

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41399
Docket No. MW-41376
12-3-NRAB-00003-100233

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(BNSF Railway Company (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 removed and withheld Mr. M. Mindus from service on April 21, 2008 and continuing (System File S-P-1287 O/11-08-0324 BNR).
2. As a result of the consequence of the violation referred to in Part (1) above, Claimant M. Mindus shall now ‘ . . . receive wages at the GP-2 rate of pay starting on April 21, 2008 and continuing until Mr. Mindus is brought back to work. This to be paid five (5) days a week, eight hours each day and 52 weeks a year. We also asked for any and all benefits he may lose because of this improper removal 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.

The facts indicate that on January 22, 2008, the Claimant was placed on medical leave of absence because he had been observed struggling with walking on uneven surfaces while working as a Group 2 Machine Operator position. That position required operating a machine, ground inspections of equipment and other associated work. The Claimant informed Carrier Officer W. Lonngren that he had problems in the past with swelling and pain in his ankles, which was why he was placed on the medical leave.

The Claimant was released by two doctors for two different conditions and returned to active service on February 22, 2008. Thereafter, he worked from February 26 through March 31, 2008,

On March 31 the Claimant was again removed from service because he continued to have trouble walking on uneven surfaces while performing his duties. The Claimant was instructed to contact Medical & Environmental Health Manager J. Costa and to be governed by her instructions.

On April 21, 2008, the Organization requested the establishment of a Medical Board pursuant to Rule 41 of the Agreement, and on the following day it filed a claim on behalf of the Claimant. On May 15 several Carrier Officers conducted an onsite field test during which the Claimant used special boots designed to help his mobility. According to those Carrier Officers, the Claimant continued to have problems walking on ballast and uneven terrain. In their view, the Claimant's problems raised significant safety concerns for the Claimant and others. Because of that field test, the Claimant was issued permanent restrictions by the Medical Department, which prohibited him from performing his duties.

It is the position of the Organization that the Claimant was entitled to a Medical Board pursuant to the terms of Rule 41. It argued that two physicians had released the Claimant for full active service while the Carrier's Medical Department had diagnosed him as unfit for duty. It reasoned that the two diametrically opposing medical opinions necessitated a third neutral doctor to make the final determination. According to the Organization, because the Carrier failed to institute the Medical Board, it had violated

the Agreement. It concluded by requesting that the Claimant be returned to service and the claim sustained as presented.

It is the Carrier's position that the Agreement provides that if an employee's physician has an opinion that is contrary to that of its Medical Department, a third doctor can be called in for a final determination. It argued that in this instance, however, there was no dissenting opinion on which to rule. It asserted that the Claimant was removed from service on January 22, 2008. The Claimant then obtained releases from two outside medical healthcare providers and was returned to duty on February 22, 2008.

According to the Carrier, the Claimant then worked until March 31 when he was once again removed from service due to his continued precarious wobbling while walking on uneven surfaces. It suggested that if the Claimant wanted to contest the opinion of its Medical Department, it needed another more current medical opinion. The Carrier concluded that at no time did an outside physician dissent from the Carrier's March 31, 2008 determination. Thus, the Organization's request for the establishment of a Medical Board was properly denied. The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and finds that there is no dispute that the Claimant was removed from service by the Carrier on January 22, 2008, because he was struggling while walking on uneven surfaces at work. The Claimant was subsequently placed on medical leave. One month later, on February 22, 2008, the Claimant was returned to service after two physicians had released him as being fit for duty. Approximately five weeks later by letter dated March 31, 2008, the Claimant was again removed from service. That letter stated, in pertinent part:

“It has come to my attention that you have continued to struggle with walking on uneven surfaces while performing your normal job duties. When you discussed these issues with Wayne Lonngren in January you indicated you did have problems in the past with swelling and pain in your ankles. . . .” (Emphasis added)

The Organization's argument is not without some appeal, because it is clear that the Claimant was removed from service the second time in March for the same reason he had been removed in January. Thus, it reasoned the prior releases by the Claimant's physicians should have sufficed as constituting the dissenting opinion to the

Carrier's Medical Department. Simply put, the Organization's request is based on the argument that the question of the Claimant's physical fitness was static. The problem with the Organization's rationale is that it takes the untenable position that the Claimant's medical condition was unchanged, while overlooking the fact that the Claimant's physical condition could have worsened since his prior release. When the Claimant was placed on medical leave on March 31, 2008, it would have behooved him to have sought a new medical release, and if his physicians again stated that he was fit for service, a request for the establishment of a Medical Board under Rule 41 would have been appropriate. Absent a more current medical release, the Carrier did not err in not establishing a Medical Board. The record also indicates that the Claimant applied for, and has been receiving Railroad Retirement Board permanent medical disability benefits since January 1, 2009, which affirms that he was not fit for active service. Therefore, the Board finds and holds that the claim must remain 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 25th day of July 2012.