

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 26039
Docket No. R44675
04-1-97-1-W-1452**

The First Division consisted of the regular members and in addition Referee Charles P. Fischbach when award was rendered.

PARTIES TO DISPUTE: (Roger Eatmon
(Wisconsin Central Railroad Ltd.

STATEMENT OF CLAIM:

“Reinstatement of Roger Eatmon and pay for all time held from service as the result of the Wisconsin Central Limited not allowing Claimant to be called even though Carrier medical consultant released him for full unrestricted duty on Feb. 18, 1997 Dr. E. J. Van Cura.”

FINDINGS:

The First 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.

The Claimant was employed by the Carrier as a Conductor in 1994. Prior to the start of his employment, he was given a pre-employment physical examination, during which it was disclosed that he had previously been treated for drug and alcohol abuse. After he was employed, the Claimant was unable to work from March 8 through March 14, 1994 as a result of an off-duty injury. During this brief

absence, the Claimant reported taking pain medication and several anti-depressant drugs. In 1994, he was off work from April 14 through April 25 and May 9 through June 19 because of off-duty and on-duty injuries. The Claimant continued to report that he was taking a variety of prescription pain relievers and anti-depressant drugs.

While the Claimant was being treated for a sore shoulder, he initially was given narcotic painkillers and then over-the-counter pain medications despite his requests for narcotic pain medication, which were denied. From January 19 through January 24, 1996, he was off work as a result of dental and sinus problems which were treated with prescribed narcotic pain relievers. The Claimant was off work for these same problems from February 2 through February 5, during which he filled additional pain medication prescriptions. Shortly after returning to work, he sustained an off-duty shoulder injury and did not perform service from February 19 to March 1, 1996. The doctor who treated the Claimant for this injury noted that he should not be prescribed narcotic pain relievers. Nevertheless, the Claimant went to another doctor who prescribed Daypro, a narcotic pain reliever. After returning to work for a period of ten days, the Claimant again was off work from March 11 through March 29, due to his recurring dental and sinus problems. According to the Carrier, the Claimant, during this period and throughout April 1996, continued to take a variety of prescription pain medications. From April 30 through May 2, he was off work again as a result of his dental problems, for which he was prescribed additional pain medication.

On May 6, 1996, the Claimant began performing service in a light duty capacity because of the continued soreness in his shoulder. The next day while driving a Carrier truck, the Claimant blacked out at the wheel and rear-ended another Carrier vehicle driven by a Carrier employee. Neither the Claimant nor the other employee was seriously injured. After returning to work following this incident, the Claimant was unable to work from May 17 through May 30 due to an off-duty illness. On June 4, 1996, the Carrier's Medical Consultant became aware that he was taking medication for Attention Deficit Hyperactivity Disorder ("ADHD"). He spoke to the Claimant and the doctor who had prescribed this medication and was informed by the latter that the Claimant was being treated for ADHD, manic depression and substance abuse problems. The Claimant took three days off to determine whether the new medication would have any impairing side effects, after which he was allowed to return to work without restrictions.

Throughout the summer of 1996, the Claimant continued to work while receiving treatment for his alleged various psychological problems. Although he was also treated for pain in his knee, he was prescribed only over-the-counter pain medications. However, on August 23, the Claimant had another off-duty injury and was off work. While taking over-the-counter medication, he received a prescription for narcotic pain relievers in mid-September. On information and belief, the Claimant putatively indicated to the Carrier's Medical Consultant that he was aware of his addiction to "opiates," but had been in severe pain when he took the narcotic medication. He told the Carrier's Medical Consultant that he only had one pill left and would not take it unless his pain became too severe.

The Claimant was cleared by the Carrier to return to unrestricted duty on October 15, 1996. Two days later, while off-duty, he experienced another blackout and was hospitalized overnight, during which he was diagnosed with "probable seizure, etiology uncertain, although likely related to alcohol or drug abuse." (Carrier Ex. 69-71) After returning to work on October 27, the Claimant, in early November, began engaging in what the Carrier characterized as drug seeking behavior. According to the Carrier, he had seen several doctors on numerous occasions complaining of pain in his chest and was given prescribed narcotic medication to relieve his pain. Besides, he went to two different emergency rooms in November where he received more narcotic pain relievers.

The Carrier maintained that the Claimant violated its policy because he failed to report any of his prescribed medications. This fact, coupled with the Claimant's alleged overuse of narcotic pain relievers, became known to the Carrier when reviewing employee use of its prescription benefits. Although the Claimant, when confronted by the Carrier's Medical Consultant, initially denied taking any narcotic pain relievers during this period, he eventually remembered filling prescriptions for such medication on many occasions in November 1996. Consequently, he was removed from service on December 3, 1996 while his constant use of pain relievers and noncompliance with the Carrier's reporting policy were discussed with him by the Carrier's Medical Consultant and other Carrier officers. The Claimant was soon returned to service with restrictions on his use of prescribed narcotics. Further, he was subject to drug testing, and required to report all medications he was taking.

