

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

(Brotherhood of **Maintenance** of Way **Employees**)
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company)

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

(1) carpenter **J. H. Swaim** shall be compensated for all compensation loss suffered by him as a result of being improperly withheld from service June 20, 1984 through September 19, 1984 (System File **MW-84-26-CB/53-740**).

(2) The Carrier violated the Agreement when it failed to recall **J. H. Swaim** to fill a #1 Painter Position June 18, 1984 through September 19, 1984 (System File MW-84-32-CB).

(3) The claimant shall be compensated for all wage loss suffered as a result of either Part (1) and/or Part (2) above."

FINDINGS :

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the **employee** or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The basic facts are undisputed. The Claimant was recalled from furloughed status by letter dated June 11, 1984, to fill a vacancy as a **B&B** Carpenter. On June 19, 1984, he was given a back-to-work physical examination by Dr. Joe C. Jones. On **July 10**, 1984, the Claimant was told he could participate in the Carrier's vocational rehabilitation program, but he was not returned to service.

On July 13, 1984, two separate claims were filed by the Organization on behalf of Claimant. The first claim was the result of Claimant being withheld from service as **B&B** Carpenter due to his physical condition. This claim covered the period of time from June 20, 1984, until the date of his eventual reinstatement. The second claim was premised on Claimant not being recalled to service as a #1 Painter. This claim covered the period of time beginning June 18, 1984.

On August 27, 1984, the Carrier had the Claimant examined in Houston, Texas, by one of its physicians. As a result of these findings, Claimant **was** notified by letter on September 19, 1984, that he was medically approved to return to duty.

It is the conclusion of the Board that the claim **must** be partially sustained. There is simply no satisfactory explanation in this record as to why the Claimant's condition was a basis to withhold him in June but not **in** August. For instance, there is no assertion that his condition changed for the better in the intervening time. I" fact, the Organization asserted quite to the contrary. The following from a January 2, 1985, letter is relevant:

"During the conference you were advised that it is our position if In fact Mr. **Swaim** did have **ankylosing spondylitis** when he had his **back-to-**work physical on June 19, 1984, this would not have gotten any better by August 27, 1984, when he was given an examination by Dr. Norris. Therefore, if Mr. **Swaim** was able to perform his normal job duties on August 27, 1984, he would have been able to perform them from June 19, 1984 through August 27, 1984, as the facts are he was performing this type duties all the time he was in a furloughed status."

This remained **unrebutted** by the Carrier.

The only defense to the instant claim was that the Claimant held no seniority as a Painter. While this is true, it is also true that the employee who was recalled had no seniority as a Painter. He was, however, **junior** to the Claimant on the **B&B** roster.

Accordingly, we believe a violation of the Agreement occurred. However, the remedy is limited since the Claimant agreed to a settlement for lost wages between July 9 and September 24, 1984, in connection with **a** U.S. Department of Labor complaint. Therefore, the Claimant is entitled only to lost wages from June 18, to July 9, 1984.

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Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1988.