Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31218
Docket No. MW-31769
95-3-94-3-49

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company

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

(1) The Agreement was violated when the Carrier withheld Sectionman D.L. Hansen from service beginning May 4, 1992, and on a continuing basis thereafter (System File T-D-568-H/3MWB 92-09-28G)

(2) As a consequence of the violation referred to in Part (1) above, Sectionman D.L. Hansen shall be returned to service with seniority unimpaired and he shall be compensated for all wage loss suffered."

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 waived right of appearance at hearing thereon.

Claimant, as veteran employee of some 27 years was required to undergo physical and neurological examinations to determine his fitness to continue to perform track work.

Following these examinations, Claimant was advised as follows:

"We have been advised by Dr. *** of the Burlington Northern Medical Department that the results of the exam you underwent by Dr. *** on February 26, 1992, indicates you cannot return to duty.

You are therefore, effective May 4, 1992, placed on medical leave of absence and prohibited from returning to work.

Any questions regarding this matter should be directed to Doctor *** in the Medical Department."

The Organization challenged Carrier's determination to disqualify Claimant as being discriminatory. Significantly they did not have Claimant secure any reports from the Medical Department nor are they challenging the disqualification of Claimant. Claimant's physical results were, apparently, fine, it just is that Claimant requires the presence of someone to act as "Big Brother" to be constantly aware of where Claimant is at, what he is doing, etc. The Organization believes that the only restriction on Claimant is that he must be constantly supervised.

The Organization contends that Carrier's refusal to permit Claimant to return to work is discriminatory and in violation of Rule 69 of the Agreement, which reads as follows:

"A. The parties to this Agreement pledge to comply with Federal and State laws dealing with non-discrimination toward any employee. This obligation not to discriminate in employment includes, but is not limited to, placement, upgrading, transfer, demotion, rates of pay or other forms of compensation, selection for training, lay-offs and termination."

This approach obligates the Organization to substantiate these allegations of discrimination by substantial evidence. When the Organization voiced the argument, the Carrier responded saying:

"*** There is no evidence that there are any other employees working with the same or similar medical conditions. *** Furthermore, to meet its burden of proof the Organization must present evidence to support its assertion ***"

This, the Organization has not done. There is all sorts of reasons why some employees can only function productively if working with supervision, but when challenged by the Carrier to show someone else with the same or even similar condition as Claimant that is currently working, the Organization did not.

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 November 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 31218, DOCKET MW-31769
(Referee Hicks)

The Majority found that the Agreement was not violated when the Carrier withheld the Claimant from his position because he was allegedly medically unfit to perform his assignment. Specifically, the Claimant was deemed to be medically unfit to perform his assignment without direct supervision even though he had worked under direct supervision since he began his career in 1966. The alleged evaluation was performed without reference to any of the Claimant's previous medical records from which a comparison could be made. It is fundamentally impossible to determine that the Claimant's condition has deteriorated without knowing his previous condition. During the handling of this dispute on the property, the Organization presented written statements from the Claimant's co-workers attesting to the fact that the Claimant had shown no significant change in his abilities.

Inasmuch as the Claimant was deemed qualified when he was hired in 1966 and for twenty-seven (27) years thereafter the Carrier had full knowledge of his mental capabilities, the Carrier may not now disqualify him where no showing is made that his condition has changed. It is apparent that there is no medical basis on which to disqualify the Claimant. Although the Carrier has a right to set reasonable medical standards for its employes, it must base

those standards on some rational criteria and may not apply its criteria in an arbitrary or capricious manner. The Organization pointed out that other employes were allowed to continue service after restrictions being placed upon them, wherein they required direct supervision of a qualified employe.

The Majority's error was compounded when it stated that:

> "This approach obligates the Organization to substantiate these allegations of discrimination by substantial evidence. When the Organization voiced the argument, the Carrier responded saying:
>
> > '*** There is no evidence that there are any other employees working with the same or similar medical conditions. *** Furthermore, to meet its burden of proof the Organization must present evidence to support its assertion ***'
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> This, the Organization has not done. There is all sorts of reasons why some employees can only function productively if working with supervision, but when challenged by the Carrier to show someone else with the same or even similar condition as Claimant that is currently working, the Organization did not."

The Carrier's assertion cited above was challenged by the General Chairman within his September 28, 1992 letter to the Carrier's Assistant Director of Labor Relations. The General Chairman cited at least one instance wherein a sectionman was denied a claim because the claimant in that case was required to:

"'...work under the direct supervision of a qualified employe...'"

Hence, the Carrier was fully aware that at least one other employe required direct supervision as a condition of his employment. The proof was in the record only to be overlooked by the Majority, much to the detriment of the Claimant. Moreover, the General Chairman pointed out that the employe in that case was still working as of the date of his letter of appeal. The Carrier never refuted the General Chairman's assertion that other employes were allowed to "'...work under the direct supervision of a qualified employe...'" Hence, the Organization did meet its burden of proof that the Claimant was discriminated against in violation of Rule 69 of the Agreement. In its rush to a judgement, the Majority simply overlooked this fact and the Claimant, who had more than twenty-seven (27) years of unblemished service, was made to suffer the consequences. Therefore, I hereby register my dissent to this award as being palpably erroneous.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member