Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40220
Docket No. SG-39789
09-3-NRAB-00003-060641
(06-3-641)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of S. J. Hunt, for reinstatement to service with payment for all lost time, plus skill differential and reestablishment of his employment and seniority rights as if he had been working from October 17, 2005 and continuing until this dispute is resolved, account Carrier violated the current Signalmen's Agreement, particularly Rule 19, when it denied the Claimant's request for a re-examination pertaining to his fitness to turn to service in a letter dated October 17, 2005."

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 Claimant was employed as a Signalman. In December 1999, he suffered a serious injury. On April 3, 2000, the Claimant's personal physician released him for return to service. The Carrier refused to return him to service, contending that his disability was too severe to return to Signalman work. Claims filed by the Claimant were settled after the Claimant and the Carrier agreed to a joint medical evaluation by the Claimant's physician and the Carrier's designated doctors at the University of Washington School of Medicine. Based on the medical opinion that emerged, the Claimant was disqualified from working any position that required field work, that was not "in a structured environment, such as a Signal shop," and that did not have close supervision. The Claimant's personal physician concurred with the terms of that disqualification, the record shows.

The Carrier thereafter offered the Claimant a position at its Signal Shop in Springfield, Missouri, which, in the Carrier's view, was the only facility that could meet the Claimant's medical disabilities. The Carrier notified the Organization that an agreement would have to be reached in order for the Claimant to be assigned at Springfield, Missouri, because the Claimant had been employed in Washington State and lacked seniority in Missouri. The Organization contended that the Claimant should have a right to return to work at the Seattle Shop, or, alternatively, to a position in the field. When the parties were unable to reach agreement, the Organization filed a claim under Rule 19 seeking the Claimant's return to service. In Third Division Award 37304, the Board denied the claim.

By letter dated April 21, 2003, the Claimant requested a medical re-examination under Rule 19G. The Carrier denied the request, stating that the matter had been permanently resolved under Rule 19 of the Agreement. The Claimant did not pursue the matter further and no claim was filed on his behalf.

Against that background, we now come to the facts giving rise to the instant dispute. On September 26, 2005, the Claimant once again requested a re-examination of his medical condition, claiming the right to a field assignment on the Tacoma, Washington, Signal crew. Attached to his request was a letter dated September 25, 2005 from Ms. Donna Parker-Bush, a nurse practitioner, and

purportedly countersigned by Deborah Hammond, MD. The letter stated that the Claimant worked very hard to recover after his "traumatic head injury on December 2, 1999" and has since obtained an associate college degree and a commercial driver's license. The letter further stated that the Claimant was able to work without supervision.

The Carrier denied the request for a medical re-examination. It contended that the Claimant lacked a basis under Rule 19 for re-examination because the matter was permanently resolved by the joint medical examination years earlier.

The Organization thereafter filed the instant claim on November 3, 2005, asserting that Rule 19G provides for re-examination of employees who have been medically disqualified. The Organization took the position that the Claimant's medical condition had improved and, therefore, he had a right to request a re-examination after 90 days in accordance with Rule 19G.

The Carrier responded that Rule G is inapplicable to the facts of this case; that the claim was untimely and barred by the doctrine of laches; and that there was no violation of the Agreement.

Turning first to the threshold procedural objections raised by the Carrier, we are not persuaded that the claim is untimely. The Claimant requested to be re-examined by letter dated September 26, 2005 and his request was denied by the Carrier on October 17, 2005. Under Rule 53, claims must be filed within 60 days of the event giving rise to the grievance. The claim filed by the Organization on November 3, 2005 falls within the time limits.

The Carrier also relies upon the doctrine of laches. It asserts that in 2003, it notified the Claimant of its position that there was no right to a medical re-examination under Rule 19. It argues that the Claimant and the Organization should have appealed that decision within 60 days. The instant claim, filed two and one-half years later, simply comes too late, in the Carrier view. Thus, the filing of the claim is estopped by laches.

The Organization responds that the claim is not barred by laches because Rule 19G allows employees to request a medical re-examination 90 days after receiving an adverse decision, and every 90 days thereafter. It asserts that Rule 19G does not restrict the Claimant from again requesting a re-examination. The Claimant may have abandoned an opportunity back in 2003 to claim a violation of the Agreement, but he is permitted under Rule 19G to submit a request to be re-examined every 90 days if he believes he has become medically qualified.

In examining the respective arguments of the parties, it becomes apparent that they are closely intertwined with the merits of this dispute. If the Claimant has the right to make a renewed request for a medical re-examination under Rule 19G, then his request is not barred by laches. In order to make that determination, we must look to the language of Rule 19 - PHYSICAL EXAMINATIONS, which reads, in relevant part, as follows:

> "B. The employee will be jointly re-examined by a physician designated by the Carrier and a physician of the employee's own choice who shall both be graduates of a Class (A) medical school of regular medicine. This re-examination will be conducted at the office of the Carrier physician, unless otherwise mutually agreed to by the two physicians. If the two physicians agree that the man is disqualified, their decision is final; if they agree the man is qualified, he will be returned to service.
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> C. If the two physicians fail to agree, the employee's physician and the Carrier's physician will select a third physician who shall be a practitioner of recognized standing in the medical profession and where any special type of case is involved must be a certified specialist in the disease or impairment which resulted in the employee's disqualification. The board of physicians thus selected will examine the employee and render a report of their findings within a reasonable time, not exceeding fifteen (15) days after their selection, setting forth the employee's physical condition and their conclusion as to

whether he meets the requirements of the Carrier's physical examination rules. The fifteen (15) day period may be extended through mutual agreement between the General Chairman and the Carrier.

D. The Carrier and the employee involved will each defray the expense of their respective physicians, with the expense of the neutral physician being borne equally by the Carrier and the employee.

E. If the majority of the board of physicians conclude that the employee meets the requirements of the Carrier's physical examination rules, he shall be permitted to return to the service from which removed.

F. If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Carrier's doctors, the original medical findings which disclose his condition at the time disqualified shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification.

G. Should the decision of the Board of physicians be adverse to the employee and he considers that his physical condition has improved sufficiently to justify considering his return to service, a re-examination will be arranged upon request of the employee, or the General Chairman but not earlier than ninety

(90) days after such decision, nor oftener thereafter than each ninety (90) days." (Emphasis added)

It is a well-established tenet of contract interpretation that the meaning of each paragraph must be determined in relation to the Agreement as a whole. Applying that accepted tenet here, we see that Rule 19G is not available unless a board of physicians is convened pursuant to Rule 19C. However, Rule 19C is not applicable unless there is a conflict of opinion between the Claimant's own doctor and the Carrier's physician. That did not occur here. The Claimant's physician and the Carrier's medical authorities concurred in the medical disqualification.

While the Board commends the Claimant for his rehabilitative efforts and wishes him well in his future endeavors, Rule 19 must be applied as it is written. The Board does not sit as a court of equity. Rule 19B specifies that where the physicians for both sides are in accord, their decision is final. There is no factual predicate for proceeding further under Rule 19. It must, therefore, be concluded that the Carrier did not violate the Agreement when it denied the Claimant's request for re-examination under Rule 19G. The physicians for both parties agreed to the medical restrictions imposed on his return to service and the matter was permanently resolved at that time. This claim 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 December 2009.