

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 22944

Docket Number **MW-22273**

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(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: The operative factual situation and respective positions of the parties in this case were clearly and completely set forth in our Award No. 22640 dated November 30, 1979.

In our Award No. 22640 we indicated **that** this Board would retain jurisdiction of this dispute pending the **outcome** of Carrier's directed compliance with the provisions of Rule 29(a) which requires:

"(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."

The Board has **now** been advised by Carrier that they have **made** no less than five (5) separate attempts - including the sending of a letter via Certified **U. S. Mail** for which a signed receipt was received - to contact Claimant Bertucci to arrange for the examination required by **Rule** 29(a). To date, claimant has not responded to any of the **communications** directed toward him in this regard. Carrier has, therefore, petitioned this Board to dismiss this claim because:

"Carrier has made every attempt to comply with Third Division Order, Award No. 22640, Docket No. M-22273, and Claimant has **made** no effort on his behalf to co-operate **in** fulfilling his part, in relation to Rule **29(a).**"

From the record of events **now** before this Board, it is apparent that claimant is attempting, for reasons **known** only to him, to prevent the orderly progression ordered by this Board for the **resolution** of **this** dispute. As we observed in Award No. 13941 (**Dorsey**) of this Division:

"There must be a termination to an adversary proceeding and the parties bear the responsibility of protection of their respective interests. The situation herein presented is analogous to a party failing to appear at a trial in a civil action set for a day certain, whereupon the court enters judgment on the pleadings or **ex parte** evidence. *****.**"

Here likewise, **Claimant Bertucci**, on whose behalf this proceeding was initiated and progressed bears the responsibility of protection of his claimed rights. **He cannot**, with impunity, ignore Carrier's attempts to arrange for the examination which is required to resolve this dispute.

Therefore, this Board now directs that Carrier will **make** one final attempt via certified mail, return receipt requested, or by personal delivery evidenced by receipt, to notify Claimant **Bertucci** to appear for an **examination** on a day certain on which an appointment can be arranged with the appropriate physician(s). If claimant fails to appear for and submit to the scheduled examination, this Board will conclude that he is **no** longer interested in pursuing this dispute and we will thereupon order that it be dismissed with prejudice.

The retention of jurisdiction as stipulated in Award No. 22640 is hereby repeated and renewed pending the outcome of the action-directed hereby.

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 Employees involved in this dispute **are** respectively Carrier and **Employees** 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 jurisdiction is retained in this Board as indicated in the Opinion.

A W A R D

Claim remanded to the property for handling consistent with the foregoing Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of August 1980.