Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40240
Docket No. MW-40489
09-3-NRAB-00003-080318

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly removed and withheld Foreman R. Dusterhoft from his assigned position on the Paynesville Surfacing Crew by letter dated July 20, 2006 (System File C-06-090-041/8-00503-002).

(2) The claim referenced in Part (1) above as presented by General Chairman G. A. Bell on August 25, 2006 to Manager M. S. Hanson shall be allowed as presented because said claim was not disallowed by Manager Hanson in accordance with Rule 21-1(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above Claimant R. Dusterhoft '. . . shall now be reinstated to service with all rights and benefits restored, and he shall be compensated for any and all lost wages at his respective and applicable rate of pay beginning July 21, 2006 and continuing until he is reinstated to service."

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.

This is a second claim filed on behalf of the Claimant on August 25, 2006, protesting his removal from service on July 20, 2006 pending the outcome of a job performance analysis (JPA). While requesting similar relief, the other claim (Third Division Award 40239) focused on the Carrier's refusal to grant the Claimant an Unjust Treatment Hearing. This claim involves the Carrier's determination that the Claimant was disqualified from service as a result of a JPA held on July 28 and August 3, 2006.

The record in this case is extensive, repetitive and somewhat confusing. The Claimant was initially notified that he was disqualified from service on August 17 and again on August 23, 2006 in response to his expressed intention to report to work believing he was qualified. Along with the claim filed by the Organization on August 25, 2006 addressed to M. Hanson and delivered to the Carrier's main office, the Claimant wrote a letter indicating that the reasons for his disqualification were unclear and asking for an explanation of what he failed to do satisfactorily at the JPA. By letter dated October 2, 2006 the Claimant was notified of the specific results of its track work JPA and the reasons for his disqualification. The October 2 letter makes no mention of the claim. On December 4, 2006 the Organization replied specifically to the October 2 letter taking issue with the JPA process used in this case, asserting that the Claimant was improperly disqualified and withheld from service for purported medical reasons without any medical personnel at the JPA, and noting that Rule 42 is the appropriate procedure for determining fitness for duty. The Organization sent a letter dated December 11, 2006 to Carrier officer D. McCall stating that it had received no response to its August 25, 2006 claim, and asserting that the Carrier was in default and should pay the claim under Rule 21(a). On January 19, 2007 the General Chairman sent another default letter to the AVP of Labor Relations, making reference the December 11 letter.

The balance of the correspondence on the property includes three detailed responses from the Carrier and two detailed appeals from the Organization concerning the multitude of arguments made by each side, both procedural and on the merits of the dispute over the Claimant's disqualification. In summary, the Organization clarifies the difference between this claim disputing the method used to disqualify the Claimant and his being withheld from service and the prior claim concerning the denial of an Unjust Treatment Hearing, arguing that the Claimant was removed due to medical or physiological fitness without any medical evaluation being performed under Rule 42, that the JPA process utilized was flawed and contained no standards of fitness being measured, and there was no proof of the allegations that formed the basis for holding the JPA or its conclusions. Procedurally, the Organization contends that the claim was properly presented, but not timely disallowed under Rule 21(a) and that the Carrier's default requires that it be paid as presented, relying on Public Law Board No. 6552, Award 1, as well as Third Division Awards 29481, 28745, 28744 and 28532.

The Carrier's position also raises both procedural and substantive arguments. First, the Carrier contends that the Board has no jurisdiction to entertain the claim because it has not been handled in the usual manner on the property inasmuch as it was not timely presented to the officer designated to receive the claim, noting that the appeal was to McCall not Hanson, and citing Third Division Award 23239 and Fourth Division Award 3350. It notes that the Organization failed to prove who the claim was filed with. Additionally, the Carrier raises the fact that the Organization filed duplicative claims with the same requested remedy and based on the same incident, which forms a basis for dismissal. The Carrier contends that it properly disallowed this claim on October 2, 2006, and that the claim is excessive, because no losses were suffered by the Claimant who went to work for the Organization. With respect to the merits, the Carrier asserts that the Claimant was properly removed from service for safety reasons based upon observations of fellow workers and supervisors, citing Public Law Board No. 6302, Award 8; Public Law Board No. 5015, Award 14; and Third Division Award 26249, that it has broad discretion in determining fitness and an objective evaluation was made based upon the results of a JPA which showed that the Claimant could not perform the job tasks required given two opportunities, that a licensed professional was not required to demonstrate the Claimant's fitness to perform his job, and the Organization has never shown a medical disqualification. The Carrier stresses the fact that the Claimant was provided the opportunity to return to work any time he could successfully complete a JPA, but failed to request another one, and asserts

that the Claimant failed to mitigate his damages which must be considered when evaluating his excessive claim.

