

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24277
Docket Number MW-24146

John B. La Rocco, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees** -
(Denver and Rio **Grande** Western Railroad Company

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

(1) **Claimant** Andrew L. Young shall be reimbursed for all compensation loss suffered by him AS A result of being improperly withheld from service beginning January 31, 1980 (System File D-8-80/MW-25-80)."

OPINION OF BOARD: To fully understand the issue presented in this case, we must relate the facts in sum detail.

During the period from 1972 to January 2, 1980, Claimant, a section laborer, was **medically disqualified** from service. In the latter part of 1979, Dr. Boyd, a physician affiliated with the Carrier, thoroughly examined **Claimant** and concluded that he could return to his former position on the section gang on January 2, 1980. There is **some** confusion in the record regarding whether or not **Claimant** misled Dr. Boyd **concerning the** job duties of a section laborer. The **Organization asserts** Dr. Boyd was fully aware that Claimant would be working around **moving** trains and power **equipment**. However, the Carrier declares that Dr. **Boyd thought he was returning** Claimant to a job where Claimant would not be working around mechanical equipment.

While sweeping a switch on January 30, 1980, **Claimant** suddenly lost consciousness for **several** minutes. Claimant was treated at a hospital and released the **next** day. **The** attending physician **at the** hospital instructed **Claimant** to **undergo an examination** by Dr. Nay, a neurologist. Dr. Nay certified **that Claimant** could return to service on February 5, 1980. A cardiologist **also** examined Claimant and said he could return to service on February 11, 1980. The cardiologist surmised **that** since **Claimant** was suffering from acute bronchitis with pleurisy, his loss of consciousness on January 30, 1980 was probably due to his **temporary** lung illness.

Dr. **Boyd reexamined** Claimant on February 15, 1980. After talking with the Section **Foreman** who witnessed **Claimant's** loss of consciousness and evaluating the results of his February 15, 1980 examination, Dr. Boyd **recommended** that the Carrier disqualify Claimant **from** service due to a seizure disorder. In his report dated February 15, 1980, Dr. Boyd referred to Claimant's loss of consciousness on January 30, 1980 and stated **as** follows: "It is possible, **as** **Doctor** Nay believes, that the patient (Claimant) merely fainted **and** that this was the result of his lung problem". However, Dr. **Boyd** concluded that **Claimant** had suffered a grand **mal** seizure. On March 15, 1980 the Carrier physically disqualified Claimant **from** service.

After the Organization instituted this **claim**, in a letter dated September 30, 1980, Dr. Nay reiterated his opinion **that** Claimant "... did not have a grand **mal** **convulsion**, but rather he fainted". Dr. Nay again emphasized that "... Claimant should be released to return to work as a section laborer".

The Organization urges this **Board** to **convene** a Board of Physicians in accord with Rule 24(a), (b), and (c). According to the Organization, a panel of doctors is necessary because the attending hospital physician, the cardiologist, and Dr. Nay all **authorized** Claimant to return to work. The opinions of these **medical** experts, the Organization argues, constitute evidence that the Carrier arbitrarily disqualified Claimant. We note that the Organization is not directly challenging the Carrier's medical standards for a section laborer, but rather the Organization contests the manner **in** which the Carrier has applied those medical standards to Claimant.

On the **merits**, the Carrier **avers** that **Claimant's first disqualification** (in 1972) continues to be effective because Claimant misrepresented his job duties **in** order to gain Dr. Boyd's approval to return to service on January 2, 1980. If Claimant had accurately articulated the tasks which a section laborer regularly **performs**, Dr. Boyd would not have rescinded the 1972 disqualification. Lastly, the Carrier contends that a Rule 24 **Board** of physicians is **unnecessary** since there is no **real conflict** among the doctors who examined **Claimant**. The Carrier maintains that all the medical data in the record conclusively demonstrates that **Claimant** suffers from epilepsy and he was properly disqualified under **the Carder's** applicable medical standards.

As a threshold issue, the Carrier **contends** that the claim presented to this Board for adjudication is not the **same** claim which the Organization filed and progressed on the property. This **Board** notes that the claim before this Board contains different language but the **fundamental** essence of the claim (as well as the Organization's requested relief) is exactly the same **as** the claim handled on the **property**.

