

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

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

(1) The Carrier violated the Agreement when it withheld Section Foreman James Pando from service June 17 through August 1, 1965 inclusive and from September 27 through November 17, 1965 inclusive. (System File 30-20-149.)

Section Foreman James Pando be paid for all wage loss suffered as a result of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant, who had established and held seniority rights as a track foreman, was on sick leave for the purpose of surgery beginning March 26, 1965.

Following advice from his personal physician (Dr. C. T. Rustin) that he could resume work on June 17, 1965, the claimant so informed Roadmaster J. I. Spees and requested the Roadmaster to arrange for him to be examined by the Carrier's Chief Surgeon.

On July 9, 1965, the claimant was examined by the Chief Surgeon. The claimant was instructed on July 12, 1965 to submit to further examinations by a Cardiologist and by an Ophthalmologist on July 26, 1965.

The claimant was then re-examined by the Chief Surgeon. None of the examinations revealed any medical reason which would prevent the claimant from performing the duties of a track foreman. Consequently, the Chief Surgeon approved the claimant's return to active service.

On August 2, 1965, the claimant returned to work as a section foreman at South Lorain Yards. He subsequently received a letter reading:

"Conneaut, Ohio
August 16, 1965

Mr. James Pando:

Your recent physical examination discloses that you are qualified for duty. You must, however, be re-examined in January 1966 in accordance with Dr. Edmonds' request.

OPINION OF BOARD: The claim herein seeks payment in behalf of Section Foreman James Pando for two periods that he was withheld from service, namely, June 17 through August 1, 1965, and September 27 through November 17, 1965.

The record shows that in March, 1965, Claimant was granted an indefinite leave of absence. The Carrier states that in April he underwent abdominal surgery. On May 10, 1965, he was informed that prior to returning to active service it would be necessary that he be examined by a Company physician. Upon his request to return to active service on July 1, 1965, an examination was scheduled and conducted by Carrier's Medical Director on July 9, which examination raised certain questions concerning the Claimant's vision and heart condition. The Carrier's Medical Director arranged for Claimant to be examined by two medical specialists, a cardiologist on July 12, and an ophthalmologist on July 26. Following receipt of reports covering those examinations, the Claimant was conditionally qualified to return to service, which he did on August 2, 1965.

In the absence of Agreement restrictions, we have previously held in numerous Awards that the requirement of physical examinations is within the discretion of the Carrier. (Awards 14866, 14049, 14249, among others.) We do not find that the delay in completing the examinations was unreasonable under the circumstances, or that the Carrier's action was arbitrary or capricious. We, therefore, find no basis for the claim for the period June 17, 1965, through August 1, 1965, and it will be denied.

As to the period September 27 through November 17, 1965, however, we find no proper basis for withholding the Claimant from service. The record shows that Claimant took his vacation from August 30 to September 24. Arrangements were made for another physical examination at the hands of a Dr. Kieger at Cleveland on September 22, 1965. The Claimant was accompanied to Dr. Kieger's office by the Carrier's General Foreman. However, as a result of a misunderstanding which occurred in the doctor's office, the examination was not completed on that day. On October 7, 1965, the Vice Chairman of the Organization initiated a complaint that Carrier was improperly withholding Claimant from service. Another examination was arranged for at the hands of the Chief Company Surgeon on November 10, 1965, and Claimant was permitted to return to service on November 18, 1965.

We agree with the Carrier that it had a right to require the second examination it ordered for September 22, 1965. However, we think it was the Carrier's obligation to see that such examination was promptly conducted, and we do not agree with the argument that, under the circumstances here involved, the delay in completing the examination was due entirely to Claimant's actions. We will sustain the claim for pay from September 27 through November 17, 1965.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 violated to the extent shown in Opinion.

AWARD

Claim for pay for wage loss by Claimant from September 27 through November 17, 1965, sustained; claim in all other respects denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1968.