

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISIONAward No. 4949
Docket No. 4927
94-4-93-4-15

The Fourth Division consisted of the regular members and in addition Referee William F. Euker when award was rendered.

PARTIES TO DISPUTE: (American Railway & Airway Supervisors
(Association: A Division of TCU
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(Chicago & North Western Transportation
(Company

STATEMENT OF CLAIM:

- "1. Carrier has violated the Agreement, including, but not limited to Rule 34, withholding claimant, Mr. W. Browning, from returning to service when employee satisfied the Carrier's return to work physical, having been released by the Carrier's physicians.
2. Carrier be required to make claimant whole for all wages and benefits lost due to Carrier's violative actions."

FINDINGS:

The Fourth 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 waived right of appearance at hearing thereon.

On or about January 25, 1992, Claimant, who was working as Foreman at Carrier's Proviso Diesel Shop, sustained an off-duty personal injury that prevented him from working until March 9, 1992, when he was given a release by his orthopedic physician. Following the usual procedure, Claimant was given a back-to-work physical examination by Carrier's physician. He was then returned to service, with certain specified restrictions, effective March 17, 1992. The Claimant's supervisors refused to allow Claimant to resume service until he had a complete and full release from the Carrier's physician. Their stated explanation was that the Motive Power Department had no "light duty program" and, consequently, any employee sustaining an injury, on duty or off duty, could not return to work until he had recovered from his injury. They further assert, this policy applies to supervisors as well as craft workers and the rationale is one of safety.

The Organization rejected his reasoning, contending Claimant was not required to do craft work which they infer is the real reason Claimant was not permitted to return to service.

At the heart of this dispute is the modified release which reads, inter alia, as follows:

"...no work requiring jerking, jamming, pushing, pulling or lifting with the left arm more than five pounds pressure; no climbing; no hammering; no work above shoulder level."

The sole question presented for our consideration is whether the terms of the aforestated release justified Carrier's refusal to allow Claimant to perform service on his former position until he has been granted a full release.

During the on-property handling, we found little discussion concerning Claimant's actual duties other than Carrier pointing out that getting on and off engines had the potential for causing Claimant further injury. The Carrier's Medical Officer had concluded Claimant could not raise his arm above shoulder level so it would be doubtful if he could comply with these restrictions and still perform the work of inspecting locomotives.

It is a well accepted principle that Carrier has the inherent right to make decisions regarding safety of its operations including the well-being of its employees. When those decisions collide with alleged contractual provisions, we must examine the circumstances to determine if those management decisions were made in good faith for safety sensitive reasons.

In this case, the burden of proof rests with the Organization to establish by substantial evidence the merits of their claim. This burden requires more than assertions to prove Claimant was physically capable of safely performing all of the supervisory duties of his assignment with one useful arm. Common sense dictates otherwise and so does Carrier's recitation of Claimant's duties, some of which would clearly require the use of both arms simultaneously. Moreover, the mere idea that another employee, sometime in the past, may have been permitted to work with an arm in a sling, does not merit consideration in this case. That could be the reason Carrier decided at this time it was not worth the risk. Managerial decisions regarding safety will only be second guessed where those decisions appear to be orchestrated by a clear and evident attempt to circumvent the Agreement. The Organization has asserted, but not proven that to be a fact in this case, so the claim must be denied.

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 Fourth Division

Dated at Chicago, Illinois, this 2nd day of December 1994.