The question before us is whether there is substantial **disagreement** whether Claimant's physical condition among the examining physicians to warrant the establishment of a **Board** of Physicians as provided by Rule 24 of the applicable Agreement. **Claimant's** disqualification in 1972 is not pertinent since the Carrier **found him** physically fit to return to **service** as a section laborer on January 2, 1980.

After Claimant lost consciousness on January 30, 1980, Doctors **Boyd** and Nay both recognized that the black out could have been either a fainting spell induced by severe bronchitis or an epileptic convulsion caused by a seizure disorder. **Dr. Boyd** eventually concluded (especially after talking with the Section Foreman who observed the incident) that Claimant had suffered a **grand mal** seizure. While Dr. Way was originally unsure of the cause of **Claimant's** loss of **consciousness**, by September 30, 1980, it was his **fin**s medical opinion that Claimant merely fainted. Not only did Dr. Nay's medical conclusion conflict with Dr. **Boyd's** diagnosis, but also Dr. Nay declared that Claimant was fit to **return** to service as a section laborer.

This Board is faced with a difficult **dilemma**. We recognize that both Dr. Boyd and Dr. Nay were exercising their best medical judgment. Nonetheless, we lack the **medical** expertise to adequately resolve the **areas of** disagreement between Dr. **Boyd** and Dr. Nay. **Thus**, the best forum for-evaluating Claimant's medical condition is **a** Rule 24 Board of Physicians.

Within sixty days of the date of this Award, the parties shall establish a panel **of** physicians as set forth in Rule **24(b)**. Should the physicians be unable to agree **on** Claimant's fitness and ability to perform service as a section laborer, we expect the parties to thereafter **comply** with subsections (c) through (e) of Rule 24. Before evaluating **Claimant's** medical condition, the Board of **Physicians** should fully understand the nature of Claimant's job, the Carrier's medical standards, and **Claimant's** medical history.

In addition to determining if Claimant is presently fit for service, **the** Board of **Physicians** will pass on the propriety of **Claimant's** disqualification **from** service on **March 5, 1980**. However, we must impose one restriction **on** the **Board** of physicians authority. **In** this case, the substantial **disagreement over** Claimant's physical condition did not **come** into clear focus until Dr. Nay issued his complete **medical** opinion **on** September 30, **1980**. Therefore, the Carrier cannot be held accountable for any back pay **liability** prior to **October 20, 1980** (which was the date the Carrier received a copy of Dr. Nay's **September 30, 1980** letter). Nothing **in** our **opinion** should be **construed to** mean that the **Board** of Physicians must award Claimant any back pay even if the Board decides Claimant is physically fit to **return** to service as a section laborer.

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 the **Agreement** was violated.

A W A R D

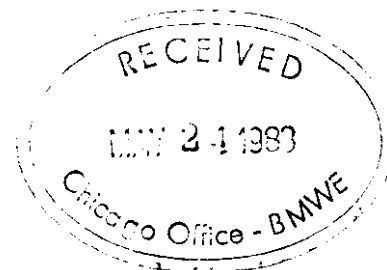
Claim sustained **in** accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of May 1983.



Serial No. 329

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 24277

DOCKET NO. MU-24146

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way **Employees**

NAME OF CARRIER: Denver and Rio Grande Western Railroad Company

The Organization petitioned this Division to interpret Award No. 24277.

In Award No. 24277, we ruled that as of October 20, 1980, there was a conflict between the Carrier's doctor (Dr. **Boyd**) and Claimant's personal physician (Dr. **Nay**) over Claimant's fitness for service. Specifically, the two medical experts disagreed on the cause of Claimant's loss of consciousness while on duty on January 30, 1980. As a result of the incident, the Carrier disqualified Claimant from service. Due to the conflicting medical evidence, we ordered the parties to establish a panel of physicians pursuant to Rule **24**.

