

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26041
Docket Number MW-26138

Philip Harris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation (Amtrak)

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

(1) The Carrier violated the Agreement when it failed and refused to comply with the General Chairman's written request dated December 6, 1983 to establish a board of doctors in accordance with Rule 86 to examine Mr. R. Poe (System File NEC-BMWE-SD-744).

(2) The Carrier shall comply with Rule 86 and promptly establish a board of doctors to examine Mr. R. Poe."

OPINION OF BOARD: On April 20, 1979, Reginald Poe was a passenger on an Amtrak train which was involved in a collision. He reported a back injury which caused him to go off duty and on medical care until August 13, 1979. He then worked until August 20, 1980, at which time he could no longer report in because of back pain. He sued the Carrier for \$270,000, which included a claim for the loss of future earnings. On November 18, 1981, he was awarded \$6,000 by the Jury for his disability from April 20, 1979, to August 13, 1979, but nothing for August 20, 1980, into the future. On October 24, 1983, Mr. Poe submitted to the Carrier medical documents stating that he could resume work. The Carrier did not accept the documents as grounds for what they were submitted, disallowing the request to resume work.

The Organization contends that Rule 86 was not implemented, which it should have been because of differences among medical authorities. The amount sought in the lawsuit did not speak as a permanent disability, but only to a projection of probabilities. The Jury Award did not reflect that permanent injuries were caused.

The Carrier's position is that the Court "finally decides" the physical condition of the Claimant. Also, there is evidence of a pre-existing back condition which was exacerbated by the collision, rendering Mr. Poe permanently disabled and therefore unable to resume his duties. Furthermore, there is good reason to question the credibility of the injury allegations.

The Board is of the opinion that the Claimant's rights were violated. This is the conclusion despite the strong case made by the Carrier, including the references to the Court determination, the numerous Awards that were cited, and the credibility problem of Mr. Poe. The basis for the Board's finding is the clear intent of Rule 86 taken in conjunction with statements made by the Carrier's Attorney in defending against the lawsuit. His relevant and persuasive words are:

"Ct. Tr. P. 438(a):

'We are an agency of the Congress and we have to follow the law and the law says that if Mr. Poe came in today, even though he has this x-ray condition that he developed when he was growing up, we would have to give him a job back on the tracks even though we know that in the future he's probably going to have aches and pains. We have to give him a job. That's what Congress says.

'It isn't a question, as Mr. Smukler would have you believe, that we won't let him go back to work. He has to come back and say, "I want to go back to work". All he has to do is call up, see Doctor Spencer and say, "examine me. I want to go back to work".

'He is going to have complaints of pain if he does the work but if he came back, Doctor Anderson would let him have the job back if he wanted it. We can't stop him from working because the government says we have to let him work. That's what Congress says....'

The Board cannot ignore this testimony, nor can it ignore the Carrier's finding of a lack of credibility with the Claimant, which we are not inclined to reject. Within the narrow confines of the fact pattern in this Claim, the contract language of Rule 86 should be made operative.

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.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1986.