ". . . probably not 100% but real close. I've had no problems. I just need to get back to work. . ," or words to that effect. The Carrier has not refuted this statement. Neither the Manager nor the Carrier had any medical information or

documentation from a physician to suggest that the Claimant should not return to work. The Claimant also did not have the opportunity to demonstrate in any way his ability or inability to perform the functions of the job. The Manager, nevertheless, felt that he had no choice but to remove the Claimant from active service pending a medical evaluation. At the time of the Manager's decision, no medical documentation or information from the Claimant's physician was available to him regarding the Claimant's condition. His decision was based solely on the Claimant's acknowledgment that he wasn't "100 percent" and that his knee still hurt.

The Claimant was subsequently placed on a 30-day medical leave of absence and advised to confer with his physician regarding his knee pain. The Claimant complied with Carrier's instructions and received two more releases from his doctor dated February 28, and April 1, 2003, three and 35 days after his initial return to work. Each time, the Claimant's physician released him to return to work without any restrictions. It also noted that the Claimant's "fitness for duty" evaluation was not conducted until March 26, 2003, approximately 30 days after he was pulled from service. There was no explanation given for such delay. At no time during this timeframe was there any medical documentation suggesting that it was unsafe or unhealthy for the Claimant to return to work, or that conflicted with the information made available to the Carrier. Further, a visit to the Carrier's Health Services Department on or about April 14, 2003 further substantiated that the Claimant should be cleared to return to work.

On the property, the Claimant references violations of numerous provisions of the Agreement. However, only a violation of Rule 50(e) was raised in the Organization's Submission before the Board.

We find that the Carrier capriciously and arbitrarily medically disqualified the Claimant from service pending a medical evaluation without "good and sufficient cause" and without the benefit or incident of reasonable suspicion. We find that the Carrier's reliance on the Claimant's words as evidence that the Claimant was unable to perform the functions of the job or would be working unsafely as an excuse to explain a less than prudent supervisory decision. We also find the Carrier's reliance on Section 2.5(b) of the Carrier's Medical Policy and on Paragraph 28 of the Guide for Use of Chief Medical Officers in the Application of Medical Standard by Occupational Profile as Recommended by the Committee on Medical Standards and Approved by Committee of Direction Medical Section to be to misguided in this case. There was never any medical information or complaint by the Claimant to cause the Manager to reasonably conclude

that the Claimant was in or would create an unsafe medical condition for himself or others, much less a concern that the Claimant had any medical condition that might predispose him to sudden or unpredictable incapacitation or death, mental confusion or the use of poor judgment as Paragraph 28 states.

We do not dispute the Carrier's province to set medical standards to protect itself, as well as the employee and others. However, in this case, the Manager's "concern" was insufficient in and of itself to justify the Claimant's removal from service. The Claimant's comment that he was not 100 percent does not equate to an unsafe condition or suggest impending injury. In fact, the Carrier would be hard-pressed to find any authority to suggest that an employee performing at less than 100 percent necessarily does not perform the essential functions of the job. By its own language, the "essential" functions of the job are highlighted, not each and every function. Therefore, it is reasonably contemplated that an employee may not be "100 percent," but still be able to perform the essential functions of the job. The Carrier simply failed to meet its burden to show that the Claimant ever failed to perform the essential job functions of his position, or that there was sufficient basis to believe that the Claimant could not perform his job. Every case cited by the Carrier is distinguishable, because they are examples of cases where some type of medical issue was raised (e.g., loss of consciousness, seizures or conflicting medical reports) there was a clear question concerning performance, or an incident served as the basis for the Carrier's determination that it was prudent for the employee to be pulled from service pending a medical evaluation.

The Carrier failed to demonstrate how its medical policies were appropriately applied to the Claimant in this case. The Carrier states in its Submission that "[n]either the Carrier Manager nor the Organization Representative are medical practitioners and thus neither party is qualified to assess medical conditions or to set medical standards." We agree. Section 1 Definitions and Responsibilities of Health Services Department ("HSD") Medical Rules define the Supervisor's responsibilities regarding employee medical issues. Among other things, it states ". . . the supervisor monitors the employee's work behaviors and alerts the HSD if unsafe behaviors appear to be associated with physical and/or mental impairment." (Emphasis added) Therefore, the Manager should have accepted the Claimant's assertion that he could perform his job functions, accepted the Claimant's physician's assessment absent any reasonable basis to question it, or suspected the Claimant could not perform his job based upon objective criteria to rebut the Claimant and his physician.

Nevertheless, the Organization's reliance on Rule 50(e) is misplaced because Rule 50 pertains to compensation when there is a three doctor panel empaneled. Therefore, despite the overwhelming evidence that the Claimant was improperly removed from service from February 25 to April 14, 2003, the Organization failed to meet its burden to demonstrate how the improper removal from service is a violation of the parties' Agreement. For this reason alone, 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 15th day of January 2010.

