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

Award No. 44107
Docket No. MW-43095
20-3-NRAB-00003-190360

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 removed and withheld Mr. T. Sandoval from service beginning on November 24, 2013 and continuing (System File D-1450U-301/1598675 UPS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Sandoval shall '* be allowed compensation for all hours he was not allowed to work commencing November 24, 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 T. Sandoval established and held almost twenty (20) years of seniority within the Carrier's Maintenance of Way Department, at the time at issue. On the dates giving rise to this dispute, it is undisputed that he was assigned and working as a Machine Operator.

On November 23, 2013, the Claimant told his new supervisor, R. Steffer, that he had an issue with his back issue that he had worked with since 2005. Supervisor Stetter pulled the Claimant from service without pay, effective November 24, 2013. The Carrier ordered the Claimant to undergo testing and evaluation regarding his back issue.

After reviewing results of the medical records and the results of the Fitness Capacity Exam, the Carrier's Chief Medical Officer placed permanent lifting restrictions on the Claimant. It was determined that the Carrier could not accommodate the Claimant's restrictions working as a track laborer (based on lifting restrictions) and referred the Claimant to the Carrier's Accommodation group to try to find an alternate position that could accommodate his restrictions.

By letter dated January 20, 2014, the Organization filed a claim on the Claimant's behalf, disputing the Carrier's action and alleging that Carrier arbitrarily pulled the Claimant from service in the first place, and refrained from timely action that would restore the Claimant to service, through accommodations pursuant to the Carrier's Health Services Department Rule 2.5b.

The claim was properly handled by the Organization at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for resolution.

In reaching its decision, the Board has considered the record 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.

The Board finds no evidence that the Carrier's decision to remove the Claimant from service was arbitrary. The Claimant informed his supervisor about the back pain that starts to affect him within thirty (30) minutes of starting work. The Track Laborer position is classified as one involving heavy physical labor. This was sufficient information for the Claimant's supervisor to initiate the fitness for duty review. Through this review process, the Carrier's Chief Medical Officer determined that the Claimant was restricted to medium labor positions. Therefore, the Claimant's removal from service was not arbitrary. Further, the Carrier's failure to convene a Medical Board review did not violate the Agreement. Rule 50 which governs disqualification for physical reasons requires a Medical Board review upon the issuance of a dissenting opinion. No dissenting medical opinion was provided by the Claimant. Accordingly, the agreement was not violated.

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:

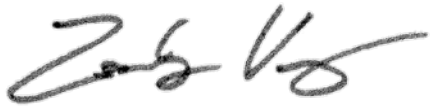
> "The Board has carefully considered the record before us and find that there are no procedural errors that nullify the need to review the merits of this dispute. With regard to the merits of the claim, we find that the Organization has not met its burden of proof that the Carrier violated the Agreement 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