Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36034
Docket No. MW-36057
02-3-00-3-202

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly removed, disqualified and withheld Mr. R. C. Boyter from service beginning on November 19, 1998 and continuing through March 26, 1999 (System File J-9950-51/1177210).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. C. Boyter shall now be compensated for all lost wages at his respective track machine operator's rate of pay beginning on November 19, 1998 and continuing through March 26, 1999."

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.

At the time the instant dispute arose, the Claimant, a Track Machine Operator, had been working restricted duty as a result of an on-duty injury in 1995. A functional capacity evaluation test conducted on August 24, 1998 showed that there was no improvement of the Claimant's condition, and that, in fact, it had worsened in certain respects.

By letter dated November 20, 1998, the Claimant was temporarily removed from service pending further medical evaluation in accordance with Section 2.5 (b) of the Carrier's Medical Rules, which provides in pertinent part:

> "If a Supervisor observes an Employee's unsafe behavior(s) that may be associated with a physical or mental medical condition, or the Supervisor becomes aware of an Employee's unsafe behavior(s) or medical condition which might be associated with an Employee's physical or mental impairment, the Supervisor should immediately: 1) Notify the Health Services Department (HSD) . . . 2) with assistance from the HSD . . . refer the Employee for a Fitness-for-Duty Evaluation. When the Supervisor requests a Fitness-for-Duty Evaluation, the Supervisor may either: 1) temporarily withhold the Employee from active service; or 2) temporarily assign the Employee alternative job duties in a safe working environment during the evaluation period. . . ."

The Claimant was further directed to obtain a current evaluation from his personal physician.

When no response was received from the Claimant, the Carrier sent another letter dated December 7, 1998 offering the services of a back hardening program to begin on January 4, 1999.

Again, no response was received from the Claimant. By letter dated December 17, 1998, the Carrier advised the Claimant that vocational rehabilitation was also available to assist him in returning to work. Vocational rehabilitation services were to include such things as job modification and/or accommodation, vocational evaluation and counseling, and skills development.

The Claimant did not avail himself of those services either. Instead, on January 6, 1999, the Organization filed the instant claim on his behalf, contending that the Claimant had been improperly withheld from service. The claim also sought the

establishment of a Medical Board pursuant to Rule 50 of the Agreement to resolve any dispute about the Claimant's physical condition.

The record further shows that on February 3, 1999, the Carrier's Medical Department received a release dated December 23, 1998 from the Claimant's physician, Dr. Dunn. Two days later, on February 5, 1999, the Claimant was reinstated. He immediately entered a back hardening program offered through the Cottonwood Hospital in Salt Lake City.

The Carrier denied the Organization's claim on March 4, 1999, noting that the Claimant had accepted an offer for vocational services and work hardening. The Claimant completed the work hardening program and was returned to work on March 26, 1999.

The Organization's position is twofold. First, it argues that the Carrier did not have a valid reason for removing the Claimant from service. Second, the Organization contends that the Carrier violated Rule 50(e) of the Agreement by not agreeing to a three-doctor Medical Board.

The Board reviewed the record as it developed on the property and concludes that the Organization's contentions are unconvincing. As the foregoing recitation of facts demonstrates, the results of the Claimant's functional capacity evaluation indicated his condition was worsening. Under these circumstances, we find that the Carrier had a legitimate, reasonable basis for temporarily removing the Claimant from service pending further medical evaluation in accordance with Rule 2.5(b) of the Carrier's Medical Rules. This conclusion is consistent with the numerous Awards of the Board which have confirmed the right of the Carrier to withhold employees when it has reason to believe their physical condition may not permit them to perform the duties of their assignment safely and to medically disqualify them from duty if the employee has a medical condition that does not meet the Carrier's medical standards. Third Division Awards 16579, 29818, 32585, 33627.

Moreover, we find no basis for a finding that the Carrier violated Rule 50(e) of the Agreement by denying the Organization's request for the establishment of a Medical Board. Rule 50(e) applies only when there is a disagreement between the doctors of the Carrier and the employee. In this case, the report from the Claimant's physician was not received by the Carrier until February 3, 1999. There is no evidence of a disagreement between the medical authorities at that time which would trigger the

application of Rule 50 (e) of the Agreement. On the contrary, the Claimant was returned to work whereupon he successfully completed the work hardening program.

It is clear that any lost work time cannot be attributed to improper actions on the part of the Carrier. More than two months elapsed before the Carrier was provided with the medical information requested. Once the medical documentation was received, the Carrier acted expeditiously to return the Claimant to service. In addition, the Claimant was compensated for the time he participated in the work hardening program. He was not kept out of service for an inordinate or excessive time thereafter.

Concluding as we do that no Agreement violation has been proven, the claim for lost wages must be 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 21st day of May, 2002.