Carrier Members'
Concurring & Dissenting Opinion
to
Third Division Award 40248; Docket MW-38394
Referee Danielle Hargrove

We concur with the Referee's conclusion that the claim lacked merit and warranted a denial Award. The Award correctly concludes that no evidence was presented to establish a violation of the parties' Agreement. Rule 50, upon which the Organization relied to substantiate its claim, pertains to an employee's loss of wages in instances in which a three-doctor panel is requested. Because no such panel was requested here, there was no basis for finding a violation of that Rule.

That should have ended the Board's inquiry. Unfortunately, the decision goes on for several pages addressing matters that had no bearing on the question at issue. Obviously such discussion is purely dicta and, as such, cannot be relied upon as authority in future cases. While it is, therefore, not necessary to dissect the analysis of those matters, we note that the record contains ample evidence that the Carrier's decision to temporarily withhold the Claimant from service so as to afford medical experts an opportunity to reevaluate his fitness for duty, was neither arbitrary nor capricious. Although the Claimant described his meeting with the Manager of Track Maintenance in different terms than was reported by the Carrier, even the Claimant admitted that he told his supervisor that his surgically repaired knee was not 100%. Previous Awards of the Board have recognized that an employee's statements which are inconsistent with an unrestricted medical release may form the proper basis for withholding the employee from service. See Third Division Award 36056 involving the parties to this dispute, as well as the Awards cited therein. In the instant case, while the term "not 100%" may not be medically precise, it too was enough reason for the Manager of Track Maintenance to be genuinely concerned that the Claimant might not be physically capable of safely performing the rigorous tasks associated with maintenance-of-way work. Thus, the Board's statement that the Claimant was improperly withheld from service is not only gratuitous and not relevant to the question before the Board, but it is also without factual basis as well.

In the final analysis, we concur in the Board's conclusion that the claim should be denied because no Agreement violation was established, but we

respectfully dissent from the Board's dicta regarding whether the Carrier had sufficient reason to temporarily withhold the Claimant from service.

Michael D. Phillips
Carrier Member

Michael C. Losnik
Carrier Member

January 15, 2010

LABOR MEMBER'S DISSENT
TO
AWARD 40248, DOCKET MW-38394
(Referee Hargrove)

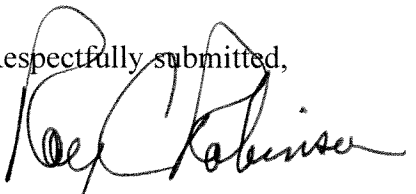
This DISSENT is directed towards the Majority's erroneous finding that the case should be denied because the Organization's citation of Rule 50 was without merit. The Organization is befuddled to understand the Majority's reasoning in the case. While one reads the findings of the Majority one gets the impression from the outset that the Board agreed with the Organization's position that the Claimant was improperly removed from service. It is not until one turns the page does the shock set in that the Majority denied the case based on the theory that a medical board was never convened. Never mind that it found that the Claimant was improperly removed from service and was out of work from February 25 through April 14, 2003, yet denies the monetary relief to the Claimant. The Board held:

> "We find that the Carrier capriciously and arbitrarily medically disqualified the Claimant from service pending a medical evaluation without 'good and sufficient cause' and without the benefit or incident of reasonable suspicion. We find that the Carrier's reliance on the Claimant's words as evidence that the Claimant was unable to perform the functions of the job or would be working unsafely as an excuse to explain a less than prudent supervisory decision. We also find the Carrier's reliance on Section 2.5(b) of the Carrier's Medical Policy and on Paragraph 28 of the Guide for Use of Chief Medical Officers in the Application of Medical Standard by Occupational Profile as Recommended by the Committee on Medical Standards and Approved by Committee of Direction Medical Section to be misguided in this case. There was never any medical information or complaint by the Claimant to cause the Manager to reasonably conclude that the Claimant was in or would create an unsafe medical condition for himself or others, much less a concern that the Claimant had any medical condition that might predispose him to sudden or unpredictable incapacitation or death, mental confusion or the use of poor judgement as Paragraph 28 states." (Underscoring in original)

Stuck between the proverbial rock and a hard place, the Organization cited Rule 50 because that is the only rule in the Agreement that addresses medical issues. What the Carrier has done here is to effectively remove one of the pillars wherein a Medical Board can be convened. That is, by intentionally failing to have the Claimant examined by a reputable Carrier physician to determine his fitness, it relied on the observation of a track supervisor. Hence, there was no competing medical opinion from the Carrier, to measure the Claimant's fitness for duty. We submit the this was done purposely by the Carrier. As a result the Claimant was out of work and not drawing any compensation for the work that he had been medically cleared for by his treating physician.

To find that the Carrier's actions were improper when it removed the Claimant from service for the period of February 25 through April 14, 2003, but deny any monetary compensation is a travesty of justice that this Board should never repeat. It is crystal clear that the Majority has shirked its responsibilities to sustain the remedy requested for the Claimant. Because of this failure the Organization must record our Dissent to this award.

Respectfully submitted,



Roy C. Robinson
Labor Member