

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28396
Docket No. MW-27769
90-3-87-3-248

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

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

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

The Carrier shall establish a Board of Doctors to examine Mr. Stanford Douglas in compliance with and as required by Rule 86."

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.

Claimant herein was injured in an altercation with another employee while working in October of 1979. He had continued problems with his hand as a result of the incident, although he worked intermittently over the next several years. In June of 1980, he instituted a Claim against Carrier pursuant to the Federal Employer's Liability Act. Following a Jury Trial in January of 1986, Claimant was awarded \$31,500 (considerably less than he had sought). In the course of the court proceedings Claimant's physician, an orthopedist, testified that he had permanent damage to his right hand and would never be able to perform his regular work as a carpenter. This testimony by Dr. Lee was given on January 8, 1986. Claimant also testified that he was only able to work on light duty assignments.

The Claim herein, filed on April 26, 1986, was supported by a letter from another physician, Dr. Margolies, who by letter dated June 16, 1987, stated:

"Patient was last treated in this office on May 23, 1986, as of April 10, 1986 patient was to return to work but due to swelling of the right hand the company would not accept him."

The Organization believes that Rule 86 mandates the establishment of a medical panel in this case. That Rule provides:

"RULE 86

PHYSICAL CONDITION - BOARD OF DOCTORS

When an employee covered by this Agreement has been removed from or is withheld from service on account of his physical condition and the organization desires the question of his physical fitness to be finally decided before he is permanently removed from his position or restricted from resuming service, the case shall be handled in the following manner:

The General Chairman will bring the matter to the attention of the Director of Labor Relations. He and the General Chairman shall then each select a doctor to represent them, each notifying the other of the name and address of the doctor selected. The two (2) doctors thus selected shall confer and if they disagree on the nature of the illness, they shall appoint a third doctor.

Such board of doctors shall then fix a time and place for the employee to meet them. After completion of the examination they shall make a report in triplicate, one (1) copy to be sent to the Medical Director, one (1) copy to the Director of Labor Relations of AMTRAK, and one (1) copy to the General Chairman.

The decision of the board of doctors on the physical fitness of the employee to continue in his regular occupation or to resume service shall be final, but this does not mean that a change in physical condition shall preclude a re-examination at a later time.

The doctors selected for such board shall be experts in the disease from which the employee is alleged to be suffering, and they shall be located at a convenient point so that it will be only necessary for the employee to travel a minimum distance, and if possible, not be away from home for a longer period than one (1) day.

AMTRAK and the organization shall each defray the expenses of its respective appointee. At the time their report is made, a bill for the fee, and traveling expenses if there are any, of the third appointee should be made in duplicate and one (1) copy sent to the Medical Director and one (1) copy to the General Chairman. AMTRAK and the Organization shall each pay one-half of the fee and traveling expenses of the third appointee."

The Organization relies on the letter from Dr. Margolies cited supra as well as a letter from Dr. Lee dated June 10, 1985, which stated:

"Please be advised Mr. Douglas was seen by me today June 10, 1985.

His paresthesia is completely resolved and he still experiences some weakness of hand grip and pinch but feels improvement.

I am very pleased to see such good progress and I recommended he return to work at light duty at this time and he will see me once again for his last checkup in about six weeks.

If you have any questions, please contact me at my Office."

It is urged that the two letters from doctors represent documentary evidence that Claimant was sufficiently recovered to return to service. The Organization notes that Carrier presented no contrary evidence. It is argued further that Rule 86 does not require that there be a conflict in the opinions of the Carrier's Medical Director and Claimant's physician. Finally, it is noted that the Jury's determination in the litigation did not by virtue of the amount awarded constitute a finding of permanent disability.

Carrier's position initially is that the doctrine of estoppel is operative in this dispute. It is argued that the Jury's determination was based on pleadings and testimony indicating permanent disability by both Claimant and his doctor, Dr. Lee. Additionally, Carrier maintains that there is no dispute in medical findings which would trigger any need for a board of doctors as provided in Rule 86.

The Board finds that it is not necessary to evaluate the arguments with respect to estoppel in this dispute. The simple fact is that there is no persuasive evidence of record to indicate that Claimant was physically (or medically) able to return to his former position. The Organization's reliance on the two medical notes was misplaced. Dr. Lee's note was dated prior to the date of his testimony that Claimant was permanently disabled; thus it has no relevance to the subsequent medical condition of Claimant. Dr. Margolies' letter of June 16, 1987, is not an unequivocal release to work for Claimant and certainly cannot be construed to embrace a diagnosis which could be the subject of dispute before a board of doctors.

After a careful review of the authorities presented and an evaluation of the evidence contained in the record, the Board concludes that Carrier did not violate the Agreement by refusing to convene a panel of doctors as required in Rule 86.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.