

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43798  
Docket No. SG-44499  
19-3-NRAB-00003-170652**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly Baltimore & Ohio):**

**Claim on behalf of C.C. Roberts, for reinstatement to his former position or other employment within the Signal Department that his seniority permits, with all seniority and benefits unimpaired, and compensation for all lost time, including overtime, from April 6, 2016, until he is returned to service, account Carrier violated the current Signalmen’s Agreement, particularly Rules 64 and 65, when it improperly withheld the Claimant from service. Carrier’s File No. 2016-226726. General Chairman’s File No. 16-09-64. BRS File Case No. 15719-B&O.”**

**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.

At the time of the events that gave rise to this dispute, the Claimant, C.C. Roberts, was assigned as a Signal Maintainer on the B&O Pittsburgh-East Signalmen Roster. On April 6, 2016, co-workers expressed to Claimant's manager concerns that the Claimant was showing behavior that could affect the safety of himself or others. His manager, Zachery Jenkins, had doubts about Claimant's ability safely to perform his job responsibilities, and removed Claimant from service pending a medical evaluation. Jenkins gave Roberts CSX Form MD3, an Attending Physician's Return to Work Report, and instructed the Claimant to see his doctor to have the form completed and returned to the CSX Medical Department for review. Jenkins attached a "Letter to Personal Physician" form to the MD3 that detailed Claimant's deficiencies and why they would prevent an employee from safely performing his job duties. The substance of the letter stated:

"Mr. Roberts exhibits frequent short-term memory lapses with respect to routine cognitive tasks. Examples would include the need to repeatedly have computer passwords reset, difficulty remembering names of railroad locations, and the ability to drive to those locations. Roberts becomes visibly frustrated with his inability to remember such things or work through basic problem solving challenges. As a railroad signal maintainer he is engaged in a highly safety-sensitive craft in which his personal welfare, coworkers' welfare, and the welfare of the general public can be placed in jeopardy with his every action. Items such as turning a circuit breaker back on before leaving a site can have dire consequences, and that is a prime example of the type of concern CSX has with Mr. Roberts. Roberts has been a long-time employee of CSX, and has a history of medical conditions both prior to and as a CSX employee. Both peers and managers that have known Roberts throughout his career have experienced concern for his safety, and as such request that he receive a comprehensive medical examination."

The Claimant was examined on May 5, 2016 by Dr. Liv Miller, a psychiatrist and Assistant Professor at the West Virginia University Department of Behavioral Medicine and Psychiatry. The MD3 Form returned by Dr. Miller indicated a diagnosis of "Major Neurocognitive Disorder." "Prognosis" was filled in as "Guarded." Dr. Miller gave the Claimant a return to work date of June 14, 2016, with restrictions: "Position should be

limited to manual labor with direct supervision.” As for how long the restrictions should be in effect, Dr. Miller wrote: “Indefinitely as cognitive condition is not thought to improve with time.” Attached to the MD3 Form was a detailed 3-page, single-spaced “Progress Notes” completed by Dr. Miller that set forth Claimant’s Medical History, Behavioral Observations, Results, and Conclusions. Mr. Roberts’ medical history includes severe traumatic brain injury sustained in a motor vehicle accident in 1980, a seizure disorder that was well-controlled with medication, cardiovascular disease resulting in aorta stent placement, and prior excessive alcohol use that had ceased some fifteen years previously. Most pertinent were Dr. Miller’s Conclusions, which read in part:

“The results of the current neuropsychological evaluation support findings of mild to moderate cognitive deficits primarily affecting the right hemisphere and executive and memory abilities. Specifically, he is noted to have deficits in complex attention, fine motor dexterity, inhibitory control, and he is noted to be behaviorally somewhat impulsive, disinhibited and perseverative. He also has poor ability to acquire new information, is highly sensitivity [sic] to interference, and has memory retrieval and consolidation problems.... The profile and history meets criteria for a non-progressive dementia due to multiple general medical conditions.

