

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40342
Docket No. MW-40676
10-3-NRAB-00003-080523**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CP Rail System (former Delaware and Hudson
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to reimburse Mr. J. Hurlburt, Jr. for medical expenses incurred under the direction of Carrier (Carrier’s File 8-00542 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Hurlburt, Jr. shall now be reimbursed for a total of eight hundred thirty-two dollars and thirty-seven cents (\$832.37) for the aforesaid medical expenses.”**

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 claim seeks reimbursement for medical expenses incurred by the Claimant under the provisions of Rule 27, Determination of Physical Fitness, which provides, in relevant part:

“27.1 When there is a justifiable cause, or in cases where an employee has been continuously absent for a period of thirty (30) calendar days or more, it is understood that such employee will when requested provide a medical report of his fitness for active duty, at his expense. In those instances where the Carrier does not concur with the determination of the employee’s physician and directs the employee to a second medical examination, such examination will be at the Carrier’s expense.”

The Claimant is a Work Equipment Foreman whose job requires possession of a CDL. His medical certification exam appointment was made by the Carrier with United Occupational Medicine for January 13, 2006, and its report indicates that the Claimant has sugar in his urine, and that he should be evaluated for hypertension and Type 2 Diabetes. By letter dated January 17, 2006 the Claimant was advised that he was approved by the CMO for a one year medical card due to sugar in his urine, and that she “is requesting that you see your physician regarding the sugar in your urine and provide Health Services an update that should include current blood sugar and HgbA1C results” before April 17. When nothing was received, a second notice dated April 21 was sent reminding the Claimant to provide this information. The Claimant attended office visits with his personal physician on April 27 and May 16 and took a series of medical tests, the results of which were received by the Carrier. On May 27 the Carrier requested that Health Services be provided with the results of his stress test and his HgbA1C result. The Claimant was sent two additional letters in June seeking the results of these tests updating his medical condition; the final letter stated that his failure to comply within the designated time could result in disciplinary action. By letter dated July 12, 2005 the Carrier confirmed receipt of the medical update and advised the Claimant that its

CMO was approving his continuation in service; he was also requested to provide another medical update on his condition one year later. The Claimant submitted his medical bills covering his office visits and medical tests to his Manager for reimbursement, and was informed that he would not be reimbursed for them. The instant claim seeks such reimbursement.

The Organization argues that the first sentence of Rule 27.1 does not apply to the Claimant, but that the second sentence does, and that the Claimant was clearly directed by the Carrier to a second and subsequent physical exam for further information after he passed his first exam and was issued a one year medical certification. It asserts that the only possible reason for this was that the Carrier disagreed with the first examination. The Organization points out that not only was the Claimant directed to have this additional examination and the resultant tests, but also that he was informed that his failure to do so could result in disciplinary action. The Organization maintains that the language of Rule 27.1 is clear, does not distinguish between regulatory and non-regulatory requirements, and must be applied by the Board as written, supporting the Claimant's request for reimbursement, citing Third Division Awards 1248, 18423, 20276, and 20956.

The Carrier contends that it never disputed the medical findings from the certification exam, so the second sentence of Rule 27.1 does not apply. It asserts that it requested additional medical information concerning the Claimant's condition identified in such examination, as it does in similar situations where employees have conditions that lead the Carrier to request documentation of their fitness for duty, which the Carrier notes is to be furnished at the employee's expense under the first sentence of Rule 27.1. The Carrier explains that the initial medical appointment for the Claimant's physical was a regulatory requirement for the maintenance of his CDL, and was not a fitness-for-duty examination resulting in a determination that it disagreed with, which is what the parties intended in order for the second sentence of Rule 27.1 to apply. The Carrier also notes that the claim is excessive because the types of expenses submitted include tests unrelated to the Claimant's medical condition about which he was requested to provide information.

A careful review of the record convinces the Board that this dispute is governed by Rule 27, which must be read as a whole. In doing so it is clear that in Rule 27.1 the parties intended to provide a mechanism for obtaining a second

medical opinion when the Carrier disagrees with a fitness determination of the employee's own doctor, and assesses the cost of the fitness-for-duty exam by his own doctor to the employee, and for the second medical opinion to the Carrier. Rule 27.2 outlines the procedure to be followed when an employee is removed from his position due to his physical condition, which does not apply here. The first sentence of Rule 27.1 gives two examples of when an employee may be requested to provide a medical report of his fitness for duty at his own expense, one of which is "when there is justifiable cause." The second sentence provides that, "where the Carrier does not concur with the determination of the employee's physician and directs the employee to a second medical examination," it will be at the Carrier's expense. The language clearly states that there are two prerequisites for the Carrier's obligation to pay - its disagreement with the employee's physician's assessment of his fitness and its direction for a second opinion, and two situations in which an employee may be requested to provide evidence of his fitness for duty at his own expense - justifiable cause and extended absence.

The question presented in this case is whether what the Claimant was being asked to do was to provide evidence of his fitness from his own doctor based upon "justifiable cause" resulting from the findings in his certification exam, or being directed to a second medical examination as a result of the Carrier's lack of concurrence with the Claimant's physician. The Organization argues that the fact that the Carrier clearly directed the Claimant to submit additional medical documentation from his own doctor on his condition after he was issued a medical certification for one year can only mean that it did not concur with the opinion of the first doctor. We are unable to agree with the Organization's reasoning in this case. The initial certification exam was not conducted by the Claimant's physician. Further, there is no evidence that the Carrier disagreed with the findings of either the Claimant's doctor or of the first medical report. In fact, it relied upon the results of the certification exam to find "justifiable cause" to request that the Claimant provide additional medical documentation on his condition from his own doctor. The conclusion that what was occurring was a request to provide evidence of fitness for duty under the first sentence of Rule 27.1 is also supported by the fact that when such information was ultimately furnished, a determination was made by the CMO that the Claimant could "continue in service," and he was so informed. Under the specific facts of this case, the costs incurred by the Claimant for which he

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seeks reimbursement are not the Carrier's to bear. Accordingly, the Organization failed to sustain its burden of establishing a violation of Rule 27.1 in this case.

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 1st day of March 2010.