

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10941
Docket No. 10646
2-BRCofC-CM-'86

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(The Belt Railway Company of Chicago

Dispute: Claim of Employees:

1. That The Belt Railway Company of Chicago violated the terms and conditions of the current Agreement, specifically Rule 20, when Mr. H. E. Miller, Lead Car Foreman-Car Department, failed to decline the claim set forth in Local Chairman B. Dearth's letter dated May 22, 1982 within the required sixty (60) day time limit mandate of the rule.

2. That, as a result of resigning his position as a Car Foreman to return to the Carmen's Craft, Mr. F. Fender was forced to subject himself to another physical examination before he could return to work as a Carman in violation of Memorandum of Understanding (Attachment No. 5) of the current Agreement which resulted in lost wages from April 3, 1982 until April 13, 1982, plus the loss of an additional eight (8) hours at the time and one-half rate for April 9, 1982 which was a holiday and a day when he would have otherwise worked.

3. That the Belt Railway Company of Chicago be ordered to compensate Carman F. Fender for eight (8) hours at the pro rata rate of pay for each day from April 3, 1982 until April 13, 1982 and, further, that he be compensated an additional eight (8) hours at the time and one-half rate of pay for April 9, 1982 which was a holiday and which he otherwise would have worked.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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.

Claimant, initially employed by Carrier on May 10, 1978, was promoted to a Car Foreman position, effective February 1, 1980. On June 4, 1981, Claimant suffered injuries to his back in a work related accident, and eventually had surgery for a herniated disc on August 10, 1981. He was released by his physician to return to work as a Car Foreman on October 21, 1981.

On April 2, 1982, Claimant notified Carrier's Superintendent of the Car Department of his resignation as Car Foreman effective that date. On April 5, 1982, Claimant was notified by the Carrier that he had been scheduled for a physical exam on April 7 with a Neurosurgeon to determine his ability to return to work as a Carman. Claimant passed the physical and returned to work April 13, 1982.

The Board finds no support for the Organization's Claim that Carrier violated the 60 day time limit contained in Rule 20 for disallowance of a claim. There is evidence that Carrier timely posted in regular U.S. Mail a letter dated July 21, 1982, in which the Claim was denied in its entirety. The Organization argued that it did not receive this letter until several months past the 60 day deadline for disallowance of the Claim. The Board finds the Organization has failed to overcome the rebuttable presumption that the July 21, 1982, denial was timely received by the Organization before the 60 day limit ran on July 24, 1982. See, Second Division Award No. 10940 for discussion of disallowance letter timely posted but not received within time limits; and Second Division Awards 8725, 8680 and 6878.

Absent a contractual prohibition, the Carrier may require its employees to take a physical examination as long as this requirement is not arbitrarily, capriciously or unreasonably applied. The Board notes Carrier's position that Claimant's job transfer would require an increase in physical effort is uncontested by the Organization. Nevertheless, the Organization submits that a physical re-examination is not permitted upon a change in an employee's position as evidenced by a Letter of Agreement between the Carrier and the Shop Crafts dated May 15, 1940, commonly known as "Attachment No. 5". The Board fails to read Attachment No. 5 as prohibiting, either expressly or impliedly, the physical examination required of Claimant. Indeed, Paragraph 3 of the Letter of Agreement may possibly be read as permitting the examination in question:

"It will be further understood that when it becomes apparent that an employee in service or returning from furlough is obviously unfit, or that we receive knowledge of an employee having a serious accident or a major operation, that the Company will have the cooperation and assistance of the Shop Crafts Committee involved in handling cases of this type to a conclusion; due consideration being given to the facts and the physical condition of the man involved, and where a

certificate is needed to protect the
Company as to a man's physical condition
that it will be furnished by a reputable
physician." (Emphasis added)

In this case the Organization is correct that Claimant was medically authorized to return to full and unrestricted employment October 21, 1981. However, this examination was not predicated on the performance of Carman duties, but rather on Claimant's duties as a Foreman. The Organization at no time contested that Claimant's duties as a Foreman were markedly less arduous than those of a Carman.

The Board finds that it is the Carrier's duty to protect the health of all its employees, especially those employees with a known medical condition which may preclude the performance of certain physical efforts required by a change in position. The Board further finds Second Division Award Nos. 7333 and 9551 to be inapplicable to this case. Neither of these Awards involved the right to work without a physical exam upon a change of position which included a change in physical duties. Further, there is no demonstration under these facts and circumstances that the ten (10) day delay between Claimant's immediate resignation as Car Foreman and his reinstatement as a Carman was unreasonable and excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1986.