Subsequent to the issuance of Award No. 24277, Doctors **Nay** and **Boyd** examined **Claimant** on or about June 20, 1983. Dr. **Nay**, a Neurologist, could not find any disturbances of **cognitive** function. Dr. **Nay** concluded:

"The present examination is entirely normal. I see no reason to alter the position I took some years ago--this man does not have a convulsive disorder and in fact has no neurological disability".

Dr. **Boyd** concurred and wrote:

"Patient presently exhibits no objective evidence of any organic neurological disease or injury. His history suggests that he may have had some type of altered state of consciousness at the time of his problem in **1980....At** present, I **find** no **reason** why the patient should not be back in service."

Inasmuch as the two doctors resolved the prior conflict, it was **not** necessary for the parties to utilize the services of a neutral physician. On August 1, 1983, the Carrier reinstated Claimant to service but without back **pay**.

The issue presented to us is whether our Award No. 24277 granted Claimant an entitlement to wages lost in view of the congruent evaluation⁸ of **Claimant's** physical condition rendered by the panel of two physicians.

The Carrier resisted paying Claimant any back compensation for **two** reasons. **First**, the reports submitted by Doctors Nay and **Boyd** merely reflected Claimant's fitness for service in June, 1983. Dr. Boyd referred to Claimant's present physical condition and implicitly endorsed the propriety of his 1980 medical analysis. Neither medical practitioner alluded to back compensation which manifests their recognition that Claimant was properly disqualified from service in 1980. Second, the Carrier stresses the following explanatory observation which this Board included in Award No. 24277, "Nothing in our opinion should be construed to mean that the Board of Physicians must award Claimant any back pay even if the Board decides Claimant is physically fit to return to service...." Pursuant to Award No. 24277, the panel of physicians, as opposed to this Division, was to determine if Claimant was entitled to back compensation. Again, the doctors' silence demonstrates their denial of back pay.

The question of Claimant's entitlement to back pay is expressly addressed in Rule 24(b) which provides in pertinent part: "If they [a two physician panel] agree the employe is qualified he will be returned to the service and paid for any time lost". (Brackets added for clarification.) Thus, by operation of the clear Rule language Claimant was vested with a right to back compensation as soon as Doctors Nay and Boyd reached identical conclusions on Claimant's fitness for service. Thus, it was unnecessary for the two physicians to expressly grant Claimant his lost wages. His back pay entitlement arose from the automatic application of Rule 24(b).

The Carrier's reliance on the final sentence in our main Opinion is misplaced. When rendering Award No. 24277, we could not foresee that the dispute over Claimant's physical condition would be expeditiously resolved without resorting to a neutral physician per Rule 24(c). Given the substantial differences between Dr. Nay and Dr. Boyd over whether Claimant fainted or suffered from a seizure disorder, we anticipated that a neutral physician would be required to resolve the medical disagreement. Our comment on back pay was intended to preserve the neutral doctor's authority to review the correctness of the Carrier's decision to disqualify Claimant in 1980. Compare Rule 24(e) with Rule 24(b). Unlike the former, the latter provision specifically grants back pay when the Carrier doctor and the **employe's** physician agree that an employe should be returned to service.

In our Opinion, we found that the Carrier violated Rule 24. If the Carrier had followed Rule 24 commencing on October 20, 1980, it would have avoided back pay liability. Although the two physicians examined Claimant almost three years later, the delay stemmed from the Carrier's violation of the contract.

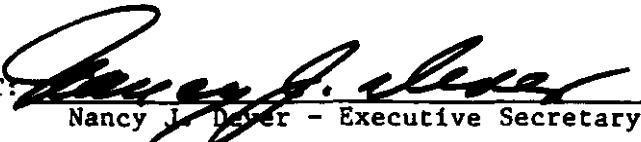
The Carrier has raised allegations that Claimant experienced health problems after his reinstatement to service. These accusations are irrelevant to Claimant's back pay entitlement.

In accord with this Interpretation of Award No. 24277, the Carrier shall pay Claimant back compensation from October 20, 1980, to August 1, 1983, less his outside earnings.

Referee John B. LaRocco, who sat with the Division as the Neutral member when Award No. 24277 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of July 1986.