A careful review of the record convinces the Board that the procedural objections raised by each party do not deprive the Board of jurisdiction to decide the merits of the case. There is evidence that the August 25, 2006 claim was filed with the proper Carrier officer, although it does not specifically raise objection to the Carrier's decision to disqualify the Claimant on the basis of the JPA. Additionally, while Hanson's October 2, 2006 letter appears to be addressing the Claimant's request for specificity as to the reasons for his disqualification and not the August 25, 2006 claim, which is not mentioned, it does set forth the underlying basis for the Carrier's actions. If the claim can be considered as appropriately raising a protest to the disqualification and the JPA process (which was repeatedly argued on the property) and not duplicative of the one filed the same day protesting the denial of an Unjust Treatment Hearing, the October 2, 2006 response from Hanson can be considered a disallowance of the claim under the provisions of Rule 21(a) requiring written reasons. The Board is not convinced that sending a default notice to the wrong Carrier officer converts an otherwise valid claim into a defective one. The extensive correspondence on the property reveals that the parties understood what was being protested and the basis for the Carrier's denial of the claim.

With respect to the propriety of the Claimant's disqualification as a result of findings made by the Carrier from the JPA, it is incumbent on the Organization to establish that the process utilized by the Carrier in assessing the Claimant's ability to perform his job was flawed and that its conclusions were arbitrary or made in bad faith, because the Carrier has broad discretion in determining fitness and the right to assign work to only qualified people. See Public Law Board No. 6302, Award 8; as well as Third Division Awards 20361 and 20135. The thrust of the Organization's argument is that the Claimant was disqualified based upon a process without ascertainable standards and a finding that he was medically or physiologically unfit, without any medical assessment whatsoever. At various times in the correspondence the Carrier denies that the Claimant was withheld for medical reasons. However, a review of the June 20, 2007 denial makes clear that the Claimant was determined to not be "physically fit for duty based upon the JPA." The Organization's December 4 response to Hanson's October 2 letter setting forth the JPA results makes clear its position that the appropriate contractual method for determining fitness and ability to safely perform the duties

of a work assignment is a Rule 42 physical examination, not a JPA process it believes is not sanctioned by the Agreement. While the Carrier has broad discretion in withholding an employee from service for safety reasons and making fitness determinations, if such determination is based upon a perceived medical or physiological issue, a proper medical assessment is necessary in order to substantiate a resulting disqualification, as was the case in Public Law Board No. 6302, Award 8, where it was held that ". . . once Carrier withholds an employee from service for medical reasons, it has a duty to conduct the medical review expeditiously and, once any medical issues are resolved, to return the employee to service promptly."

While we are in agreement with the Carrier that there is no requirement for there to be a licensed professional at a JPA, and that the chosen method of determining qualifications by conducting a JPA is not prohibited by the Agreement, this case turns on whether the Claimant's disqualification was based upon a determination that he was not medically fit to perform his job. Because the results of the JPA stress concerns for the Claimant's health, including his losing breath, fatigue, poor balance, etc., and the Carrier's denial concludes that the Claimant was not physically fit to perform his job tasks, the Board finds that this case raises an issue of disqualification based upon the Claimant's medical or physiological condition. Under such circumstances, we agree with the Organization that the Carrier's determination without any effort to obtain a physical examination or medical assessment of the Claimant was arbitrary and in violation of the Agreement.

The Carrier has continuously raised issues that the claim is excessive, that the Claimant suffered no losses because he went to work for the Organization, that the Claimant failed to mitigate his damages during the period of his disqualification prior to his surgery, and that the Claimant made no effort to return to work by establishing his fitness either in another JPA or by some other means. The Organization did not specifically respond to these contentions in its correspondence on the property. Accordingly, the Claimant is to be reinstated to service and the case is remanded to the parties to determine what, if any, losses were suffered by the Claimant as a result of his disqualification and what, if any, efforts were made by the Claimant to mitigate his damages. The Claimant shall be made whole for the period of time it is established that he was medically fit to work, less any interim earnings or amounts attributable to his failure to mitigate his damages.

## AWARD

Claim sustained in accordance with the Findings.

## 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 21st day of December 2009.