

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43879
Docket No. SG-45242
20-3-NRAB-00003-190009**

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 A.M. Hovel, for return to service with compensation for all lost time, including overtime and with benefits unimpaired from June 28, 2017, continuing until he is returned to service; account Carrier violated the current Signalmen’s Agreement, particularly Rule 52, when on June 28, 2017, it improperly withheld the Claimant from service and then failed to schedule a medical re-examination after he properly requested said re-examination. Carrier's File No. 1691738. General Chairman's File No. N 0120. BRS File Case No. 15948-UP. NMB Code No. 127.”

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 was hired in October 1994. At the time of incident, the Claimant was working as a Skilled Signal Maintenance Foreman. In May 2017, the Claimant underwent a cardiac procedure whereby an implantable cardioverter defibrillator (ICD or pacemaker) was inserted. The Claimant's personal physician, Dr. Zardkoohi, placed temporary restrictions on the Claimant effective 5/15/17 and released the Claimant for normal activity with no restrictions on 5/30/17.

Based upon the surgical implant and a review of the Claimant's medical condition/history, the Carrier's Health and Medical Services (HMS) department placed a permanent medical restriction on the Claimant. In relevant part, the permanent restriction prohibited the Claimant from the following work activities:

- “• Operation of Company vehicles
- Operation of cranes, hoists, or machinery
- Operation of forklifts
- Work on or near moving trains, freight cars or locomotives
- Work at unprotected heights over 4 feet above the work surface
- Work in environments with electromagnetic field exposure
- Work on 1-Man or 2-Man Gangs”

The Claimant's supervising department was unable to accommodate the permanent restriction given the Claimant's assigned position. As a result, the Claimant was removed from service on 6/28/17. On 7/10/17, the Organization requested a re-examination under Rule 52 of the Agreement. It should be noted that on September 15, 2017, the Carrier was able to accommodate the Claimant into a different work environment so he could continue working while still maintaining the permanent restrictions.

In relevant part, Rule 52 states the following:

“RULE 52 – PHYSICAL EXAMINATIONS

A. Physical Disqualification

An employee subject to the Agreement between the parties hereto who is disqualified as a result of an examination conducted under the Carrier's rules governing physical or mental examinations will be notified in writing, with copy to his General Chairman of his disqualification and will be carried on leave of absence.

B. Requesting Re-Examination

If the employee feels his condition does not justify removal from the service or restriction of his rights to service, he may request re-examination. Such request must be submitted by him or his representative within thirty (30) days following notice of the disqualification, unless extended by mutual agreement between the General Chairman and Labor Relations. He may be given further examination as follows:

- 1. The employee will be re-examined by a physician designated by the Carrier and a physician of the employee's choice who will both be graduates of a Class (A) medical school of regular medicine. 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 service.**
- 2. If the two physicians fail to agree, the employee's physician and the Carrier's physician will select a third physician who will be a practitioner of recognized standing in the medical profession; and, where any special type of case is involved, must be a certified specialist in the disease or impairment which resulted in the employee's disqualification. The board of physicians thus selected will examine the employee and render a report of their findings within a reasonable time, not exceeding 30 days after their 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 30-day period may be extended by mutual agreement between the General Chairman and Labor Relations.**
- 3. The Carrier and the employee involved will each defray the expense of their respective physicians. The fee of the third member of the board will be borne equally by the employee involved and the Carrier. Other examination expenses such as X-ray, electrocardiographs, etc., will be borne equally by the employee involved and the Carrier.**
- 4. If the majority of the Board of Physicians conclude that the employee meets the requirements of the Carrier's examination**

rules, he will be permitted to return to the service from which removed.

5. If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Carrier doctor(s), the original medical findings which disclose his condition at the time disqualified will be furnished to the neutral doctor for his consideration and he will specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor will be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification.
6. In the event the decision of the Board of physicians is adverse to the employee and he subsequently considers that his physical condition has improved sufficiently to justify considering his return to service, a re-examination will be arranged upon request of the employee, or his representative, but not earlier than ninety (90) days after such decision.

Should it be necessary to select a second Board of Physicians to resolve such a request for a re-examination and the decision of such second Board of Physicians is adverse to the employee, he will not be subject to any further re-examination.

