Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41392
Docket No. SG-41432
12-3-NRAB-00003-100270

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 BNSF Railway Company:

Claim on behalf of M. C. Mayfield, for compensation for all lost wages, including overtime and skill pay, beginning on January 16, 2009, and continuing to May 6, 2009, account Carrier violated the current Signalman's Agreement, particularly Rule 19, when on January 16, 2009, it withheld the Claimant from service after his treating physician released him to return to work without restrictions. Carrier's action has created undue hardship on the Claimant and his family. Carrier's File No. 35-09-0009. General Chairman's File No. 09-005-BNSF-121-T. BRS File Case No. 14353-BNSF."

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 is a Signalman on the Texas Seniority District. In December 2006, he was involved in an on-duty accident that resulted in neurological injury and visual impairment. The record is not clear when the Claimant went on medical leave,[1] but at some point he did. The record includes medical reports from 2008. By letter dated February 27, 2008, the Claimant's ophthalmologist indicated that his "visual acuity" was 20/20 but that he had "visual field defects," specifically tunnel vision. A neuropsychological evaluation dated July 24, 2008, indicated that the Claimant had "numerous areas of deficit which are felt to be secondary to a closed head injury." The evaluation expressed doubts about his ability to return to work: "It is unlikely that Mr. Mayfield will ever be able to return to physically demanding, cognitively challenging employment. His ability to engage in simple, low-level employment at some future date remains unclear. At the present time, however, it is unlikely that he can function effectively in any vocational capacity." The evaluation was conducted in conjunction with a personal injury action by the Claimant against the other party engaged in the accident.

On January 16, 2009, the Claimant sought to return to work and submitted a release from his family physician that stated, in its entirety: "Mr. Mayfield is released to return to work without restrictions." By letter dated February 6, 2009, the Carrier's Field Manager, Medical & Rehab Services, requested more information:

> "BNSF Medical Department is in receipt of Dr. Talley's 01/09/09 recommendation that you be allowed to return to work full duty. You are also claiming that you are now fit to return to work. Unfortunately, Dr. Talley did not provide any medical documentation to support his recommendations nor have you provided any documentation noting a change in both your physical and cognitive status.

[1] The medical records indicate that he was not admitted to the hospital after the accident.

Return to work fitness for duty decisions are based on medical evidence, not opinion. Medical documentation that is currently available (provided to BNSF in the course of managing your personal injury) reveals that you have a visual field defect as well as markedly abnormal neuropsychological functioning. . . .

Based on the documentation to date, you would be a significant safety hazard if allowed to perform the safety sensitive functions of your signal maintainer position.

In order to be considered for return to work in your position, please provide the following information:

1. **Current visual field rating (degrees of vision) as performed and documented by an ophthalmologist (not optometrist) – on ophthalmologist letterhead.**

2. **Current cognitive functions (updated evaluation must be as detailed and complete as the July 2008 exam).**

3. **Current neurologist evaluation. . . .**

4. **Office visit notes of Dr. Talley from 10/2007 thru January 2009 which would support his January 2009 full duty recommendation."**

On March 9, 2009, the Claimant responded. He submitted a letter from his ophthalmologist dated February 16, 2009, in which the doctor indicated that he had examined the Claimant on February 11, 2009, and that his visual acuity was 20/20. It said nothing about the Claimant's visual field. The Claimant also submitted a Status Form dated February 23, 2009, from his treating neuropsychologist indicating that he could "return to full work status." On March 9, 2009, the Claimant renewed his commercial driver's license and he submitted documentation. The accompanying Medical Examination Report indicated that his horizontal field of vision was "> 70."

By letter dated March 10, 2009, a Field Medical Officer denied the Claimant's request to return to work, based on the 2008 medical documentation that the Carrier had:

> "In re review of the medical documentation provided by you in your request to return to work, your current claims of being able to perform your job duties are inconsistent and not supported by medical evidence provided by your treating providers (especially the neuropsychologist) utilized during your action against the offending party (trucking company). . . . Based on these claims, BNSF Medical Department issued activity level restrictions.
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> As such, we feel that you should address your disagreement with the current restrictions (based on your private treating providers' documents) to your union general chairman."

That same day, the Field Medical Officer also contacted the doctor who had conducted the Claimant's CDL vision examination and told him about the Claimant's 2008 diagnoses, after which the CDL doctor revoked his certification that the Claimant met the physical requirements for a commercial driver's license.

This claim was filed on March 13, 2009. On March 31, 2009, the Claimant had a second neuropsychological evaluation by the same doctor who had evaluated him in 2008 and passed. The Field Medical Officer was informed of the results on April 6, 2009. On April 20, 2009, the Field Officer asked for more information from the ophthalmologist and the neuropsychologist. On April 24, 2009, she sent a letter to the Claimant informing him that he needed to get another DOT physical, which he passed. The Carrier finally authorized his return to work on May 6, 2009.

By letter dated April 23, 2009, the Carrier denied the claim, but indicated that it would consider the claim as the written request required under Rule 19.A and invited the Organization to tell the Claimant to have his designated physician contact the Carrier's physician to make arrangements for a joint medical examination pursuant to Rule 19.B. That ended up being unnecessary because by April 24, 2009, the Claimant submitted all medical documentation requested by the Carrier. In an email message of that same date, the Field Medical Officer informed the Human

Resources Department that the Claimant could schedule a return-to-work fitness-for-duty evaluation. The Claimant was released for work on May 4, 2009, and returned to duty on May 9.

