NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22640
THIRD DIVISION Docket Number MW-22273

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(New Orleans Public Belt Railroad

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

(1) The Carrier shall reinstate Bridgeman-Helper Frank J. Bertucci, Jr. to service with all seniority, vacation rights, insurance coverage and any other rights unimpaired

and

(2) Claimant Bertucci shall be reimbursed for all compensation loss suffered by him as a result of being withheld from service commencing September 16,1976 (System File 013.7)."

OPINION OF BOARD: Claimant, a Bridgeman Helper, was dismissed from service on June 7, 1976 account unauthorized absence from work. His dismissal was upheld following hearing and investigation. Subsequent appealwas made however, and on September 8, 1976 Carrier, the Organization and Claimant entered into an agreement for his conditional reinstatement to service as follows:

> "It is mutually agreed between the New Orleans Public Belt Railroadandthe Brotherhood of Maintenance of Way Employees representing Bridgeman Helper F. Bertucci, Jr., who was dismissed from service on June 7, 1976, effective 4:30 P.M., for continued unauthorized absence, and with his consent, that:
>
> Mr. Bertucci shall be reinstated to service as a Bridgeman Helper, effective September 16, 1976 without pay for time lost, which shall be considered as discipline time, with seniority and vacation rights unimpaired. It being agreed that Mr. Bertucci shall submit to, and pass, a physical examination by the company physician before being allowed to return to service.

"It is further agreed that this action is being taken on a leniency basis, and that no claim will be submitted in connection with this matter, and those which have been submitted are withdrawn with this agreement.

It is further agreed that this agreement shall not be used as a precedent by either party."

Claimant was examined by a physician for the Carrier on September 8, 1976. That doctor made the following findings relative to Claimant's physical condition as indicated by special x-ray:

"LUMBAR SPINE: AP, lateral, both obliques, and spot lateral of the lumbosacral joint.

Small osteophyte projects from the anterior superior margin of L-3. There is n-wing of the interspace between L-2 and 3. The other intervertebral spaces are well preserved. The spinous and transverse processes are intact. The pars interarticularis of L-5 are hot well visualized on the oblique views because of positioning. There is no evidence of spondylolisthesis."

On the basis of that finding, another Railroad physician recommended that Claimant be rejected for re-employment.

When notified of his physical disqualification Claimant arranged for examination by his own doctor. Relevant to this case, Claimant's personal physician made the following finding of physical conditionby spinal x-ray:

"1. The disc space between Lumbar 2 and Lumbar 3 verterbrae is slightly thin. There is also 2.A spondylolysis of the tarsintra-ticular on the right side of the L5 vertebrae. It is to be noted that there is no sclerosis of the adjacent surfaces of the bodies of L2 or L3 verterorae, and there is ri attempt at calcification br bridging of the discs space of L2 and L3.

Claimant's doctor stated his opinion that the thinning of the disc space should not prevent his return to heavy activity.

The Organization on behalf of Claimant invoked Rule 29 (a) and (b) by letter of October 18, 1976. Carrier by letter of November 4, 1976 refused to participate in further examinations of Claimant under Rule 29, asserting that it had already complied fully with that rule.

Rule 29, which is at issue in this case, reads in pertinent part:

"RULE 9

PHYSICAL EXAMINATION

Should employees coming within the scope of this agreement be required to take-physical examinations,, such examinations will not be more frequent than once each year unless in the opinion of their supervisory officers the employee's health or physical condition is such that an examination should be made for the purpose of informing them of the disability so that proper treatment can be given.

If an employee should be disqualified upon examination by the Railroad's physician and feels that such disqualification is not warranted, the following rules will apply:

(a) The employee involved, or his Representative, will, at his expense, select a physician to represent him and the Railroad, at its expense, will select a physician to represent it, in conducting a further physical examination. If the two physicians thus selected shall agree the conclusions reached by them will be final.

(b) If the two physicians selected in accordance with paragraph (a) should disagree as to the physical condition of such employee, they will select a third physician at the joint and equal expense of the Railroad and the employee, who shall be a practitioner of recognized standing in the medical profession and a specialist in the disease, or diseases from which the employee is alleged to be suffering. The board of medical examiners thus selected will examine the employee and render a report within a reasonable time, not exceeding fifteen (15) calendar days after such examination, setting forth his physical condition

"and their opinion as to his fitness to continue service in his regular employment. The opinion of any two such physicians will be accepted as final. Should the decision be adverse to the employee and it later definitely appears that his physical condition has improved, a re-examination will be arranged after a reasonable interval, upon request of the employee and upon presentation of evidence from his physician that his condition is improved to the extent of making him fit for service."

The Carrier responded that Rule 29 had already been complied with since two doctors had examined Claimant and were in agreement regarding his "physical condition" i.e. thinning of the disc space. Accordingly, Carrier maintained that no further action was required under Rule 29 and has refused to date to participate in any further physical examination of Claimant.

Carrier correctly points out that the cited Rule 29 provides for medical arbitration in Paragraph (b) upon prior disagreement regarding "physical condition" by the partisan doctors following the "further examination" called for by Paragraph (a). That argument, however, begs the question *in this* case which is whether, on the facts of record, Paragraph (a) has in fact been complied with by Carrier. We conclude that Carrier has failed to meet its obligation under that Paragraph. It is pure sophistry to suggest that the initial examination by Carrier doctor may be coupled with later examination by Claimant's doctor in fulfillment of the obligation under Rule 29(a). The plain words of Rule 29 are to the contrary. The state of events as of October 18, 1976 was, in the words of Rule 29, that Claimant had been disqualified by the Railroad's physician and *"felt* that such disqualification was not warranted." His feelings in that regard were buttressed by an examination conducted by his own physician. Under Carrier's rationale, Claimant would. have been able to invoke Paragraph (a) had he protested the disqualification based solely upon his feelings that it was unwarranted, but he somehow waived his right to further examination by supplementing his "feelings" at that time with medical evidence. That theory cannot withstand scrutiny in light of the plain language of Paragraph (a). Rule 29(a) speaks of a "further examination" by a physician selected by the Railroad and a physician selected by the employe or his Representative. (Emphasis added) The plain meaning of the words are inescapable that Rule 29(a) gave Claimant the right to another or second physical examination by a Railroad physician for comparison with a physical examination by his

own doctor. To date he has been denied that right by Carrier and accordingly no one knows whether the two physicians thus selected agree in their conclusions. At this point therefore, it is premature to argue whether medical arbitration under Paragraph (b) is warranted. There is no question however, that Claimant has been denied improperly the "further physical examination" to which he was entitled under Rule Q(a). The question of damages is at this point in time conjectural and dependent upon the conclusion of the physicians of a physical examination as to Claimant's condition. This dispute is remanded to the property and Carrier is directed to comply with the provisions of Rule 29(a) of the Controlling Agreement es to the Claimant. Jurisdiction is retained by this Board to resolve further questions which may arise regarding implementation of this Award and the computation of such damages, if any, as may be warranted by the outcome of the physical examination ordered under Rule 29.

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 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 violated.

A W A R D

Claim remanded to the property for handling consistent with the foregoing Opinion. Jurisdiction is retained in this Board as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1979.