

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28506
Docket No. MW-28561
90-3-88-3-364

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when DeQuincy Division Trackman J. K. Spencer was suspended from service effective Tuesday, July 28, 1987 (Carrier's File 870671).

(2) As a consequence of the aforesaid violation, Mr. J. K. Spencer shall be allowed pay:

'*** for eight (8) hours each work day, including any holidays falling therein, beginning July 28, 1987, to continue so long as he is held out of service, until he is returned to service with seniority, vacation and all other rights restored to him.'

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant entered service with the Carrier in August 1978. He was employed as a scrap cutter at the Carrier's Palestine Scrap Yard until July, 1983; he thereafter established seniority as a trackman and, in February 1987, was assigned as a trackman on the Carrier's DeQuincy Division.

The Claimant's supervisors apparently observed him to be taking risks to his safety in working too close to machinery and to be risking the safety of others in swinging his sledgehammer close to other employees. According to the supervisors, Claimant's conduct continued even after he was warned to

change his conduct. The Claimant was not charged with violation of disciplinary or safety rules, and he had not been injured or involved in any accident. However, on July 27, 1987, acting pursuant to Section III, Paragraph 2 of its Form 2501 Physical Examination Rules, the Carrier withheld Claimant from service for physical or mental impairment and referred him, through the Employee Assistance Program, to Dr. D. B. Feigenbaum, Ph.D., for psychological evaluation. Claimant contacted the EAP Representative on August 17, 1987.

In Dr. Feigenbaum's evaluation, issued on the basis of testing conducted on August 24 and 25, 1987, he found the Claimant's intellectual capabilities to be,

"consistently below average abilities in all areas assessed, including attention and concentration as well as abstract reasoning abilities [and including] non-verbal skills ... requiring visual-motor and visual-perceptual skills, including tasks requiring speedy responses in visual motor-tasks."

Dr. Feigenbaum concluded that,

"because of general intellectual level as well as visual-motor and visual-perceptual levels, that it would not be wise to keep this man working at dangerous tasks which demand exacting visual-motor performance. On the other hand, there are many personality characteristics exhibited which suggest this man is a very dedicated, motivated employee who most likely will work year after year consistently in the proper position."

The Carrier was notified of Dr. Feigenbaum's findings by October 8, 1987. The Carrier's Medical Director reviewed Dr. Feigenbaum's evaluation and, on the basis of that review, the Carrier approved Claimant's return to service, which was effective November 9, 1987.

At the time of the Claimant's being withheld from service, the Organization filed a Claim on his behalf for loss of pay and benefits for such period as he would be withheld. The Claim was progressed in the usual manner and is before this Board.

The Carrier also withheld Claimant a second time, apparently for similar reasons, in April 1988; and it addressed in its Submission the Organization's Claim filed in response to that action. However, only the 1987 Claim is before the Board in this proceeding.

The Organization argues that the Carrier failed to offer evidence in support of its action withholding Claimant. It asserts that the Carrier was precluded by Rule 12 of the applicable Agreement from withholding the Claimant without investigation, which concededly did not take place. It asserts that

the Carrier offered no evidence that the Claimant failed to perform his duties in a safe, competent manner or evidence of physical or mental symptoms which would warrant his disqualification. Indeed, it asserts that the evidence is to the contrary and that the Carrier failed to meet its burden to demonstrate that the Claimant was medically disqualified. The Organization urges that, in the absence of such proof, the Carrier's action withholding Claimant was improper.

The Carrier argues that a medical disqualification is not discipline and, therefore, Rule 12 was not violated. It asserts that it had the right to examine the Claimant because it had reason to believe that he had a medical condition which might not allow him to perform the duties of his position in a safe manner. The Carrier urges that it did not act in an arbitrary, capricious, or unreasonable manner in denying the Claim. It urges, in addition, that the Board may not overrule medical standards imposed by competent medical personnel. The Carrier asserts that neither the Claimant nor the Organization utilized the appeal procedures contained in the Carrier's Physical Examination Rules to resolve the dispute.

It is well established that a Carrier has the right, upon reasonable cause, to subject an employee to appropriate medical evaluation to determine his fitness to perform the duties of his position in a safe and responsible manner. It has also been held that the Carrier may, in proper circumstances, withhold the employee from service pending the results of such evaluations. Such suspensions are not disciplinary in nature; and the disciplinary rules requiring Investigation are not applicable. See, e.g., Third Division Awards 18710, 25186, 25417, 25801 and 27729; see also Award 2 of Public Law Board No. 4073, involving this Carrier.

The Carrier's action disqualifying the Claimant must, if challenged, be supported by proof that it acted reasonably and not arbitrarily, discriminatorily, or in bad faith. See, e.g., Third Division Award 22379. The burden is on the Carrier to establish the legitimacy of its action in accordance with those standards. See, e.g., Third Division Award 26056.

The record in the instant case demonstrates that the Carrier had reasonable cause to question whether the Claimant was mentally and/or physically able to perform the duties of his position. The supervisors' observations were sufficient to warrant referral for examination and withholding Claimant pending that examination. Dr. Feigenbaum's report, quoted above, confirms the existence of Claimant's mental and physical conditions, some of which reasonably impact the Claimant's ability to perform the duties of his assigned position. Contrary to the Organization's assertions, Dr. Feigenbaum's report does not unequivocally conclude that the Claimant is fit to perform those duties.

There is no indication in the record that the Carrier's action subjecting the Claimant to medical evaluation and withholding him from service pending the results of that evaluation was arbitrary or capricious or that its motives were discriminatory or pretextual.

Withholding from service an employee who has not been charged with any rules violation deprives the employee of income and benefits during the period he is withheld. The Carrier is obligated diligently and promptly to carry out its examination and determination. If the Carrier is delinquent, it is obligated to make the employee whole for time to which the employee would have been entitled, but for the delay.

In the instant case, the Claimant was tested and interviewed by Dr. Feigenbaum one week after Claimant contacted him. No reason is given for Claimant's delay in contacting the EAP. The Carrier's Chief Medical Director determined to reinstate the Claimant to duty less than one month after receipt of the report.

The Carrier's rule provides a mechanism for the review of medical determinations, which the Claimant did not utilize. The Carrier urges that such remedy is the exclusive means to overturn medical determinations and it urges that the Claimant's failure to pursue that remedy removes this dispute from the Board's jurisdiction. The Board is not persuaded. The Claim does not challenge the medical determination, which was, in the end, to reinstate him to service. Instead, the Claim challenges the Board's determination to withhold Claimant and claims compensation for the time lost. The Board holds that such a Claim is within its jurisdiction.

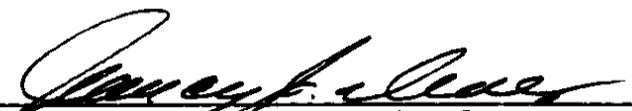
Under the circumstances, the Board is persuaded that the medical evaluation process was properly undertaken, that the Carrier did not act unreasonably in withholding the Claimant from service pending the results of the evaluation, and that the period of the evaluation was not unduly or improperly extended by the Carrier. The Board holds, therefore, that the Claimant is not entitled to be compensated for the period of time he was held out of service.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.