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

Award No. 44109
Docket No. MW-44428
20-3-NRAB-00003-170550

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 (Former C&NW)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to remove restrictions or re-evaluate the Claimant's medical condition following release from Claimant's personal physician and when the Carrier failed to appoint a Medical Review Board pursuant to Rule 56 as requested by the Organization (System File J-1656C-402/1662348 CNW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant K. Miller shall now be compensated one hundred dollars ($100.00) per week as a result of his loss of work opportunity, promotion and compensation beginning on May 16, 2016 and continuing until the restrictions are removed or the findings of the Medical Review Board concludes otherwise."

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 K. Miller was originally hired on June 10, 2002. He was discharged from service on March 2, 2011 and reinstated on March 15, 2013. Subsequent to filing the present claim, the Claimant was terminated from service for a rule violation once more on September 14, 2016. As a result, any award of compensation cease to apply as of the date of his termination.

On May 16, 2016, the Organization sent a letter requesting the Carrier to convene a three-doctor panel or Medical Review Board of the Claimant's work restrictions related to a seizure disorder controlled by medication, pursuant to Rule 56 of the collective bargaining agreement (Agreement). In response to the request, the Carrier's Health and Medical Department reviewed the Claimant's history and medical documentation. The Carrier's Chief Medical Officer (CMO), Dr. Holland, also spoke with the Claimant's neurologist, Dr. Ta, who confirmed that the Claimant is under his care for treatment of epilepsy and taking medication to prevent recurrent seizures. CMO Holland issued a letter dated July 12, 2016, denying the request for the Medical Review Board based on the fact that there is no dispute in the Claimant's diagnosis.

Based on the continued restrictions placed on the Claimant, the Organization filed a claim via letter dated June 9, 2016 contending that the Claimant suffered a loss of work opportunities and compensation as a result of the Carrier's continued restrictions and failure to establish the medical panel to review the restrictions. By letter dated July 8, 2016, the Carrier denied the Organization's claim by asserting that it was not required to convene a Medical Review Board since there was no disagreement about the Claimant's condition.

The Organization appealed the Carrier's denial by letter dated July 14, 2016. The Carrier denied the Organization's appeal by letter dated August 17, 2016. 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.

The Organization argues that the Claimant had a contractual right to have the Carrier's medical director's decision to maintain the Claimant's work restrictions be reviewed by a three-doctor panel as provided in Rule 56 of the Agreement. The

Carrier's decision to not allow such review was arbitrary, capricious and in violation of the Agreement, the Organization argues.

The Carrier counters that there is no dispute in diagnosis between the Claimant's neurologist and the Carrier. The medical diagnosis is that he is epileptic and on medication to control seizures. Further, Rule 56 in no way restricts the Carrier in how it may proceed if the two physicians agree on the diagnosis. Therefore, the Organization has failed to meet its burden of proof.

The question before this Board is whether, under the circumstances of this case, the Agreement requires the Carrier to convene a Medical Review Board pursuant to Rule 56. As the moving party, it is the Organization's responsibility to prove by a preponderance of evidence that the Carrier committed the alleged violation. After careful review of the record, the Board finds the Organization has not met its burden. The Carrier's failure to convene a Medical Review Board did not violate the Agreement. Rule 56, which governs disqualification for physical reasons, requires the convening of a Medical Review Board upon the issuance of a dissenting opinion. There is no dissenting medical opinion in the record. 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:

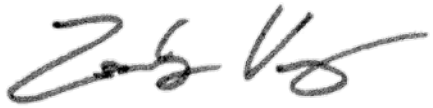
> "The Board has carefully considered the record before us and find that there are no procedural errors that nullify the need to review the merits of this dispute. With regard to the merits of the claim, we find that the Organization has not met its burden of proof that the Carrier violated the Agreement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