On December 27, 1996, the Claimant again took a leave of absence due to a non-work related back injury. Over the next month and a half, he was treated by a

doctor and chiropractor, and was prescribed pain medication. The Claimant was released by his doctor to return to duty on February 18, 1997 with no restrictions. Having been apprised of this situation, the Carrier had serious reservations returning the Claimant to a safety-sensitive position without a more thorough evaluation of his physical, psychological and substance abuse problems. To that end, the Claimant was examined by an outside physician certified in both psychiatry and orthopedic medicine. Based initially on his review of the Claimant's medical records, this doctor concluded that the Claimant presented "a great number of risks and liabilities to the [Carrier] and [was] certainly a substantial danger to himself in terms of potential injuries, particularly in light of the unexplained syncopal episodes, and taking into account his job responsibility also poses a significant potential hazard to others." (Carrier Ex. 93) Subsequently, this physician-psychiatrist and a psychologist examined the Claimant on March 17, 1997. Both essentially concluded that he suffered from psychological problems, was a chronic substance abuser since he had a high probability of relapsing to drug abuse because of his failed attempts to respond to substance abuse treatment, and had suffered at least two blackouts which were probably related to drug abuse.

Acting on these medical and psychological examinations and evaluations of the Claimant, including the review of his employment history over the previous 15 months, the Carrier decided that he would not be allowed to return to work as a Conductor, or in any safety-sensitive position. The Claimant was informed of this decision on April 17, 1997. However, he was also informed that his employment was not being terminated. Soon thereafter, the Carrier's Assistant Vice President, Human Resources met with the Claimant to discuss other jobs with the Carrier that might interest him and for which he would be qualified. This discussion also involved the use of an outside vocational counselor to assess the Claimant's vocational strengths and weaknesses. At the conclusion of this meeting, the Claimant was asked to consider his vocational, geographic, and monetary requirements before further discussions on other employment opportunities with the Carrier were resumed.

On May 22, 1997, the Carrier's Assistant Vice President, Human Resources again met with the Claimant. This meeting apparently revealed a lack of interest on the Claimant's part to pursue a non-operating job with the Carrier. Efforts by Carrier Management to have its vocational counselor contact the Claimant were to no avail. In the interim, the Claimant allegedly submitted to his supervisors letters from his doctor and a psychiatrist, dated June 9 and July 24, 1997, respectively,

stating that he was able to return to work with no restrictions. (Employee Exs. D and E) After July 17, 1997, the Carrier and the Claimant were no longer in direct communications.

On July 18, 1997, three months after the Claimant was informed that he would not return to work as a Conductor for the Carrier, the United Transportation Union ("Organization") was certified by the National Mediation Board as the bargaining representative of Carrier Conductors. Several weeks later, on September 29, 1997, the Organization wrote the Carrier requesting that the Claimant be returned to service as a Conductor. The Carrier's response affirmed its earlier stated position that the Claimant would not be permitted to work in a safety-sensitive position like Conductor. Shortly thereafter, the Claimant filed a "Statement of Claim" with the National Railroad Adjustment Board ("NRAB") seeking reinstatement with the Carrier. More than a month later, or eight months after the Claimant was removed from service as a Conductor, the Carrier and the Organization began negotiations on a Collective Bargaining Agreement. Such an Agreement was not in effect prior or subsequent to the instant claim.

After carefully reviewing the record in this dispute, it becomes evident that the disposition of the parties' controversy turns on the procedural requirements of the Railway Labor Act ("RLA") and the NRAB. Section 3, First (i) of the Act provides the NRAB with jurisdiction over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." See Railroad Trainmen v. Chicago River & I.R.R., 353 U.S. 30, 36-37 (1957). Before a dispute can be considered a "minor dispute" under the Act, there must be a written Agreement between the parties. Lancaster v. Norfolk & Western Ry., 778 F. 2d 807, 814 (7th Cir. 1985); see also, Consolidated Rail Corp. v. Railway Labor Executives' Ass'n., 491 U.S. 299, 305 (1989). Here, the Carrier had no Agreement with the Claimant, or the Organization representing workers of his craft, at the time of or subsequent to his complaint. Simply put, since there is no Agreement to interpret, the Board, according to the Carrier, has no jurisdiction to decide this case. Besides, a dispute growing out of a disciplinary grievance or the interpretation of a Collective Bargaining Agreement cannot be presented to the NRAB unless it is handled on the property "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." RLA, Sec. 3, First (i). In the absence of a written Agreement, this process was not triggered in the Claimant's dispute.

Aside from the Act's statutory procedural requirements, the Claimant failed to take advantage of the on-property appeal procedure set forth in the Carrier's Problem Resolution Policy. Under that internal procedure, he had the opportunity to appeal to the Carrier's President the decision removing him from service as a Conductor. The Claimant chose to ignore that procedure. In any event, the Carrier's argument that the Board lacks jurisdiction over the instant claim because it has no Agreement to interpret is well taken. To similar effect, see First Division Award 24990.

Accordingly, the Board has no alternative but to dismiss this case. It should be noted, however, had this case been adjudicated on the merits, it is unlikely that the Claimant would have prevailed.

AWARD

Claim dismissed.

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 First Division

Dated at Chicago, Illinois, this 23rd day of July 2004.