

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26204
Docket Number MW-26095

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Atchison, Topeka and Santa Fe Railway **Company**)

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

Trackman J. A. Young shall **be** returned to his position as **trackman** and he shall be **compensated** for all **compensation** loss suffered by him as a result of being improperly withheld from service sixty (60) days retroactive **from** September 13, 1983 (System File 50-26-824/11-1500-20.3-2)."

OPINION OF BOARD: On September 2, 1982, the Claimant requested re-examination by physicians in view of his medical disqualification as a **Trackman** by the Carrier. The Claimant filed a request for re-examination under the provisions of Rule 26(b) which states the following:

"26-(b) - Requesting Re-Examination. If the employe feels his condition does not justify removal **from** the service or restriction of his rights to service, he may request reexamination. Such request must be **submitted** by him or his representative within thirty (30) days following notice of the disqualification, unless extended by mutual agreement between the General Chairman and the General Manager. He may be given further examination as follows:

(1) The employe will be jointly reexamined by a physician designated by the Carrier and a physician of the **employe's** own choice who shall both **be** graduates of a Class (A) medical school of regular medicine. When practicable, this reexamination will **be** conducted at the office of the Carrier's physician. **When** not practicable to conduct a joint examination, the employe will **be** examined independently by each physician. If the **two** physicians agree that the man is disqualified, their decision is final; if they agree the man is qualified, he will be returned to service.

(2) If the ~~two~~ physicians fail to agree, the employe's physician and the Carrier's physician will select a third physician who shall be a practitioner of recognized standing in the medical profession and, where any special type of case is involved, must be a certified specialist in the disease or impairment which resulted in the employe's disqualification. ~~The~~ board of physicians thus selected will examine the employe and render a report of their finding within a reasonable time, not exceeding 30 days after their selection, setting forth the employe's physical condition and their conclusion as to whether he meets the requirements of the Carrier's physical examination rules. The 30-day ~~period~~ may be extended by mutual agreement ~~between~~ the General Chairman and the General Manager.

(3) The Carrier and the employe involved will each defray the expense of their respective physician. ~~The~~ fee of the third ~~member~~ of the board will be borne equally by the employe involved and the Carrier. ~~Other~~ examination expenses such as x-ray, electrocardiographs, etc., will be borne equally by the employe involved and the Carrier.

(4) If the majority of the Board of Physicians conclude that the employe meets the requirements of the Carrier's examination rules, he shall ~~be~~ permitted to return to the service ~~from~~ which removed.

(5) If there is any question as to whether there was any justification for restricting the employe's service or ~~r~~-ing him ~~from~~ service at the time of his disqualification by the Carrier doctor(s), the original medical finding which disclose his condition at the time disqualified shall ~~be~~ furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion

of the neutral doctor shall be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employe will be compensated for loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification.

(6) In the event the decision of the Board of Physicians is adverse to the employe and he subsequently considers that his physical condition has improved sufficiently to justify considering his return to service, a reexamination will be arranged upon request of the employe, or his representative, but not earlier than ninety (90) days after such decision. Should it be necessary to select a second Board of Physicians to resolve such a request for a reexamination and the decision of such second Board of Physicians is adverse to the employe, he will not be subject to any further reexamination."

The Claimant designated his personal physician of the two-doctor Examination Board to be Joseph Huston, Topeka, Kansas. The Carrier designated its physician to be Joseph Gendel, Topeka, Kansas, after the General Chairman made a request to the Carrier that it change its first choice. The latter was a physician from Wichita, Kansas who was not "convenient" for the Claimant to have seen. By letter dated November 9, 1982, the Carrier wrote to the Claimant with instructions to "... arrange appointments for examination by both (doctors) with their examination findings and report to be forwarded" to the Carrier's Medical Director in Chicago. After subsequently being examined by both doctors the Carrier informed the Claimant that the doctors were not in agreement over his physical fitness and ability to resume his position as Trackman. Rule 26(b)(2) was then applied. On February 25, 1983, the General Chairman wrote to the General Manager of the Carrier, Topeka, Kansas, that the Claimant had attempted to see the third doctor designated to the panel, R. O. Sutton, of Topeka but that "... upon commencement of the examination Doctor Sutton informed (the Claimant) that he would have to seek his third opinion from another physician and refused to examine him." By return letter dated March 2, 1983, the Carrier stated to the General Chairman that the Claimant failed to "... give all the facts" concerning this matter to the Organization because the third physician had not examined the Claimant because he had refused "... to cooperate and provide necessary information." This physician now refused to "... schedule another appointment or participate any further in the matter." The Carrier stated that this left no alternative but to arrange

for the selection of "... another doctor to form the three-doctor **board**." It added that if the Claimant refused to cooperate at the next examination scheduled it would consider the Claimant to have forfeited protection and entitlements under Rule 26 of the Agreement. On March 30, 1983, the Claimant was advised that an additional doctor ~~from~~ the Topeka area had been chosen by Doctors Huston and Gendel and that this physician's name was Joseph L. Shaw. The Claimant was advised to report to this doctor for an examination on March 31, 1983. After examination of the Claimant the third physician of the **Board**, an Orthopedic Surgeon, wrote to the Carrier the following, in pertinent part:

"(c)uriously enough, I don't believe this fellow has any current **symptoms** associated with fairly active work, and I questioned him quite thoroughly in this regard as well as job description as his work as a track man.

I think that he could be capable of performing that type of **work** as a track man, and it would be my inclination to let him go ahead and do this **work**. obviously, I cannot guarantee that he will not have a possibility of reinjuring his back after having had **two** prior surgeries. his possibility is probably higher than for the average person of his age and degenerative changes."

