

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6920**

Kansas City Southern Railway Company)	
)	
and)	Case No. 20
)	Award No. 20
)	
Allied Federation of the Brotherhood)	
of Maintenance Way Employes)	
Division of the International)	
Brotherhood of Teamsters)	

STATEMENT OF CLAIM:

1. Carrier violated the Agreement of July 1, 1979, Rule 1. Scope, Rule 2. Seniority, and Rule 13. Discipline and Grievances, when it removed Claimant A. Fincher from duty pending a fitness-for-duty examination and thereby denied Claimant's right to work as a Machine Operator beginning on January 7, 2010 and continuing.
2. As a consequence of the violation referred to in Part 1 above, Claimant should be immediately returned to service and made whole for lost wages, reimbursed for expenses incurred which would have been covered by benefits and restored seniority and benefits.

Findings:

Public Law Board 6920, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employes within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this dispute were accorded due notice of the hearing.

Claimant is a Machine Operator with date of hire March 5, 1991. His work schedule is "4/10" which is ten (10) hours daily, four (4) days a week. On June 18, 2001 he incurred an on-the-job injury to his back when the gang he was assigned to removed a frog from a track.

On July 14, 2008 the Claimant informed the Carrier that his physician restricted him to an eight (8) hour work day. The Carrier notified Claimant that it could not accommodate a permanent 8-hour work restriction whereupon Claimant was removed from service until February 2, 2009 when he returned to duty without the 8-hour restriction.

Since returning to duty on February 2, 2009 the Carrier asserts that Claimant has reported off work after 8 hours on occasions and asserts a restriction not to lift over fifty (50) pounds. According to the Carrier, Claimant has self-imposed the 8-hour work and lifting restrictions. The Carrier states it accommodated the lifting restriction but cannot accommodate the 8-hour restriction.

On January 6, 2010, Claimant was not operating a machine but on the ground using a shovel with his team when the Roadmaster directed the team to repair damaged track caused by a derailment. Prior to this directive, the Claimant states that he reported back pain to his Foreman and needed to leave which rendered him unavailable for the track repair work.

The next day (January 7, 2010) the Carrier removed Claimant from service pending a fitness-for-duty examination by the Carrier's Medical Management. On January 11, 2010 Claimant's physician examined him and concluded that Claimant could work full time as a Machine Operator with restrictions. On January 12, 2010 the Carrier's physician stated that Claimant "may work [a] 40 hour week as a machine operator."

On February 5, 2010 the Carrier notified Claimant that its Chief Medical Officer (CMO) determined Claimant was not medically qualified to return to service. The Carrier reiterated to Claimant that it cannot accommodate his restriction not to exceed an 8-hour work day. As previously noted, Claimant's work schedule is a 10-hour day.

On March 1, 2010 the Organization filed this claim alleging that holding Claimant out of service is a denial of his right to work as a Machine Operator. BMW cites his physician's conclusion that Claimant can work full time as a Machine Operator with restrictions and the Carrier's physician's conclusion that Claimant "may work [a] 40 hour week as a machine operator."

BMW argues, furthermore, that Claimant has been allowed to work "light duty" since his on-the-job injury of June 18, 2001 as his restrictions have not changed since that date plus the Carrier agreed to continue Claimant's employment pursuant to a settlement dated April 23, 2009.

In the Organization's view, the Carrier's decision to remove Claimant from service on January 7, 2010 breached Rule 1 (Scope), Rule 2 (Seniority) and Rule 13 (Discipline and Grievances).

On May 7, 2010 the Carrier denied the claim:

This matter is procedurally defective in that there exists no contract predicate for the claim brought forth. There simply exists no provision covering restricted or 'light duty.' Without an agreement provision alleged to have been violated, the matter is fatally procedurally flawed for failure to state a claim upon which relief can be based.

The 'facts' set forth in your correspondence are contractually irrelevant, and the rules...cited are wholly inapplicable.

Accordingly, your claim is declined for lack of merit and agreement support.

On June 16, 2010 the Organization appealed the claim denial by restating its arguments and assertions presented in its claim filing.

On August 16, 2010 the Carrier denied the claim appeal by restating its arguments set forth in its claim denial.

On October 20, 2010 Claimant submitted a letter requesting back pay from January 2010 and continuing as well as a return to service. Thereafter the Claimant advised the Carrier's Medical Management that his restriction of July 2010 - - no work beyond 40 hours - - was the most recent update of his medical status.

In late November 2010 the CMO initiated a review of Claimant's medical status; it requested and received Claimant's medical records for the past (2) years from his physician. The Carrier notified the Organization on December 7, 2010 that the CMO's review showed no change in Claimant's condition "and consequently there is not a medical basis for changing [Claimant's] most recent Fitness For Duty determination." That is, not medically cleared to return to service.

The record is vague and inconclusive whether the CMO, at the time of his December 7, 2010 medical determination, was in possession of or otherwise aware that Claimant's physician's recommended on November 29, 2010 Claimant's "return to work with no limitations 11/30/10."


Nevertheless the Carrier, in response to the physician's recommendation, notified the Organization on December 30, 2010 that "the information provided to Medical Management is sufficient to start the [return to work] RTW process for" Claimant.


On January 28, 2011 Medical Management cleared Claimant for return to service.

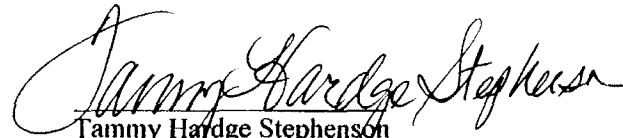
Based on the record established by the parties in the proceeding, the Board finds that the Organization presented insufficient evidence to sustain its allegation that the Carrier's decision to remove Claimant from service pending a fitness-for-duty examination violates Rule 1 (Scope), Rule 2 (Seniority) or Rule 13 (Discipline and Grievances). In the absence of a *prima facie* demonstration that rules have been breached, the claim is denied.

Award:

Claim denied.


Patrick Halter
Neutral Member
PLB 6920 Case No. 20


Kevin D. Evanski
Organization Member


Tammy Haydge Stephenson
Carrier Member

Dated this 14th day
of NOVEMBER 2012