

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40851
Docket No. SG-41052
11-3-NRAB-00003-080612**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of E. M. Anderson, for all lost time including overtime, account Carrier violated the current Signalmen’s Agreement, particularly Rules 65 and 80, when it failed to return the Claimant to service after being given a full release by his physician on June 18, 2007 and was then held out of service until July 30, 2007 without providing any reason to justify holding the Claimant out of service. Carrier’s File No. 1479961. General Chairman’s File No. UPGCW-65-1443. BRS File Case No. 14066-UP.”

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 dispute raises the issue of whether there was an unreasonable delay in returning the Claimant to work following his release from a medical leave of absence (MLOA). The following provisions of the Agreement are relied upon by the Organization:

“RULE 65 - PHYSICAL EXAMINATIONS

* * *

B. Requesting Re-Examination

5. 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 Carrier doctor(s), the original medical findings which disclose his condition at the time disqualified will be furnished to the neutral doctor for his consideration and he will specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor will 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 loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification.

* * *

C. Subsequent Re-Examination

If the employee accepts such physical disqualification and it later appears that his physical condition has improved and he furnishes evidence acceptable to the Carrier of such improvement, he will be permitted to return to service as promptly as possible. In the event the evidence is not acceptable,

an examination may be arranged by the Carrier to determine his physical qualifications. . . .”

The record reveals that the Claimant had a personal injury to his right knee as well as a condition resulting in muscle weakness which also affected his vision, resulting in his approval for a MLOA beginning February 27, 2007. The Carrier determined that the June 1, 2007, generic doctor’s note furnished by the Claimant, returning him to work without restriction, was insufficient and continued him on MLOA until its Medical Department could make a full assessment of his condition based on additional medical documentation requested. A June 18, 2007, medical release was also deemed insufficient by the Carrier because it did not address his neurological condition. The record contains many medical records including June 4 and 22, 2007, cover faxes from the Claimant’s neurologist furnishing records to the Medical Department. On June 22, 2007, the Organization requested evaluation by a third party doctor pursuant to Rule 65 B(5) and C, noting that the Claimant was not required to turn over all requested documents which were protected by HIPAA laws. An appointment for a third party evaluation was held on July 5, 2007, which was cut short when the Claimant left after the doctor refused to sign the waiver and release form the Claimant brought with him restricting the flow of information between the doctor and the Carrier and requesting copies of information on the nature and identity of all such contacts. The record indicates that the doctor reviewed the medical evidence and job description furnished by the Carrier prior to the appointment and obtained a medical history from the Claimant, but no physical examination was conducted.

The Carrier sent the Claimant a letter listing the specific medical information needed from his neurologist after the appointment on July 5, 2007, in order to be able to assess his current status, symptoms and functioning. The Organization and the Carrier had agreed to a procedure for a doctor to doctor conversation and the Claimant had furnished the appropriate release, but there is a dispute of fact concerning whether this actually occurred, with the Carrier asserting it did and the Claimant’s neurologist denying any such contact. A letter from the Claimant’s neurologist dated July 12, 2007, indicates the Claimant’s diagnosis and that he was symptom free at that time. The Carrier determined that it needed a Field Safety Evaluation (FSE) in order to assess the Claimant’s ability to safely perform his job functions as a Signal Maintainer due to his neurological condition. This occurred

on July 26 and the Claimant was given medical clearance to return to work as of July 30, 2007, conditioned upon his providing medical documents concerning the status of his neurological condition every three months. The claim seeks compensation for the Carrier's failure to return the Claimant to work on June 18, 2007.

The Organization argues that the Claimant complied with the Carrier's repeated requests for additional documentation, and that the Carrier had all relevant information concerning both the Claimant's knee and neurological conditions by June 22, 2007, to make its medical assessment and failed to show any basis for withholding him from service between that time and when he was conditionally returned on July 30, 2007. It also alleges that the Carrier did not comply with the agreement to hold a doctor to doctor conversation for the purpose of clarifying the medical information in June, unreasonably delaying the Claimant's return to work. Absent any evidence of a medical basis upon which to withhold the Claimant after he had been released to return to work by his doctors, the Organization contends that the Carrier unreasonably delayed the Claimant's return to work, citing Third Division Awards 28798 and 28506.

The Carrier contends that it has the right to set medical standards and the obligation to ensure that an employee can perform his job safely before returning him to work, relying on Third Division Awards 22050, 28299 and 36725, as well as Public Law Board No. 4178, Award 1. It asserts that the Organization failed to sustain its burden of showing that its determination to request additional medical information and a FSE when faced with a generic return-to-work note concerning an employee with multiple conditions in a safety sensitive and physically demanding position was unreasonable or arbitrary, citing Third Division Awards 29818, 34005, 37551 and 39007, as well as Public Law Board No. 4716, Award 89; Public Law Board No. 6302, Award 8. The Carrier argues that Rule 65 does not apply because it never disqualified the Claimant, noting that he was injured and placed on a MLOA. It submits that it did not unnecessarily delay the process of returning the Claimant to work, that the length of time was of the Claimant's own volition, and that it acted expeditiously to assure the Claimant's fitness and return him upon such a showing, citing Third Division Award 31682.

A careful review of the record convinces the Board that the Organization failed to meet its burden of establishing a violation of Rule 65 of the Agreement in this case. The record includes much medical evidence and claims as to its sufficiency, as well as challenges to the speed of the process for determining the Claimant's fitness to return to work. The Organization's position that there was undue delay in returning the Claimant to work is primarily based upon its contention that the Carrier had all medical information it needed by June 18 or 22, 2007, to adequately assess the Claimant's ability to work safely. However, it is undisputed that the Organization requested a third party doctor assessment in accordance with the procedure of Rule 65 B(5) and C on June 22, that the Carrier agreed to such procedure, and that an appointment was scheduled for July 5, 2007. Unfortunately, the physical assessment required by the Carrier did not take place as a result of a disagreement concerning the waiver required by the Claimant, and additional information from the Claimant's neurologist was again necessary. After its receipt in mid-July, the Carrier determined that an FSE was necessary. It was conducted on July 26, and the Claimant returned on July 30, 2007.

There is no dispute that the Carrier has the right to establish medical standards (Third Division Awards 28899, 38251 and 36725) and that there is nothing in the cited Rules restricting the Carrier's access to relevant medical information that is reasonably necessary to make a determination as to the Claimant's fitness to safely perform his job duties. See Third Division Awards 39007 and 29818. After an extended MLOA, it was reasonable for the Carrier to find that generic doctors' forms were insufficient to meet its duty to ensure a safe work environment. (See Public Law Board No. 4716, Award 89) In this case the Organization has not met its burden of showing that the procedures the Carrier followed in gathering information and assessing the Claimant's physical condition were arbitrary or for reasons other than its legitimate concern for his safety, or that his FSE or return to work were unreasonably delayed. It is difficult for the Board to determine the relevance of the fact that the Carrier said it spoke to the Claimant's doctor and the doctor's denial that such conversation occurred, because the procedure for a third party assessment had been requested and agreed to at the time. Additionally, the fact that such assessment was insufficient to answer the Carrier's questions was the result of the Claimant's failure to complete the examination, not any action which is attributable to the fault of the Carrier.

Under all of the circumstances of this case, we conclude that there was no unreasonable delay by the Carrier in assessing the Claimant's fitness to return to work after his extended MLOA and returning him to service on July 30, 2007. Because the claim progressed to the Board only seeks compensation for the delay between June 18 and July 30, 2007, we need not address the condition placed upon the Claimant's return to work.

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 11th day of January 2011.