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

Award No. 44098
Docket No. MW-42800
20-3-NRAB-00003-190351

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

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly withheld Mr. R. Jones from service beginning June 28, 2013 and continuing and refused to establish a Medical Board of physicians as required by Rule 50 following a proper request by the Organization (System File D-1350U-304/1590246).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall promptly establish a Medical Board to examine Mr. Jones and he shall '* be allowed compensation for all hours he was not allowed to work commencing June 28th, 2013 and continuing until he is returned to service. This shall include all hours he would have been entitled, both straight time and overtime, had the violation not taken place.'"**

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.

Claimant R. Jones established and maintained seniority in the Carrier's Maintenance of Way and Structures Department. In June of 2013, he was regularly assigned to a position on Gang 9031 near Hugo, Colorado. On June 28, 2013, the Carrier removed him from service pursuant to the Carrier's Health and Medical Policy Rule 2.5(b), after Claimant Jones' supervisor reported seeing the Claimant with an unsteady gait.

By letter dated August 20, 2013, the Organization filed a claim on the Claimant's challenging the removal from service. Therein, the Organization reviewed the pertinent details of the case and explained that the Carrier's removal and continued withholding of Claimant Jones was unsupported by any evidence and thus improper. The Organization also formally requested that the Carrier promptly impanel a Medical Board pursuant to Rule 50 to resolve the matter.

By letter dated September 25, 2013, Engineering Supervisor Mitch McClure declined the Organization's claim. In his letter, Supervisor McClure expressed that it was necessary to remove the Claimant from service given his clear and unambiguous signs of physical distress.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it is the Organization's responsibility to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). After careful review of the record, the Board finds the Organization has not met its burden.

Rule 50 states, in relevant part that:

> **"When an employee is withheld from duty because of his physical or mental condition, the employee or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employee's physical or mental condition by a competent physician, make written request upon his employing officer for a Medical Board."**

In this case, Carrier's Health Services Department findings resulted in a permanent restriction that did not satisfy the job requirements of a track laborer position. Ultimately, the dispute is about the Claimant's restrictions and not his medical condition. The Claimant has been encouraged to contact the Carrier's accommodation group to try to find a position that would be able to accommodate the Claimant's restrictions. As of the last record on file from the Carrier dated December 13, 2013, the Claimant had not elected to utilize this service. The Carrier's actions in not convening a Medical Board was in no way unreasonable, arbitrary or capricious. 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 11th day of August 2020.

LABOR MEMBER'S DISSENT
TO
AWARD 44098, DOCKET MW-42800
AWARD 44107, DOCKET MW-43095
AWARD 44109, DOCKET MW-44428
(Referee J. Charles)

In these cases, the Board held that there was no dissenting medical opinion which necessitated convening a Medical Review Board. However, just because there is an agreement on the medical diagnosis does not mean there is not a "dissenting opinion as to the employe's physical or mental condition". There are many circumstances wherein employes with the same initial medical diagnosis (arthritis, cancer, back pain, etc.) can be in a significantly different physical condition after diagnosis. Award 56 of Public Law Board No. 7660 addressed this issue and held:

> "*** There is little doubt that Claimant's successful ongoing treatment changed his medical status, as well as his mental health diagnoses, and that his FFD was an evolving issue during the time period in question. **However, an agreement by medical professionals about initial diagnoses does not mean that there is no dissenting opinion about an employee's 'physical or mental condition' affecting his FFD or impacting his qualifications to perform work.** Carrier made a determination to issue a general medical disqualification permanently barring Claimant from working for the railroad. Medical evidence presented which notes improvement in both diagnoses and treatment, and a positive prognosis, must be considered a dissenting opinion for purposes of Rule 50(a)."

A similar circumstance was also addressed by Award 97 of Public Law Board No. 7660, which held:

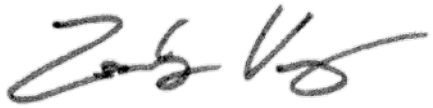
> "The Board has carefully considered the record before us and find that there are no procedural errors that nullify the need to review the merits of this dispute. With regard to the merits of the claim, we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it held the Claimant out of service. The record supports the conclusion that the Carrier had sufficient cause to withhold the Claimant from service for one year as a result of 'sudden incapacitation'. The Carrier's Medical Comments History and the Claimant's cardiologist's notes both confirm the presence of a medical condition that justified the decision to medically disqualify the Claimant from service.
>
> **We do however find that the Organization provided sufficient evidence that a dissenting opinion existed between the Claimant's cardiologist and the Carrier's medical staff, which falls within the meaning of Rule 50. The Claimant's cardiologist provided a hand-written note, dated February 10,**

> "**2017, accompanied by findings of his examination to support the conclusion that the Claimant could return to work as a 'heavy equipment operator'.**"

In accordance with the above-quoted awards, the Majority was in error in these cases when it held the Carrier was not required to convene a Medical Review Board.

For these reasons, I must dissent.

Respectfully submitted,



Zachary C. Voegel
Labor Member