While the patient has good language skills and generally pleasant demeanor, this may mask some of his difficulties with behavioral regulation, executive function, and memory. However, *his cognitive deficits are significant enough to cause functional impact and he is not thought to have the required cognition to safely perform his duties as a railroad signal maintainer.* It would furthermore be challenging to work in any position that required attention to detail, careful judgment, learning of new information, or memory for tasks and procedures... (Emphasis added.)”

The Carrier’s Chief Medical Officer (CMO), Dr. Craig Heligman, reviewed the medical documentation submitted by the Claimant. After consulting with field management regarding Claimant’s duties and responsibilities, Dr. Heligman determined that the Claimant was medically disqualified because of his restrictions, notably that he required direct supervision at all times.

Following his medical disqualification, the Claimant submitted a second MD3 Form from a different doctor, dated July 21, 2016, that indicated, without any commentary, that the Claimant could return to work without restrictions. It is not clear in the record whether the second doctor had seen a copy of the Letter to Personal Physician that Manager Jenkins had submitted with the MD3 Form that he originally gave to the Claimant. The CMO determined that the Claimant remained medically disqualified, because the findings of the second doctor did not adequately address the findings and safety concerns detailed by Dr. Miller in her initial report.

The Organization filed this claim on May 26, 2016, alleging that the Carrier violated Rules 64 and 65 when it removed the Claimant from service on April 6, 2016, and continued to withhold him from service before any determination of his fitness had been rendered. The Carrier denied the claim by letter dated July 17, 2016, in which it noted that the Claimant had been properly withheld from service and that to date, there had been no information provided by either CSX medical or the Claimant's personal physician that would allow him to return to work in full duty capacity as a signal maintainer. The Organization appealed by letter dated August 10, 2016, alleging that the Carrier violated the Agreement by refusing to return the Claimant to work despite two doctors releasing him for duty. In its October 3, 2016, denial of the appeal, the Carrier noted that the Claimant was not released by his personal physician to return to his duties unrestricted, and that the Carrier was not obligated to return an employee to service who is not physically and mentally able to work the signal maintainer position independently and safely.

The Organization contends that the Carrier's initial decision to remove the Claimant from work was arbitrary, in violation of Rule 64, as was its decision to deem him medically disqualified and refuse to return him to work despite a medical examination that cleared him to return to work without any restrictions. The Organization asked for, and the Claimant is entitled to, a three-doctor panel as provided in Rule 65. The Claimant followed the grievance procedure and is now entitled to select a physician, while the Carrier selects a physician, to provide their opinion on the matter. The language of Rules 64 and 65 is clear and unambiguous and must be adhered to, not unilaterally interpreted by the Carrier.

According to the Carrier, the Organization has failed to show that the Carrier violated any rules or agreements. Its decision to remove the Claimant from work and require him to undergo a medical examination was consistent with Rule 64(a). Arbitral

precedent has established that the Carrier maintains the right to withhold an employee from service to determine his or her physical or psychological status when an employee's behavior leads the Carrier to question the employee's fitness for duty. The Claimant's doctor, Dr. Miller, diagnosed him with "Major Neurocognitive Disorder." Dr. Miller concluded that he could only return to work with the restriction "Position should be limited to manual labor with direct supervision" and that the restriction was likely to last "indefinitely." Based on Dr. Miller's diagnosis and report, the Carrier's CMO reasonably concluded that Claimant was medical disqualified because of his restrictions. The second MD3 form did not address the findings and safety concerns detailed by Dr. Miller and the CMO accordingly determined that the Claimant remained medically disqualified. Nor did the Carrier violate Rule 65. An employee's right to a three-doctor medical panel is triggered when the employee's doctor's conclusions differ from those of the Carrier-selected physician. Here, the difference of opinion is between the Claimant's two doctors. The Claimant is not entitled to a third physician review until the Carrier has had an opportunity to examine Claimant with its own physician or until Claimant's own doctor, Dr. Miller, reexamines Claimant and finds him fit to return to work without restrictions.

