

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44315
Docket No. SG-45671
20-3-NRAB-00003-190585**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(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 R.G. Bohner, for return to service with compensation for all lost time, including overtime, and with benefits unimpaired from May 29, 2018, continuing until he is returned to service, account Carrier violated the current Signalmen’s Agreement, particularly Rules 52 and 65, when, on May 29, 2018, it improperly withheld the Claimant from service because of a supervisor’s fit for duty 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.

At the time this dispute arose, the Claimant was assigned to a Skilled Signalman on a Zone Gang position in Carrier's Signal Department. The Claimant was hired by the Carrier in July 1994.

In May 2018, the Claimant's supervisor, Victor Castillo, Jr., observed the Claimant "walking slow in the ballast." The supervisor requested that the Claimant undergo an ETT (Exercise Tolerance Test) to ensure that he could then withstand a FFE (Functional Field Evaluation). The Claimant was removed from service on May 29, 2018. That same day, the Claimant consulted with his personal physician who advised that he was "fit for duty with no restrictions."

On May 31, 2018 the Carrier mailed a letter to the Claimant stating, it had come to "my attention that you may be experiencing some health problems based on recent observations of your work performance. I am concerned about your personal safety and welfare." The letter has no signature and does not identify who sent it.

On June 6, 2018, the Organization filed a claim on the Claimant's behalf, asserting violations of Rule 52 and 65 of the parties' Agreement. On July 19, 2018, the Claimant passed the ETT and a FFE was performed. By letter dated August 9, 2018, the Claimant was notified that he was restricted from kneeling and squatting and was not capable of performing as a Skilled Signalman. It states,

"Upon review of medical documentation available to Union Pacific Railroad, Health and Medical Services has determined that you are medically cleared to return to work with the following restrictions, effective August 07, 2018:

- Kneeling – Prohibited**
- Squatting – Prohibited**
- Work without adherence to HMS protocol – Prohibited**
- The employee is NOT capable of performing work as Skilled Signalman"**

There is no dispute that the "medical documentation" referred to in the letter is the results of the FFE performed on July 19. No other examination of the Claimant was undertaken by the Carrier.

The Organization contends that the Carrier violated the parties' Agreement, particularly Rules 52 and 65, when it improperly withheld the Claimant from service due to alleged permanent work restrictions, even though the Claimant's physician found him healthy and fit to return to duty with no restrictions. The Organization also contends that the Carrier failed to notify the Claimant in writing of his disqualification. Further, the Organization contends that the Carrier failed to select a third physician for a Fit for Duty Examination of the Claimant in a timely manner, after the Organization requested it.

The Organization further contends that the Carrier based its arbitrary restrictions on a review from Carrier Officers who conducted the Fitness for Duty Evaluation. Carrier should have selected a physician who was a medical specialist to re-examine the Claimant and the restrictions it placed on him. Carrier's failure to re-examine the Claimant has effectively halted the process that is guaranteed to employees who feel their restrictions are not justified.

The Carrier contends that at no point did the Organization ever provide the Carrier with the name of the Claimant's designated physician; and at no point did the Organization ever demonstrate there was a dispute between the Carrier's and the Claimant's designated physicians concerning the Claimant's diagnosis. As such, there was nothing upon which to hold a third doctor panel. Therefore, the Carrier contends that there has been no violation of the Agreement.

The Carrier contends that it possesses the managerial right to determine fitness for duty and in fact, the Carrier has a duty to the general public and industry to make such determinations.

The parties' Agreement, at Rule 52 and Rule 65, provides, 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....

RULE 65 - LOSS OF EARNINGS

An employee covered by this agreement who suffers loss of earnings because of violation or misapplication of any portion of this agreement will be reimbursed for such loss."

Here, there is no question that the Claimant was disqualified from his assignment as a Skilled Signalman as the result of an examination conducted under the Carrier's rules governing physical examinations. Pursuant to Rule 52, the Claimant and his General Chairman were to be notified in writing of the disqualification. While the Claimant was removed from service on May 29, 2018, the first written notification to the Claimant of his disqualification was not until August 9, 2018, after the Organization had filed its claim on his behalf.

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.

While the Claimant was removed from service on May 29, 2018, he was not given written notice of his disqualification until August 9. There is no record of notification being given to the General Chairperson. By the time this claim was filed, the Claimant had not been given the written notification of the reasons for his removal that he was entitled to. The Carrier's unexplained failure to comply with Rule 52 at the time the Claimant was disqualified left him in limbo for several months. Therefore, the claim must be sustained. The Claimant is entitled to compensation for the period he was held out of service without written explanation. However, because no physician has re-examined him since the removal and declared him fit to return, this Board cannot order his reinstatement at this time.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of October 2020.