In view of the third opinion the Claimant was informed by letter dated May 2, 1983, that he was to remain disqualified as a **Trackman**. On September 13, 1983, the Organization objected to the Carrier's interpretation of the third physician's medical opinion. Absent resolution of this dispute on property this case was docketed before the Third Division of the National Railroad Adjustment **Board** for final adjudication.

First of all there is a procedural issue raised by the Carrier which must be ruled on by the **Board**. The Carrier holds that the Claim before the **Board** is procedurally defective because it was not filed in a timely manner. Under Rule 14(a)--Time Limits according to the Carrier, the Organization had failed to file the Claim within sixty (**60**) days of the date of the occurrence of the alleged Rule violation. The Organization responded on property that the Claim was protected under the provisions of Rule 14(b) because it was a "continuing claim" and that no procedural error was **committed**. An analysis of the time frame in which the original issue was raised by the Claimant, as well as the language found in Rule **14(b)** suggests that it **would** be unreasonable to interpret the "... occurrence of the alleged Rule violation" to have occurred on May 2, 1983, which was the date when the Carrier informed the Organization of its interpretation of the third doctor's opinion of the Claimant's physical condition. In fact, it was the position of the Claimant as early as September 2, 1982, that he was being improperly withheld ~~from~~ service on the basis of fitness and ability and the Organization properly **followed** the language of the Agreement at Rule 14(b) when it argued that this was a continuing claim. Rule **14(b)** reads, in pertinent part, as follows:

"Alleged Continuing Violations. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the Claimant or Claimants involved thereby shall, under this **Rule**, be fully protected by the filing of one claim or grievance **based** thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for **more** than sixty (**60**) days prior to the filing thereof...."

Precedent Awards of various Divisions of the National Railroad **Adjustment Board** dealing with **time** limits which are cited by the Carrier are **not** properly on point with respect to the instant case (see Second Division Award 7021: Third Division Awards 12767, 21018, 21530 inter alia). The procedural objection raised by the Carrier must, therefore, be dismissed.

On merits, the instant case centers on the proper interpretation of the third physician's medical opinion. **In this** respect, it is useful to **compare** this doctor's opinion with those of the first **two** physicians who examined the Claimant. **The** opinions of these physicians leave no **room** for interpretation. **The** Claimant's physician stated the following, in pertinent part, in his letter dated July 13, 1982:

"**This** man . . . has had **two** back surgeries, the last one was in November of 1980 which was a spinal **decompression** and fusion. He has been been back to **work**. He is **coming today** asking to be released **back to work**. He apparently has gotten a very **good** result Today his lower back **looks good** He is a trackman. He thinks he can do the **job**. **He wants to go back to work. He may do so.** No return necessary."

On November 19, 1982, the Carrier's physician stated the following, in pertinent part, in his letter to the Carrier:

"**This** patient says he is not having any significant backache at this time or leg aches. He obviously has marked-abnormalities of the spine as **enumerated** in the diagnosis It is my feeling that this patient is getting along **well** now because he isn't doing the heavy work that would **be** required as a **trackman**. Certainly, in my opinion, he could not do the **work** of a **trackman** with the marked arthritic and postural abnormalities that he has in his **back**, with limited **motion** of his **back** and already having had two operative procedures I am confident that he would not last very **long** at this **job**. He would **be** a danger to himself and possibly to others because of his

obvious physical inability, in my opinion, to do the work as a **trackman**. This patient could do a **job** requiring no strenuous work or lifting, but certainly in my opinion is not capable of doing the **work** required of a **trackman** and I do not **recommend** that he go back to work for the Santa Fe Railway **Company** as a trackman."

On the other hand, the opinion of the third physician is not so unequivocal. He states, as noted earlier in this Award, that he **thinks** the Claimant "... could be capable of performing that type of **work** as a trackman, and it **would** be my inclination to let him go ahead and do this work." The Organization is quite correct in interpreting this part of this physician's opinion to mean that this doctor thinks the Claimant ought to have his **disqualification** lifted **by** the Carrier. **The** physician **immediately** adds the disclaimer, however, that the possibility of the Claimant "...**reinjuring** his back . . . is probably higher than for the average person of his age and degenerative changes." **Quite** reasonably, the Carrier interpreted this qualification to mean that the Claimant did not have sufficient fitness and ability and that he should not have his disqualification removed as a **Trackman**. In an attempt to clarify the third physician's opinion the Organization asked for his own interpretation of what he wrote in his first letter. On February 13, 1984, this doctor wrote the following:

"To clarify my previous letter, I can only reiterate that I think it is reasonable for the patient to return to **work**. He does have a slightly higher possibility of reinjuring his back than had he not had previous back surgery but I don't think this should preclude him **from** the type of **work** that he was doing."

Evidently, this interpretation of his own letter is as problematical as the original opinion itself. Again, he states that the Claimant is capable of doing the **work**, but he again adds a disclaimer. In short, this physician refuses to take an **unequivocal** position on this matter as did the first two physicians who examined the Claimant.

Both the Claimant and the Carrier have a contractual right, under **Rule 26** cited in full in the foregoing, to a straightforward, clear medical opinion of the physical condition of the Claimant. Since the third physician in question was unable to provide such, this **Board** has no alternative but to direct the parties to reapply those provisions of **Rule 26** whereby the first **two** physicians are required to "... select a third physician . . . (who) . . . will examine the **employee** and render a report of their finding within a reasonable time . . . setting forth the **employee's** physical condition and their conclusion as to whether he **meets** the requirements of the Carrier's physical examination rules."

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 dispute is remanded.

A W A R D

Claim disposed of in accordance with the **Opinion**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of **December** 1986.