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

Award No. 44313
Docket No. SG-45430
20-3-NRAB-00003-190173

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 J.M. Krehbiel, for return to service with compensation for all lost time, including overtime, and with benefits unimpaired from May 15, 2017, continuing until he is returned to service; account Carrier violated the current Signalmen's Agreement, particularly Rule 52, when on May 15, 2017, it improperly withheld the Claimant from service and then failed to schedule a medical re-examination after he properly requested said re-examination."

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 assigned to an Assistant Signalman's position in Carrier's Signal Department. On February 4, 2017, the Claimant attempted suicide while off-duty. The Claimant was admitted to the hospital and received medical treatment for alcoholism and depression. Effective May 15, 2017, the Claimant's treating physician cleared him to return to work without restrictions effective July 12, 2017. After a review of the Claimant's medical records, the Carrier's Chief Medical Officer ("CMO"), John P. Holland, noted on May 15, 2017:

> **"Status of Case Review**
> **This medical Fitness for Duty evaluation was initiated because the UPRR Employee Assistance Program (EAP) notified UPRR Health and Medical Services (HMS) that Mr. Krehbiel had been hospitalized for a suicide attempt. As a result, a medical FFD was initiated, due to safety concerns at work for the employee and others. The employee was asked to provide relevant medical records.**
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> **Conclusions**
> **Mr. Krehbiel has well documented severe alcohol use disorder, and chronic recurrent episodes of serious depression, which together resulted in him making a recent serious suicide attempt. The nature of his serious chronic mental health and substance abuse conditions create ongoing, essentially permanent, unacceptable safety risks to himself and others if he were to work in any safety critical position at UPRR. Because of the chronic and recurrent nature of these severe mental health conditions, these work restrictions are considered permanent.**
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> **However, he does not have manifestations of a psychosis (with thought disorder or delusional thinking) or of mania, bipolar disorder, and he has no history of violence towards others. Therefore, there appears to be no significant safety risk at work to him or others if he were to work in a non-safety critical railroad job. Therefore, he is not given restrictions from working in a non-safety critical railroad job. This case has been discussed with Dr. Jones and Dr. Lewis, who concur with this decision.**
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> **Fitness for Duty Determination**
> **– and Other Action**
> **A. Work Restrictions**
> **The employee is given … the following work restrictions:**

1. **Not to operate company vehicles, on-track or mobile equipment, or fork-lifts.**
2. **Not to work on or near moving trains, freight cars or locomotives, unless protected by barriers.**
3. **Not to operate cranes, hoists, or machinery, if these activities might create a risk of harm to others or a risk of catastrophic injury to the employee.**
4. **Not to work at unprotected heights, over 4 feet above the ground.**
5. **Not to perform work where decisions or actions can affect the safety of others (not to work as a Train Dispatcher or similar safety sensitive positions).**
6. **These work restrictions are permanent..."**

As a result of this determination, Carrier withheld the Claimant from service and placed permanent restrictions on him effective May 15, 2017. In a letter dated May 26, 2017, the Organization requested a Re-Examination in accordance with Rule 52 on behalf of the Claimant and when one did not occur, filed the instant claim on July 31, 2017. On August 2, 2017, the Carrier responded to the claim, writing,

> **"I note the Organization has not designated a physician of the employee's choice to perform the re-examination pursuant to subsection B.1 [of Rule 52]. This designation is obviously a prerequisite to the re-examination. The Organization has not complied with the applicable Rule yet now claims violation of the Agreement…. The issue of Claimant's fitness to perform the duties of an Assistant Signalman had not been resolved pending re-examination. I note the Rule does not establish a time period for the initial re-examination by a physician designated by the Carrier and a physician of the employee's choice. Simply put, the reexamination process is ongoing."**

The Organization replied that it had submitted the report from the Claimant's own physician, releasing him to return to work, but that the Carrier had failed to take steps to re-examine the Claimant in support of its permanent restrictions.

During the on-property handling, the Organization submitted two statements from medical professionals which declared him fit to return to work. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that Rule 52 of the parties' Agreement governs this dispute. It reads, in part,

"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.

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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."

The Organization contends that the restrictions are unwarranted and not substantiated by any medical evidence contained in this record. The Organization contends that the Claimant was subject to permanent restrictions that barred him from working in any safety sensitive position for Carrier, although no re-examination has taken place.

