Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33944
Docket No. CL-34020
00-3-97-3-553

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Sand Springs Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11807) that:

Carrier acted in an arbitrary, capricious and unjust manner and violated the Agreement between the parties when, by letter dated March 15, 1996, Mr. Jesse I. Cranford, Superintendent, dismissed Claimant Richard H. Vawter, yard clerk at Sands Springs, Oklahoma, from the service of the Sand Springs Railway Company.

In view of the Carrier's arbitrary, capricious and unjust action Carrier shall now be required to exonerate Claimant pursuant to Rule 19(g) and thereby:

1. Restore Claimant to service with all seniority, vacation, back pay, wage increases, health and welfare benefits, and all other rights unimpaired; and,

2. Pay Claimant for all lost time commencing with March 1, 1996, and continuing until Claimant is restored to service."

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 employee 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 were given due notice of hearing thereon.

On February 8, 1996, Claimant filed an on-duty injury report, claiming that he had been injured on or about October 30, 1995, and that he had sought medical treatment for the injury on November 10, 1995. On February 28, 1996, Carrier sent a letter to Claimant directing him to report for an Investigation on March 8, 1996, concerning his responsibility in connection with an alleged charge of submitting a fraudulent personal injury report and falsely asserting an on-duty injury. The Investigation was held as scheduled. On March 15, 1996, Carrier notified Claimant that he had been found guilty of the charge and had been dismissed from service.

The Organization raises a number of arguments attacking the discipline. The only argument that we need address arises from the multiple roles played by Carrier officials who reviewed the claim on appeal. After very careful consideration, we find this issue dispositive of the claim.

The Carrier is a small railroad. In its Submission, the Carrier asserts that it has only three supervisors: the Superintendent, the Controller, and the Vice President - General Manager. Carrier employed an outside consultant to serve as Hearing Officer. Evidence at the Hearing revealed that Claimant could not specify the exact date of the alleged injury, that he did not report the alleged injury at the time it occurred or at the time that he allegedly first sought medical attention for it.

In his testimony, Claimant explained his actions by advising that when he sought medical attention for his on-duty injury, his doctor gave him muscle relaxers which relieved the pain for a considerable period of time. Further, Claimant maintained, at the same time his doctor discovered a more serious, perhaps life threatening, condition which he began to treat immediately. Claimant testified that the combination of the treatment with muscle relaxers and the distraction caused by the more serious condition led him to forego reporting the injury until the pain resurfaced at the end of January.

Claimant's story certainly was out of the ordinary, to the point of arousing suspicion. However, Claimant was not charged with eccentricity; he was charged with fraudulent conduct and suspicion alone does not prove fraud. The critical evidence concerning the alleged fraudulent nature of Claimant's conduct was testimony from the Controller and the Vice President - General Manager.

The Controller and the Vice President - General Manager each testified that together they interviewed Claimant's doctor, at which time the doctor advised them that he had no record of treating Claimant for an on-duty injury on November 10, 1995. Claimant, in contrast, testified that he advised his doctor on November 10, 1995, that he had sustained a work-related injury.

The Hearing Officer issued a report summarizing the evidence and indicating his determinations concerning the relative credibility of the witnesses. The Superintendent issued the letter imposing the discipline. The Organization filed a claim on Claimant's behalf. The Controller denied the claim and the Organization appealed. The Vice President - General Manager denied the appeal.

The obvious problem raised by this case arises from the fact that the claim was ruled on by a Carrier Official who was a key witness in the Investigation and the appeal was ruled on by another Carrier Official who also was a key witness. As the Board stated in Third Division Award 23427:

> "The right of appeal is neither technical nor mechanical. It is an important and meaningful right that is not to be regarded lightly or ignored. The obvious purpose of the appeals machinery is to provide Claimant with <u>independent</u> consideration of his appeal at each appellate level. See Fourth Division Award No. 2642. . . ." (emphasis in original).

We recognize that the Carrier is a small railroad and we are sympathetic to the position in which the Carrier found itself. Carrier asserts that it had no other Supervisors who could rule on the claim and the appeal. Indeed, there is a legal maxim that if all are disqualified, none are disqualified.

