

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32933
Docket No. MW-33908
98-3-97-3-411**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Denver & Rio Grande Western Railroad**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly withheld Mr. G. Garcia from service from March 14, 1995 through February 24, 1997 (System File D-95-34/MWD 95-035).**
- (2) As a consequence of the aforesaid violation, the Claimant shall be compensated for all wage loss suffered with seniority and benefits unimpaired."**

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.

On February 27, 1995, Carrier notified Claimant that he was recalled to service, effective March 14, 1995. However, Carrier withheld Claimant from service until February 24, 1997, on medical grounds.

It is clearly established that Carrier has the right to withhold an employee from service when serious questions are present concerning the employee's physical qualifications to perform the job. Carrier's decision to withhold an employee from service on medical grounds should not be set aside unless it can be shown that the decision was made in bad faith or was arbitrary or capricious.

It also is clearly established that, as an appellate body, this Board is confined to the record developed on the property. Accordingly, we review the record to determine whether Carrier's decision in the instant case was arbitrary or capricious.

During handling on the property, Carrier justified withholding Claimant from service because his physical condition subjected him to an 87 pound lifting restriction. However, nowhere in the record developed on the property is there any explanation as to why such a lifting restriction rendered Claimant unfit for his job. Under these circumstances, based on the record developed on the property, we conclude that the withholding of Claimant from service was arbitrary and capricious.

Carrier attached additional documents to its Submission but, as indicated above, we may not consider these documents because they were not presented during handling on the property. However, even if we were to consider these documents, they would only reinforce our conclusion that Carrier acted arbitrarily and capriciously. The documents include a message from the Director, Health Services to the Division Engineer advising of the lifting restriction and asking whether the Division Engineer could use the Claimant with this restriction. The Division Engineer replied that to determine whether he could use the Claimant, he needed to know the reason for the lifting restriction. The additional documents attached by Carrier to its Submission contain no response to the Division Engineer's question. Thus, even these documents show that the Division Engineer never determined whether he could use Claimant with the lifting restriction because he was not provided the additional information he needed to make such a determination.

Although Carrier is accorded substantial deference to its determinations that an employee is not medically qualified to perform his job, for such deference to be

applicable, Carrier must articulate why a particular medical restriction rendered the employee unfit. On this record, Carrier failed to do so. Consequently, its withholding Claimant from service was arbitrary and capricious.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of November 1998.