

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated Rule 58 of the effective Agreement when it failed and refused to bear all of the expense flowing from and to seven physical examinations required of Trackman Frank Rosa on various dates during the period from July 29, 1957 to January 20, 1958;

(2) The Carrier's action in requiring Trackman Frank Rosa to submit to seven physical examinations in a seven-month period was arbitrary, capricious and exceeded the Carrier's discretionary authority and was, therefore, in violation of the effective Agreement;

(3) Because of the violations referred to in Parts (1) and (2) hereof, the Carrier now be required to reimburse Trackman Frank Rosa for all expenses incurred in taking these seven physical examinations, such as transportation, meals, lodging and lost earnings.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, Mr. Frank Rosa, was regularly assigned to the position of Trackman on the section headquartered at Conneaut, Ohio, under the supervision of Section Foreman Tony Julio.

From July 29, 1957, to November 25, 1957, the Claimant was required by the Carrier to undergo six separate physical examinations at Conneaut and/or Cleveland, Ohio, and in each instance was found to be fully qualified to perform the duties of a trackman.

On or about January 9, 1957, the Claimant was again instructed by Foreman Julio to report to the office of the Carrier's Medical Director, Dr. J. W. Houk at Cleveland, Ohio, for a seventh physical examination.

In a letter dated January 20, 1958, Foreman Julio advised Claimant Rosa in part that:

"This is to notify you that notice has been received from Dr. J. W. Houk, Medical Director Nickel Plate Railroad, Cleveland, Ohio, that

OPINION OF BOARD: The record discloses that the Carrier required the Claimant to undergo seven physical examinations within a period of six months. The Claimant was held qualified to work after each of the first six examinations but on the seventh he was found disqualified. The action of the Carrier here would seem to be arbitrary and capricious because if they felt the Claimant was physically and/or mentally disqualified it should not have conducted its medical examinations in such a piecemeal manner. The record, however, does not disclose what, if any, damages the Claimant sustained. A denial Award as to damages is therefore necessary.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was partially violated. Claim 1 and 3 are denied. Claim 2 sustained.

AWARD

Claim sustained as per opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1963.

DISSENT TO AWARD NO. 11648, DOCKET NO. MW-10831

We dissent to the majority action in sustaining part 2 of the claim for the following reasons:

First: The majority expresses the opinion that "The Claimant was held qualified to work after each of the first six examinations but on the seventh he was disqualified." The record shows the Claimant was disqualified on the first examination and the claim had its genesis as the result of such disqualification. On all subsequent examinations prior to that resulting in final disqualification Claimant was only provisionally qualified for service. Second: The majority states: "The action of the Carrier here would seem to be arbitrary and capricious because if they felt the Claimant was physically and/or mentally disqualified it should not have conducted its medical examinations in such a piece meal manner." The majority thereby indulges in speculation and uncertainty as evidenced by the use of the words "would seem." Third: The examinations were arranged for by the Carrier's Medical Director, eminently qualified in the medical profession, and here we have the majority substituting its judgment for that of the Carrier's Medical Staff contrary to prior awards in which this Board has consistently recognized it is not competent to do.

G. C. White
D. S. Dugan
P. C. Carter
T. F. Strunck
W. H. Castle