Rule 19 of the parties' Agreement, Physical Examinations, provides, in relevant part:

> "A. If any employee of a class included in the scope of this agreement is found to be disqualified as a result of a re-examination conducted under the Carrier rules governing physical examinations including eyesight, color sense and hearing, feels that his physical condition does not justify removal from the service or restriction of his rights to service, such employee, upon request in writing by himself or his General Chairman within thirty (30) days following the notice of disqualification, may be given further re-examination as follows:
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> B. The employee will be jointly re-examined by a physician designated by the Carrier and a physician of the employee's own choice. . . . 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 the 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 . . . . 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 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 Organization contends that the Carrier unnecessarily delayed the Claimant's return to work by its delays and repetitive requests for information, causing him and his family economic hardship, and that it failed to implement Rule

19.B in a timely fashion. If the Carrier had questions about his ability to work, it should have had him examined by one of its own doctors, not sent him back for more information from doctors who had already cleared him for work. The Carrier's tactics were a clear abuse of its discretion and the claim should be sustained. The Carrier responded that the Claimant unduly delayed his own return to work by submitting generic documents instead of the more specific ones reasonably required by its Medical Department. Once all supporting documentation was received on April 24, 2009, and the Claimant had obtained a valid DOT certification, he was released to full duty on May 4, 2009. The Carrier did not violate Rule 19 because it requires a written request from the employee or the Organization, which it never received. The Carrier offered to treat the claim as the written request and suggested that the Claimant have his designated physician contact its Medical Department to set up a joint examination per Rule 19.B.

The Carrier has the right to establish minimum medical standards for its employees and to ensure that they meet those standards. The Organization does not challenge that proposition in this case. Instead the claim is directed at the process by which the Carrier ultimately determined that the Claimant could return to work: it asserts that the Carrier delayed unduly and unnecessarily, and it requested repetitive information.

The Carrier had medical records for the Claimant from August 2008, produced in conjunction with the Claimant's personal injury lawsuit against the other party involved in the accident, stating that the Claimant's medical issues were such that he might never be able to work again. When he presented a summary unconditional return-to-work release less than six months later in January 2009, it was reasonable for the Medical Department to ask for more specific information in order to verify that his condition had changed. The Medical Department's February 6, 2009, letter informed him exactly what he would have to submit in order to be returned to work. The requests are related directly to his ability to return to his prior position and are not unreasonable. The Claimant filed his request on January 19 and the Carrier responded on February 6, i.e., 18 days later. Absent some contractual standards, it is difficult to set hard and fast rules about whether a response has taken too long. Two and one- half weeks, however, is not so outrageous a delay as to warrant finding a violation of the Agreement.

The Claimant did not submit all required information until March 9, 2009, another month later. That delay cannot be blamed on the Carrier. Moreover, the Claimant did not provide the information requested in the Carrier's February 6 letter. The letter from the ophthalmologist did not address the Claimant's visual field. The CDL medical examination did, but it was not from an ophthalmologist. The February 6 letter asked for specific updated neurological evaluation information, but the Claimant only provided general releases with no specificity of information. It should not have been a surprise to the Claimant that the Carrier denied his return to work on March 10, referencing in particular the lack of specific neuropsychological findings. A ten-page evaluation in the Claimant's medical files indicated that his neuropsychological state was such that he was not capable of working at all in August 2008 and might never work again in anything other than "simple low-level employment." Given the serious safety considerations involved in the Claimant's work, the Carrier's caution in this regard was not misplaced. It has a duty to the public and to its other employees to ensure that all employees are physically and mentally able to perform their job duties safely. Moreover, the Carrier had informed the Claimant on February 6 that it would need to see another neurological evaluation of the same level of detail before it would entertain his request to return to work. He had submitted a one-page "Status Form" with an "X" next to "May return to full work status," and no specific findings whatsoever. As of March 10, the Claimant certainly knew that he needed to provide more specific neuropsychological information.

The Organization filed this claim on March 13, 2009. On March 31, the Claimant passed another neuropsychological examination and notified the Carrier of the results on April 6. On April 20, the Carrier asked for more information, which was provided by April 24. Having received the information it had requested, the Carrier authorized the Claimant to make an appointment for a fitness-for-duty physical examination. He had the exam and was released for work on May 4 and finally did return to work on May 9, 2009.

Looking at the entire course of events, the Carrier's requests for information were reasonable and clearly communicated. The Claimant was responsible for the delay between February 6 and March 9, when he submitted some of the requested information. He could have eliminated the delay between March 9 and April 6 if he had gotten the neuropsychological evaluation when the Carrier first requested it. An

examination of the record establishes that some delays were attributable to excusable caution on the Carrier's part and others were attributable to the Claimant himself. All in all, there is insufficient evidence of undue delay on the Carrier's part to cause the Board to conclude that it violated Rule 19.

Moreover, there is no evidence in the record that the Claimant or the Organization had made a request in writing to protest his being withheld from work on January 19 as required by Rule 19A. The Carrier did not respond until April 23, which seems to be a lengthy delay, i.e., more than one month. However, by that time, the Claimant had submitted the requested documentation and the matter became moot. Therefore, the 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 25th day of July 2012.