Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28885
THIRD DIVISION Docket No. MW-29256
91-3-90-3-140

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(New Orleans Public Belt Railroad

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

(1) The dismissal of Bridge Patrolman J. A. Melerine for alleged '... insubordination by refusing appointment to be examined by Company's Physician Doctor Applebaum in connection with your personal injury claim of September 3, 1988, and failure to follow instructions of F. E. Heath, Public Belt's Manager, Purchases, Claims and Labor Relations.' was arbitrary, on the basis of unproven charges and in violation of the Agreement.

(2) The Claimant shall be reinstated with seniority, all other benefits and rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

On April 5, 1989, the Claimant was notified that he was dismissed from service as a result of insubordination by refusing an appointment to be examined by the Carrier's physician in conjunction with a personal injury claim.

Claimant requested an Investigation. Subsequent to that Hearing, his termination was upheld.

Certain procedural objections were raised to us, but we fail to note that they were raised while the matter was under review on the property. Consequently, we will consider the case on its merits.

In September 1988, the Claimant sustained an injury and sought legal advice. Ultimately a suit was prosecuted under the Federal Employees Liability Act.

The Carrier was advised in late February 1989, that the Claimant was scheduled for surgery on March 1, 1989. Carrier desired to have the Claimant examined by a neuro surgeon prior to the operation and, as a result, since it was paying medical costs, it had the Claimant discharged from the hospital the night before the surgery. Thereafter, the Claimant was told to visit a certain medical practitioner and was given a choice of three appointment dates. He stated that he would have to consult his attorney. He never replied to the Carrier, nor did he keep any of the appointments.

Quite frequently in disputes such as these, we sense that employees become pawns of the medical and legal profession as the parties posture for the court presentation. Nonetheless, the Claimant's attorney is the agent of the Claimant and the Claimant may not simply evade an otherwise lawful order based on other considerations. We feel that a Carrier does have a reasonable right to obtain medical information about its workforce concerning continuing and/or future ability to perform work in a safe manner. Thus, regardless of the assertions or motive in this case, we feel that the Claimant had a duty to comply, or at the very least, advise the Carrier of the basis for the refusal. His total inaction invited disciplinary action.

We question, however, that this long term employee should have been terminated for his inaction. The Carrier had knowledge of the situation, and had ample time to request an examination by a specialist prior to the night before the scheduled surgery. Moreover, there is some appeal to the assertion that the Carrier could have arranged for such an examination in the hospital rather than having the employee discharged therefrom.

We will set aside the dismissal and restore the Claimant to service, with seniority and all other rights unimpaired, but without backpay. Of course, prior to resumption of service, Claimant must demonstrate that he is physically capable of performing duty. This Award does not contemplate any result which may be forthcoming from the FELA suit since we are not privy to the status of that matter.

A W A R D

Claim sustained in accordance with the Findings.

Award No. 28885
Docket No. MW-29256
91-3-90-3-140

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.