The Board concludes first that the Claimant was properly withheld from service. Rule 64 states, in relevant part:

- “(a) For the purpose of establishing their qualifications for service, employees may be required, as directed by Management, to take physical examinations or re-examinations, as well as examinations or re-examinations on the rules and instructions....”

The Organization argues that the decision to remove Claimant from service pending a medical examination was arbitrary. The record includes evidence to the contrary, specifically the "Letter to Claimant's Personal Physician" form that his manager filled out at the time Claimant was removed from service. Manager Jenkins detailed specific observations about Claimant's conduct on the job that warranted serious concerns about his ability safely to perform his duties. Obviously, the manager is not a physician; that is what the medical examination is for. The Carrier pays employees who have been withheld from service in order to obtain a medical examination up to five days' compensation. If the employee is deemed medically qualified, he or she has not lost anything as a result of being withheld.

In this case, the MD3 form submitted to the Carrier's Medical Department by the doctor selected by the Claimant indicated that he had major neurocognitive problems such that he could not be trusted to work unsupervised, which signal maintainers are often required to do. The Carrier's decision to medically disqualify the Claimant was accordingly a reasonable one. The Carrier's concerns about the second MD3 form, that deemed the Claimant fit to return to work without restrictions, but without explanation, were well-founded, following Dr. Miller's detailed report on the extensive medical examination she conducted on the Claimant.

The crux of the case is whether the Carrier violated Rule 65 when it failed to convene a three-doctor panel in response to the Organization's request that it do so. Rule 65 states, in relevant part:

**"If an employee should be disqualified by reason of his physical condition upon examination by the Company's physician and feels that such disqualification is not warranted, the matter may be handled in the same manner prescribed in these rules for the handling of grievances. If the matter is not disposed of by such handling the following will apply:**

- (a) The employee involved, or his representative, will select a physician to represent him and the Company will select a physician to represent it, in conducting a further physical examination. If the two physicians thus selected shall agree, the conclusions reached by them will be final.**
- (b) If the two physicians selected in accordance with the foregoing paragraph (a) should disagree as to the physical condition of such employee they will select a third physician to be agreed upon by them who shall be a practitioner of recognized standing in the medical profession and a specialist in the disease or ailment from which the employee is alleged to be suffering. The Board of Medical Examiners thus selected will examine the employee and render a report with reasonable promptness, setting forth his physical condition, and their opinion as to his fitness to continue service in his regular employment which shall be accepted as final. Should the decision be adverse to the employee and it later definitely appears that his physical condition has improved, a re-examination will be**

arranged after a reasonable interval upon the request of the employee.

. . . . .”

The problem here is that the difference of medical opinions is not the one addressed in Rule 65, between an employee-selected physician and a Carrier-selected physician. The difference of medical opinions is between two physicians both of whom were selected by the Claimant.<sup>1</sup> If there were any failure on the part of the Carrier, it was in not requiring the Claimant to obtain a more detailed medical report from the second doctor or in not scheduling an examination of the Claimant by a physician of its choosing. At the same time, the CMO’s decision to continue to rely on Dr. Miller’s detailed findings, rather than the conclusory report from Claimant’s second doctor, was a reasonable one.

A significant issue here is the time it has taken for the claim to get to arbitration. Looking at the record as a whole, the Board concludes that the reasonable and pragmatic thing to do is to reinstate the Claimant, with benefits and seniority but without back pay, subject to a new fitness for duty examination. Should a dispute between the Claimant’s physician and a physician selected by the Carrier develop, the parties can then follow the procedure set forth in Rule 65 for making a final determination about the Claimant’s medical condition and whether it permits him to return to work either unrestricted or with restrictions that are consistent with signal work of any sort.

### **AWARD**

**Claim sustained in accordance with the Findings.**

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<sup>1</sup> At one point the Organization alleged that the Claimant had been directed by the Carrier to go to Dr. Miller, but there is no evidence in the record to support that allegation, and the Board concludes that Dr. Miller was selected by the Claimant.

**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 16th day of July 2019.**