

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44339  
Docket No. 44520  
20-3-NRAB-00003-170680**

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

**(BROTHERHOOD OF MAINTENANCE OF WAY  
(EMPLOYES DIVISION – IBT RAIL CONFERENCE  
PARTIES TO DISPUTE: ( (UNION PACIFIC RAILROAD COMPANY (former  
Southern Pacific Western Lines)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier, commencing on May 13, 2016 and continuing, improperly removed and withheld Mr. B. Green from service (System File AE-1632S-101/1664762 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall compensate Claimant B. Green ‘... all hours from May 13, 2016 until he is returned to service. Furthermore, we request that the employee be returned to service immediately and that the Carrier compensate employees (sic) for any additional expenses he incurred because of the Carrier’s wrongful termination and/or removal from service in which Claimant was not accorded due process or any other rights listed within Rule 45 or Rule 32. Lastly, said compensation shall be in addition to any payment the Claimants (sic) may have already received.’”**

**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.

B. Green (Claimant) was working as a track supervisor assigned to the headquarters located in Newark, California. On May 13, 2016 the Claimant was removed from service after his manager, R. Brennan, voiced concerns about his ability to remain awake while on duty. The Organization filed the instant claim on July 6, 2016 on behalf of the Claimant alleging the Carrier violated the Agreement when it failed to provide him with written notification following his removal from service. The parties were unable to resolve the matter after processing it in the normal and customary manner on property. This dispute is now properly before this Board for final adjudication.

Rule 32 of the Agreement provides:

**Rule 32 – PHYSICAL EXAMINATIONS**

- (a) **HELD OUT OF SERVICE DUE TO PHYSICAL DISQUALIFICATION** – An employee removed from service by the Company due to physical conditions will be advised in writing at the time of such action. In such cases the Company may require the employee to submit to physical examination prior to returning to service.
- (b) **PHYSICAL DISQUALIFICATION** – If an employee is disqualified from service or restricted from performing service to which he is entitled by seniority on account of his physical condition, and feels that such disqualification is not warranted, the following procedure will govern... (emphasis added)

The Organization argues this language is clear and unambiguous. When the Carrier removes an employee from service due to physical conditions, it must provide written notification. It failed to do so in this case. The Organization contends the record lacks

evidence that the Carrier's decision was based on a medical evaluation by a physician but rather was made by the Claimant's supervisor. According to the medical history created by the Carrier's Health and Medical Services (HMS) department, the Claimant was cleared to remain on duty by the Carrier's physician, Dr. Lewis on March 23, 2016. The Organization contends no further medical determinations were made. The Organization concludes the Claimant's removal from service was arbitrary, capricious and unreasonable. It cites the Board's decision in Third Division, Award 25186 which held in part, "Carrier must have a rational basis for its determination and must make its determination based on some reasonable standard."

The Carrier argues it has the right to ensure employees are able to safely perform the duties of their position. It also argues the evidence of record supports its decision to remove the Claimant from service. The Claimant's supervisors became concerned because the Claimant was observed sleeping during a job briefing. In November 2015 a supervisor, J. Tovar, contacted the Carrier's HMS to report the Claimant was having difficulty remaining awake while on duty and self-reported that he suffered from headaches and migraines. Over the next several months, HMS communicated with the Claimant by phone and certified letters, but the Claimant did not respond. The Claimant was eventually scheduled for an evaluation at HMS on February 23, 2016. On March 23, 2016, test results showed the Claimant was at risk for sleep apnea. He was advised to have a sleep study and was permitted remain on duty. Several days later HMS followed up with the Claimant to ask when the sleep study would be completed. Several months later, on May 13, 2016, the Claimant's field supervisor Brennan contacted HMS to express concerns about the Claimant's ability to work safely. On May 16, 2016 the Claimant was removed from service. According to the Medical Comments History, a representative from HMS spoke with the Claimant and advised him of the safety concerns. The Claimant "voiced his understanding of being removed from service...states that his sleep study is scheduled for 6/9/16...will provide results once it is done." This last communication, the Carrier contends, satisfied the requirement to make notification to the Claimant concerning his removal from service. The Claimant eventually completed the sleep study and was returned to service on September 6, 2016.

The Carrier argues it has the right to set medical standards for its employees and can remove an employee from service when there are medical concerns. The employee can return to service once he has been medically cleared for duty. The Carrier contends there is no evidence that its decision to remove the Claimant from

service was arbitrary, unreasonable or inappropriate or that it violated the Agreement. The Carrier points out the Organization's only valid assertion of an Agreement violation is that the Claimant was not informed in writing why he was removed from service. The Carrier maintains the Claimant was fully aware and even acknowledged an understanding of the reasons for his removal. The Organization is focusing on a technicality which the Carrier contends is insufficient grounds to sustain the instant claim. The Carrier cites numerous Board awards which all found the Carrier has the right and responsibility to ensure employees can safely perform their duties.

The Board has reviewed the on-property record, the parties' submission and all supporting documentation, including cited case precedent. Board decisions have consistently held that Carriers have the right and responsibility to make determinations about its employees' physical ability to perform the duties of their positions. Carrier determinations that an employee cannot operate safely are not overturned unless there is evidence that those decisions were made in an arbitrary or capricious manner or in bad faith. It is the Organization's burden to prove the Carrier acted in such a manner. Boards have also been reluctant to question a Carrier's standards of review. Awards reviewed include, but are not limited to Third Division Awards 38251, 36725, 39940. No such evidence exists on the record before us. There is also no evidence that the Claimant was kept out of service unnecessarily. It took several months for the sleep study to be conducted and for the results to be reviewed.

There is clear language in the Agreement requiring the Carrier to notify an employee in writing when he is removed from service. There is no evidence on the record before us that requirement was met. There are, however, several indications that HMS was involved in an interactive process with the Claimant about his medical condition(s). When the Claimant was removed from service on March 16, 2016, he verbalized an understanding of the reason(s) for his removal. He further indicated a sleep study would be conducted on June 6<sup>th</sup> and that he would communicate the results. The Carrier's failure to issue a written notification is insufficient cause to sustain this claim.

The claim must therefore be denied.

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**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 6th day of January 2021.**