Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42775
Docket No. MW-42957
17-3-NRAB-00003-140341

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference**
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(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it improperly withheld Assistant Foreman Truck Driver B. Letsche from service beginning on February 27, 2013 and continuing (System File B-1326D-101/8-0002)

(2) As a consequence of the violation referred to in Part (1) above, Claimant B. Letsche '. . . must be compensated for all time lost, at the appropriate rate of pay, beginning on February 27, 2013 and continuing until employee is returned to active service. Additionally, employee must be credited all time lost, at the appropriate rate, as a result of the Carrier in violation to include but not limited to Railroad Retirement Credits for months of service and any lapse in Carrier provided benefits * * *"

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.

There is little dispute over the basic facts of this case. Sometime prior to February 15, 2013, the Claimant contacted his supervisor to inquire about obtaining a Medical Leave of Absence (MLOA), informing the supervisor he had a self-diagnosed possible issue with substance abuse. The Claimant was advised the only way to be placed on MLOA and receive treatment was to contact Carrier's Employee Assistance Program (EAP). On February 15, 2013, the Claimant contacted Carrier's EAP and requested inpatient assistance for his self-admitted alcohol problem. The Claimant also at this time explained to Carrier's EAP he had located a treatment facility which he preferred to go to but was informed the only way he would be entitled to a MLOA was to attend Carrier's designated treatment facility. The Claimant initially failed to comply with EAP's instruction and instead attempted to secure treatment at his preferred treatment facility.

By Memorandum dated February 27, 2013, Carrier's Health Services Registered Nurse/Nurse Consultant Jennifer Nelson informed the Claimant he was medically removed from Service and that he would need Health Services Clearance before returning to work. Nurse Nelson did not provide any reason or explanation for the Claimant's medical removal from service. According to the Carrier, the Claimant finally complied with EAP requirements, to undergo a substance abuse evaluation from a specified provider, received the recommended treatment for his malady, and, as a result, was approved to return to service on May 21, 2013. The Organization characterizes the Claimant's return to service as Carrier unexpectedly permitting him to resume his former assignment on May 23, 2013 without any explanation for its abrupt about face regarding the Claimant's ability to perform work. The Organization asserts that at the time the Claimant was returned to service, there was no dispute that his medical status had not changed.

The Organization argues the Claimant's medical removal from service was in violation of Rule 26-1 of the controlling January 1, 2013 Collective Bargaining Agreement which resulted in a loss of work opportunity, meaning a loss of compensation and benefit. Rule 26 (1) reads in relevant part as follows:

> **"When an employee is found by the Chief Medical Officer (CMO) to be physically disqualified, he shall be notified in writing by the Company of the specific reasons for the decision. If the employee disputes the decision, he or his representative shall, within thirty (3) calendar days of the notification of physical disqualification, notify the Director of Labor**

> **Relations in writing of an appeal and submit to the CMO a statement of medical evidence, including supporting tests, evaluation, physical notes and other pertinent medical documentation, if any, from the physician of the employee's choice attesting to the employee's meeting the Company's physical standards with respect to the matters on which the employee was found disqualified. This evaluation must include an assessment of the employee's ability to perform the essential functions of the job."**

Carrier argues that Rule 26 titled, Three Doctor Panel is not applicable to the Claimant's circumstances as the rule applies to "employees who have been physically disqualified by the Chief Medical Officer and who disagree with the Health Services findings . . . ." Carrier submits Claimant was not found disqualified by the CMO but rather Claimant disqualified himself by self referring himself to EAP. Given this circumstance, Carrier asserts Claimant became subject to the conditions of its policy, Company Policy 1810, titled, Troubled Employee Policy prior to his return to active service. Policy 1810 pursuant to the Section titled, VOLUNTARY REFERRAL PROGRAM, reads in pertinent part as follows:

> **"The Voluntary Referral Program is a resource for Federal Railroad Administration (FRA) covered employees, in compliance with 49 CFR Part 219.403. This program is designed to offer employees an opportunity to obtain assistance with drug and/or alcohol problems without jeopardizing their employment relationship.**
>
> **Employees who are affected by problems with drug(s) and/or alcohol may voluntarily seek assistance to resolve their drug/alcohol problem. Their employment relationship will be preserved as long as they follow through on all Employee Assistance Program recommendations and provide any required evidence of successful recovery by submitting to an agreed upon aftercare program which may include follow up unannounced testing."**

The Policy also provides for compliance with the following provisions regarding returning to work, to wit:

> **"The employee must successfully complete (or agree to continue in) the course of action recommended by the EAP or designated qualified professional, including but not limited to aftercare and/or support group attendance; and, the employee must be cleared to return to work by EAP**

and Health Services. * * * The employee will be returned to work promptly following completion of any return to work requirements.

Based on the clinical judgment of the EAP and/or recommendations from the treatment professional, the employee may be subject to unannounced follow-up drug and/or alcohol testing under Company authority (non-federal test) for a period of up to two (2) years."

Carrier notes that most, if not all of its 28 Collective Bargaining Agreements including other Maintenance of Way Agreements contain Three Doctor Panel provisions, here the Rule 26 provisions and that these negotiated Rules have existed in harmony with the provisions of Company Policy 1810 for many years.

The Board finds disposition of this case is dependent upon a determination as to whether the provisions of Rule 26 or the provisions of Policy 1810 are applicable to the prevailing fact circumstances as set forth in the above discourse. In comparing the two provisions, we find Policy 1810 to be apposite to the circumstances and Rule 26 to be inapposite to the circumstances of this case. Accordingly, the Board rules to deny the instant claim in its entirety.

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 24th day of October 2017.