C. Subsequent Re-Examination

If the employee accepts such physical disqualification and it later appears that his physical condition has improved and he furnishes evidence acceptable to the Carrier of such improvement, he will be permitted to return to service as promptly as possible. In the event the evidence is not acceptable, an examination may be arranged by the Carrier to determine his physical qualifications.”

NOTE: It is recognized and understood by the parties that this is a minimum standard, subject to change of Carrier policy.

The matter progressed in the normal fashion and is now before the Board for final resolution.

In summary, the Organization argues a) the Carrier improperly withheld the Claimant from service by imposing medical restrictions that were not supported by any medical evidence and by imposing the restrictions without actually examining the Claimant, and b) the Carrier failed to grant the Claimant a re-examination under Rule 52.

In summary, the Carrier argues a) the Organization failed to set forth any probative evidence to refute the Carrier's medical determination, b) following the Carrier's placement of permanent restrictions on 6/28/17, the Organization failed to provide the Carrier with the name of the Claimant's designated physician under Rule 52 and failed to provide the Carrier with any medical notes regarding a re-examination from the Claimant's designated physician under Rule 52 until the parties held conference of the dispute on February 15, 2018 (the information supplied to the Carrier at conference included a 2/12/18 letter from Dr. Zardkoohi with an attached echocardiography report dated 12/8/17), c) the 2/12/18 letter from Dr. Zardkoohi does not constitute a disagreement with the Carrier's imposed restrictions, d) the record demonstrates the Claimant's condition warranted the imposed medical restrictions, and e) there is no dispute regarding the Claimant's medical condition. The Organization provided no evidence to refute the Claimant's medical history or prove the medical restrictions were arbitrary or capricious.

As 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.

After a thorough review of the record, the Board finds the permanent medical restrictions issued to the Claimant to be reasonable and not arbitrary. The Claimant had a significant cardiac event requiring the surgically implanted ICD. The permanent restrictions were based upon a review of the Claimant's medical file following the surgical insertion of the ICD and Carrier's safety concerns regarding sudden incapacitation and excessive exposure to electric and magnetic force (EMF).

The Organization argues that there is a disagreement as to the Claimant's disqualification under Rule 52 based upon the 5/10/17 letter from Dr. Zardkoohi, whereby Dr. Zardkoohi released the Claimant to work with no restrictions, effective 5/30/17. The Board respectfully disagrees. Under Rule 52, the triggering event regarding requests for re-examination are Carrier physical or mental examinations that result in disqualification. In the instant case, the Claimant was disqualified on 6/28/17. The 5/10/17 letter from Dr. Zardkoohi was written prior to the Claimant being disqualified and cannot constitute a re-examination by a physician of the employee's choice under Rule 52.

The only evidence in the record regarding a re-examination under Rule 52 concerns the information the Organization provided to the Carrier during conference of the matter on 2/15/18 (the 2/12/18 letter from Dr. Zardkoohi and associated echocardiography report dated 12/8/17). The 2/12/18 letter from Dr. Zardkoohi is absent a disagreement with the Carrier's decision to disqualify the Claimant from his former position as a Skilled Signal Maintenance Foreman. Furthermore, the 2/12/18 letter from Dr. Zardkoohi is absent a specific disagreement with the Carrier-imposed restrictions that led to the Claimant's disqualification. In his 2/15/18 letter, Dr. Zardkoohi requested that the Carrier "reassess" the Claimant's work restrictions based upon the echocardiography report dated 12/8/17. A request by the Claimant's personal physician for the Carrier to reassess the Claimant's work restrictions does not constitute a disagreement with the Carrier's decision to disqualify the Claimant from his former position. That being said, it should be noted that HMS reviewed the 2/15/18 letter from Dr. Zardkoohi and associated 12/8/17 echocardiography report and found that the new medical information did not change the Claimant's need for the permanent restrictions.

Given these facts, the Board finds the Organization failed to meet its burden. The Carrier's medical determination here was reasonable and not arbitrary. The record is absent a physician disagreement under Rule 52 regarding the Carrier's decision to disqualify the Claimant from his former position as a Skilled Signal Maintenance Foreman. As a result, 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.

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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 28th day of January 2020.