

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43433
Docket No. SG-44244
19-3-NRAB-00003-170309**

The Third Division consisted of the regular members and in addition Referee Paul Betts when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of R.G. Bohner, for 150 hours at his straight-time rate, 5.5 hours at his overtime rate, 24 hours Holiday pay, and any expenses he incurred, account Carrier violated the current Signalmen's Agreement, particularly Rules 5, 53, and 65 when, it improperly withheld the Claimant from service and required him to attend medical examinations from December 11, 2015, until January 16, 2016, without compensating him for lost time and expenses. Carrier's File No. 1650677. General Chairman's File No. S-5, 53, 65-1546. BRS File Case No. 15551-UP.”

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.

On December 11, 2015, the Claimant, a Skilled Signaller, was removed from service based upon observations by his supervisor regarding the Claimant's difficulty with climbing and lifting. The Claimant explained he suffered from an arthritic hip but could relieve his symptoms via stretching. Through discussion with the Carrier's Health and Medical Services (HMS) department, it was determined that an occupational medical exam (OME) and functional capacity evaluation (FCE) be scheduled for the Claimant. On January 14, 2016, after receiving said exam results, HMS cleared the Claimant for work with no restrictions. The Claimant was notified of such on January 15, 2016.

The Organization argues a) the Carrier's scheduling of medical examinations was not timely, b) the Claimant suffered a loss as a result of such, c) under Rule 65, the Claimant is entitled to lost earnings, and d) the Carrier's procedural argument is improper because it was never raised by the parties during the on-property claim handling process.

The Carrier argues a) per Rule 56, the Organization's claim is procedurally defective and should be dismissed because it failed to present its claim to the designated Carrier officer within sixty days from the date of the occurrence, b) the Organization failed to prove any rule violation, c) the Claimant's return to work was not unduly delayed, and d) the Organization failed to satisfy its burden of proof obligation.

The Carrier argues the Organization committed irreversible error when it failed to present its claim to the Carrier within sixty days from the date of the occurrence. In relevant part, Rule 56(a) states:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the office of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based."

The alleged violation began on December 11, 2015. The record establishes the Organization filed its initial claim on February 12, 2015, sixty-three days after the alleged violation. Under Rule 56, the Board finds the claim is outside the time limits negotiated by the parties. The Organization argues that the Carrier failed to present this procedural argument at any time during the on-property handling of the claim, and for the first time, presented the argument in its submission to the Board. The

Organization argues the procedural error raised by the Carrier for the first time in its submission is improper because the Board's jurisdiction is limited to evidence and arguments that were properly raised by the parties during the on-property handling of the claim. Both parties cited awards and presented argument to support their respective positions.

After thoroughly reviewing the record and arguments presented, the Board agrees with the Organization that the procedural argument raised by the Carrier constitutes new argument and cannot be considered by the Board. The Organization's notice of intent was sent on February 27, 2017. The NRAB assigned a case number to the claim on March 14, 2017. The Carrier's submission is dated May 22, 2017. The argument raised in the May 22, 2017 Carrier submission clearly constitutes new argument and was never presented to the Organization during the on-property handling of the claim. As such, the procedural argument raised by the Carrier will not be considered by the Board.

Turning to the merits, the Board has said on many occasions, the Carrier has the right and responsibility to set proper and reasonable medical standards for its workforce. It is not the function of the Board to substitute its judgment for that of the Carrier's regarding medical determinations or the medical standards upon which it bases its decisions. That being said, the Carrier must have a rational basis for its determination and must make such determinations based upon a reasonable standard.

In the instant case, the Claimant's supervisor observed the Claimant having difficulty lifting and climbing. HMS spoke to the Claimant on December 14, 2015 regarding his supervisor's concern, whereby the Claimant told HMS that at times he had problems with an arthritic hip. On December 15, 2015, HMS Physician Lewis ordered the OME and FCE. The OME was performed on January 4, 2016, and HMS received the results on January 7, 2016. The FCE was performed on January 11, 2015, and HMS received the results on January 13, 2016. On January 14, 2016, the HMS physician reviewed the OME, FCE, and the Claimant's personal physician's notes, finding the Claimant did not have arthritis but did have tight ligaments in his left hip. The review also found the Claimant's limp to be associated with the fact that his left leg was ½ inch shorter than his right. Based upon these findings, HMS released the Claimant for work with no restrictions. The Claimant was notified of such on January 15, 2016.

Based upon a review of the medical records and the timeline of events noted above, the Board finds the Carrier's actions here to be rational and not arbitrary. HMS spoke with the Claimant immediately after his supervisor noted the Claimant's difficulty lifting and climbing. Its decision to order the OME and FCE were rational and not arbitrary based upon not only his supervisor's observation but also upon the information provided by the Claimant himself. Furthermore, the record reveals HMS was proactive in attempting to move up the required exams. Although HMS was unable to move up the FCE, HMS was successful in rescheduling the OCE from January 11, 2015 to January 4, 2015. Once HMS had all the reports in hand, the Carrier acted promptly in reviewing the reports and notifying the Claimant of his ability to return to work. Here, the Carrier's actions were rational and were not arbitrary. As such, the claim must be denied.

Although the Board may not have repeated every item of documentary evidence, nor all the arguments presented, we have considered all the relevant evidence and arguments presented in rendering this Award.

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 1st day of March 2019.