The Organization contends that the Carrier ignored the Organization's request to re-examine the Claimant as required per Rule 52. Furthermore, the Carrier concluded that the Claimant's condition warranted the restrictions based on a review

of the Claimant's records, rather than a re-examination of the Claimant. The Organization contends that Dr. Holland's review of the Claimant's medical records is not a medical re-examination.

The Carrier contends that the Organization's claim was premature, because it was filed even before the Claimant was to return to work. Furthermore, the Carrier contends that the Organization never provided the Carrier with the name of the "Rule 52(B)" designated physician and that the Organization has failed to show that there is a dispute between the Carrier's designated physician and the Claimant's physician. The Carrier contends that while the Claimant's physician said that he could return to work, she did not refute the restrictions placed on the Claimant.

The Carrier contends it has the managerial right and a duty to determine whether its employees are able to safely perform the jobs to which they are assigned. The Carrier contends that the Organization has failed to prove violation of Rule 52. In accordance with the federal standards for the safety sensitive industry, the Carrier made the reasonable decision to place workplace restrictions on the Claimant, and its decision was neither arbitrary nor capricious. The Carrier contends that it has re-examined the Claimant's medical file multiple times, and there is nothing in it to trigger a third doctor panel.

Firstly, the Board disagrees with the Carrier's contention that the request for re-examination was filed prematurely. Once the Carrier notified the Claimant that he was permanently disqualified from all safety-sensitive railroad work, thereby preventing him from returning to his assignment, he had a viable claim.

Secondly, with respect to the merits of the claim, there is ample Board precedent establishing that the Carrier has the right to set reasonable medical restrictions, so long as the decision was not made in bad faith, arbitrary, or capricious. "It has long been held that '[q]ualification, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination.'" Third Division Award 28138. See also, Third Division Award 35808. "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." Third Division Award 43879.

The Organization argues that while the Carrier may set reasonable medical restrictions, those restrictions may not be arbitrary or unreasonable in nature and may not be used to arbitrarily withhold employees or to fail to timely return them to service. Furthermore, it argues persuasively that the exercise of any reserved managerial right may be constrained by the specific provisions of Rule 52.

In Rule 52(B), the parties agreed to a multi-step process to be followed when an employee feels that his medical condition does not warrant removal from or restriction of his return to service. The employee may request re-examination following notice of his disqualification.

The Claimant was examined by his own physician who wrote on May 15, 2017, that he would be able to return to work without restrictions on July 12, 2017. However, before that date, the Carrier's MRO reviewed the Claimant's medical records and concluded that the Claimant's diagnosed condition warranted permanently restricting the Claimant from working in any safety critical railroad job, thereby preventing him from continuing in Carrier's service as an Assistant Signalman.

It was this decision that the Organization sought to appeal, requesting a re-examination of the Claimant within 30 days of the notice of disqualification. The Carrier argues that the Organization failed to designate a physician of the Claimant's choice to perform the re-examination pursuant to subsection B.1 of Rule 52, and thus, the right to Request Re-examination was never properly triggered.

Previous determinations by this Board make clear that an examination by the Claimant's own physician that preceded the decision to disqualify him does not constitute a "re-examination" by a physician of the employee's choice under Rule 52. See, Third Division Award 43879. Additionally, the medical opinion submitted by the Organization dated October 4, 2018, was provided by an APRN, which does not satisfy the Rule 52 requirement that the Claimant be re-examined by a "physician of the employee's choice who will [be a graduate] of a Class (A) medical school of regular medicine." Although the Claimant's physician also submitted a second statement, there is no evidence that the Claimant was "re-examined" in light of the restrictions and the physician's opinion does not address the concerns identified by the CMO. Thus, the statement cannot serve as a re-examination under Rule 52.

Therefore, as pointed out by the Carrier, the Organization has not yet designated a physician who will re-examine the Claimant in light of the restrictions

placed on the Claimant by the Carrier's CMO. Furthermore, the process is "on going" and Rule 52 places no time limit restrictions on the process, so long as the initial request is made timely. Since there has been no re-examination of the Claimant by physicians designated by the Carrier and by the employee, this Board has no basis on which to evaluate the reasonableness of the Carrier's determination. On this record, the Board is constrained to find that the Organization has failed to show a violation of Rule 52.

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 23rd day of October 2020.