

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44921
Docket No. SG-47176
23-3-NRAB-00003-220041**

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**

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.L. Cokendolpher, for re-examination and return to service with compensation for all lost time, including overtime, account Carrier violated the current Signalmen’s Agreement, particularly Rule 52, when, on September 1, 2020, it improperly medically disqualified and withheld the Claimant from service. Carrier’s File No. 1742297, General Chairman’s File No. S-52(B)-74, BRS File Case No. 4620, NMB Code No. 104 - Out-of-Service Discipline: Miscellaneous/Other Not Specified Above.”

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 of this dispute, the Claimant was assigned as a Signal Foreman on

Gang 2148 in the Carrier's Signal Department. On August 25, 2020, the Claimant was contacted about his Fitness for Duty status. He was told that because of a previous doctor's note, the Claimant was restricted from operating any DOT vehicles. The Claimant denied that he had the underlying medical condition. The Claimant was told that he could not return to work until he had a cardiology and neurology evaluation. On September 1, 2020, the Carrier sent a letter to Claimant stating that his "temporary restrictions cannot be accommodated" and that his medical leave of absence was extended from August 26 through September 26, 2020.

The Claimant went for a medical examination on September 1, 2020. His doctor indicated that his EKG and brain MRI were unchanged from 2015 to 2019. The Claimant was examined again on September 4, and September 10, 2020. The Claimant faxed the physician's notes to the Carrier on September 15, 2020. Having heard nothing, the Claimant contacted the Carrier on September 21, 2020. The next day, the Carrier requested additional medical documentation. On September 23, 2020, the Carrier's Director of Medical Services wrote, "I have reviewed the medical records and it appears to me that he has done what he needs to do." On September 30, 2020, the Chief Medical Officer ("CMO") was made aware of the Claimant's situation for the first time. On October 1, 2020, she received the medical information that had been shared with the Carrier on September 15, 2020. On October 2, 2020, the Carrier released the Claimant to return to work without medical restrictions.

In a letter dated September 10, 2020, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated November 6, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the Carrier failed to follow the provisions of Rule 52 of the Agreement. The Organization contends that once the Claimant objected to his removal from service, the Carrier should have selected a physician to re-examine the Claimant and the restrictions that were placed on him. The Carrier's failure to reexamine the Claimant prevented the Rule 52 process from moving forward. The Organization contends that Rule 52 provides protection for employees who feel that they have been improperly removed from service.

Rule 52 states,

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.

The Organization contends that the Carrier's position that the Claimant was unfit for duty is dubious in light of the Claimant's successful performance for nine months prior to his removal from service. The Organization contends that the Carrier neglected to provide timely and concise requirements for the Claimant's return and denied the Claimant the right to a re-examination. The Carrier failed to honor the Claimant's proper request for a third party examination.

The Organization contends that even if the Carrier had legitimate reasons to place restrictions on the Claimant's work, he was kept out of work for an excessive period of time. The Claimant timely satisfied the Carrier's requirements but still was not returned to work. Once the Carrier realized it was already in possession of the proper paperwork, the Claimant was returned to work.

The Organization acknowledges that the Carrier has the right to establish reasonable physical standards for its employees to ensure that they can safely perform their assigned duties. Here, the Carrier based the restrictions on a misdiagnosis from

nine months earlier. The Organization contends that the Carrier cannot show that the Claimant was incapable of performing his regular duties or that he represented a threat to his or others' safety.

The Organization contends that the Carrier assumes the risk of fallibility when it disqualifies an employee. If the Carrier acted improperly, the Carrier must make the Claimant whole for any monetary losses.

The Carrier contends that the Organization has failed to prove its case. The Carrier contends that it had a managerial right and a valid basis to place medical restrictions on the Claimant based on the information provided by his doctor. The Carrier contends that it did not excessively delay in assessing the Claimant's fitness for duty and removing the restrictions.

The Carrier contends that the Claimant's medical records indicated that he had suffered a medical episode. The Carrier contends that it was obligated to review his condition to ensure that he was not putting himself or others at risk. Throughout the review process, the Carrier's Health and Medical Services team interacted with the Claimant. The Carrier contends that it placed narrowly tailored workplace restrictions on the Claimant. The Carrier restricted the Claimant from driving Company vehicles or performing safety sensitive work until he could be medically cleared to return to service.

The Carrier contends that it never medically disqualified the Claimant from his position but placed narrowly tailored workplace restrictions on him. The Carrier contends that Rule 52 did not apply to the Claimant's medical restrictions. The Carrier contends that it cannot be held responsible for the Claimant's doctor placing allegedly incorrect information in his medical records. The Carrier contends that the Claimant never refuted the on-property medical documentation.

Under the parties' Agreement, the Carrier has the managerial right to medically disqualify an employee from service based on a physical or mental examination. The Organization does not dispute this authority. But the Organization rightly points out that exercise of this right must be reasonable and expeditious. The fact that the Claimant's removal from service was caused by work restrictions rather than a medical disqualification does not change the Carrier's obligation to make a determination rationally and promptly.

The Board finds that the Carrier's initial decision to place work restrictions on

the Claimant was neither arbitrary nor unreasonable, in light of the concerning notations in his medical file. Although the Claimant asserts that the medical information was false, the Carrier would have no way to know his true condition without requiring more testing. This Board is not in a position to substitute its judgment for that of the Carrier in determining fitness for duty.

The Organization charged the Carrier with delaying excessively in removing the work restrictions because the Claimant provided all the requested documentation by September 15 but the CMO did not release the Claimant to return to work until October 2. No explanation was given as to why it took two weeks for the CMO to review the Claimant's records and make a determination.

In Second Division Award 7033, it was found that when a carrier medically disqualifies an employee and holds him out of service, the carrier "assumes the risk of fallibility." Here, the Carrier had all the information it had requested in its possession but for unexplained reasons, it took two weeks to review the records and make a determination that the Claimant could return to work without medical restrictions. The Board finds the delay to be unreasonable under the circumstances. We will sustain the claim for the period from September 15 to October 2, 2020.

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 21st day of April 2023.