

Award No. 4808

Docket No. 4761

2-DM&IR-EW-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis J. Robertson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 71, RAILWAY EMPLOYEES'

DEPARTMENT, A.F. of L.-C.I.O. (Electrical Workers)

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the terms of the current agreement Richard F. Thompson, Electrician, was unjustly withheld from service from June 12, 1963 to August 17, 1963, inclusive.

2. That accordingly, the Carrier be ordered to compensate Richard F. Thompson for all time lost at his applicable rate of pay as a result of being withheld from the service.

EMPLOYEES' STATEMENT OF FACTS: That Richard F. Thompson, hereinafter referred to as the claimant, is a regularly assigned electrician of the Duluth, Missabe & Iron Range Railway Company, hereinafter referred to as the carrier, on the Missabe Division.

The claimant requested and was granted permission on May 6, 1963, to go to a chiropractic specialist in the state of Oregon for treatment of a neck injury, which was previously sustained in the service of the carrier. On June 12, 1963, the claimant reported for duty, whereupon the carrier instructed him to report to their physician for a physical examination. As a result of this examination, claimant was not permitted to return to duty but the carrier gave no reason for refusing to permit the claimant to return to duty. Later, however, the carrier belatedly advised that claimant was being withheld from service because he could not perform heavy work.

A copy of the physical report made by the carrier's chief surgeon on June 12, 1963, and furnished the claimant on the same date. It does not reflect that the chief surgeon disqualified the claimant for service or placed any restrictions on his performance of work.

A previous examination of the claimant by the carrier's chief surgeon was made on May 19, 1962, and claimant was permitted to go to work as lineman in a construction crew. He continued in this capacity until he was furloughed on January 18, 1963, as a result of force reduction.

Due to the position taken by carrier, and in order to expedite the return of claimant to the service, the case was processed by the organization under

3. Rule 37, the applicable rule, does not provide for a penalty payment.

4. The carrier has shown that there is no rule, practice, or consideration in equity that would entitle claimant to the payment claimed.

5. The carrier has not acted arbitrarily or capriciously in the instant case.

6. The claimant was properly withheld in this instance in accordance with the provisions of Rule 37.

The carrier has conclusively proven that there is no basis for this claim and respectfully requests your Honorable Board to find the claim without merit and deny it accordingly.

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 employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute herein.

Parties to said dispute waived right of appearance at hearing thereon.

The claimant, a regularly assigned electrician requested and was granted permission on May 6, 1963 to visit a Chiropractor Specialist for treatment of a neck injury. Thereafter on June 11, 1963 he reported for work and was instructed to submit to a physical examination. The carrier's physician reported that due to certain symptoms the claimant was not qualified for heavy work, and the claimant was notified of those findings on June 17, 1963. He was then advised of his rights under Rule 37 to have a physician of his own choice examine him and to furnish the Chief Surgeon with said physician's findings. Although the claimant's physician's report letter, when first submitted by the General Chairman to the carrier (unsigned), was dated July 11, 1963 it appears that he was examined by said physician on June 25, 1963 and in the opinion of the latter claimant was found able to do heavy work. The carrier's physician refused to act upon the unsigned letter and in the absence of the General Chairman who was on vacation the claimant was advised on July 19, 1963 that the unsigned letter was rejected by the Chief Surgeon. Finally on July 30, 1963 the claimant furnished a signed copy of a letter worded similarly to the unsigned letter of July 11, 1963. Arrangements were then made between the carrier's physician and the claimant's physician to have him examined by a neutral doctor on August 9, 1963. The report of the neutral physician was received on August 13, 1963 by the Chief Surgeon who on August 14, 1963 notified carrier's Director of Safety of the finding that it (the neutral physician's report) showed no restriction on the claimant. The claimant was notified of this and returned to work on Monday, August 18, 1963.

The employes concede that Rule 37 (physical examinations) contains no penalty provisions but in essence argue that the claimant is entitled to be made whole for damages resulting from Carrier's unjust treatment.

We see no need to discuss all the aspects of Rule 37. Suffice it to say that considering the claimant's medical history and the reason which he himself gave for requesting permission to be off on May 6, 1963 reasonable cause existed for the carrier to be apprehensive about his physical ability to perform his regular work and therefore it justifiably required that he

submit to a physical examination. In the light of the fact that there is no penalty rule or provision for pay for time lost in Rule 37, if the carrier discharges its responsibilities under that Rule with expedition it is difficult to see how it can be held accountable for wage loss. It is axiomatic that no one should be permitted to profit by his own dereliction or dilatoriness. In the instant case from the chronology set forth above it is apparent that the claimant delayed from June 17, 1963 to July 30, 1963 in furnishing the carrier with evidence of his physician's findings. This, despite the fact that according to the first unsigned report the claimant was examined on June 25, 1963. No attempt is made to explain this delay. However, it does appear from the neutral physician's report that from mid-June the claimant had been working at re-building his basement. Perhaps this explains the delay. In any event the delay certainly was not chargeable to any action of the carrier. Accordingly, we can find no basis for a sustaining Award.

AWARD

Claim (1) and (2) Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January, 1966.