Nevertheless, we are forced to conclude that under the facts and circumstances presented in this case, Carrier violated Claimant's due process rights. First, we find that Claimant was materially prejudiced by the multiple roles filled by the Controller

and the Vice President - General Manager. They were the key witnesses against Claimant and their testimony furnished the key evidence that Claimant acted fraudulently.

Second, it is not clear that Carrier had no alternative way of handling the situation which could have avoided denying Claimant his right to an independent review. There was no explanation as to why both Carrier Officers had to interview Claimant's doctor. Moreover, there was no explanation as to why they did not obtain a written statement from the doctor. Had they obtained such a statement, these two Carrier Officers would have served as the conduit for the statement, but the statement itself would have been the direct evidence and the credibility of the statement, including its hearsay nature, is what would have been in issue. Instead, at issue was not only the doctor's oral statement to the Controller and the Vice President - General Manager, but also the two Carrier Officers' credibility, including the accuracy of their recollection of the statement and any interest they might have which could influence their testimony reporting the statement.

This Board has recognized that multiple roles do not per se invalidate discipline. There must be some prejudice to the Claimant. Furthermore, this Board has recognized the peculiar position in which small carriers sometimes find themselves. In this case, however, the conflict between the roles of critical witness against Claimant and Officer on appeal is manifest. To excuse the breach of Claimant's right to an independent appellate review because of Carrier's size would relegate Claimant and other employees of small railroads to being second class citizens in the industry. Because of the seriousness of the conflict between the roles of witness and Appellate Officer in the instant case, the complete absence of any independent review of the claim, and the availability of alternatives to the Carrier, we find that the handling of the claim was procedurally flawed and that the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.

Sand Springs Railway Company

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Carrier Members Dissent

Third Division Award 33944

It is the position of the NRAB Carrier Members that egregious errors underlay Referee Malin's decision in Third Division Award 33944. Our express reasoning follows:

The dismissal case involved in Third Division Award 33944 was decided solely on a procedural matter. Thus, Referee Malin did not deem it necessary to reach the merits of the case, which dealt with the fraudulent handiwork of an employee who filed a bogus personal injury report. In overturning the much-deserved dismissal, Referee Malin focused on the appeal process and decided that two company officials impeded due process rights because of a multiplicity of roles. Referee Malin erroneously rationalized that the claimant was denied an independent assessment of his case as a result of these multiple roles.

The first problem with Referee Malin's decision on this independent review theme is that he ignored the indisputable facts of record, which

undeniably confirm that there was an independent review of the case at its very outset. The decision to dismiss the claimant did not rest with the two company officers that engaged in the so-called multiple roles. Instead, the determination as to whether the claimant was responsible, as charged, for submitting a bogus personal injury rested solely with individuals that were not witnesses at the investigation and were not designated to handle the case on appeal. Indeed, and contrary to Referee Malin's position, there was an independent review of the case. In his zeal to overturn the dismissal of this claimant, Referee Malin obviously elected to both ignore and distort the actual facts of the case.

The overwhelming majority of referees focus on the role of an appeal officer during the discipline assessment phase. In short, if such officers are directly involved in deciding the discipline, they should not be involved in the appeal process, according to these neutrals. They have also said that when the discipline is decided by other than an appeal officer, the independent review requirement has been satisfied. That well-entrenched doctrine, as we argued to Referee Malin in our case, did have application in the facts here because the actual guilt and subsequent discipline was determined and assessed by individuals who were not involved in the appeal process. Put simply, the issue of independent review was

necessarily disposable in the company's favor in this factual setting by doctrine of *res adjuticata*.

Referee Malin attempted to strengthen his otherwise shaky rationale by expressly referring to an earlier decision of the division in its Award 23427. However, Referee Malin obviously ignored crucial facts in that case that clearly distinguished it from having any value in deciding the case at hand. The TCU first presented Award 23427 in its submission to the Board. During the oral hearing, we thoroughly explained to Referee Malin that the facts in that award were not analogous in the case at hand. We pointed out that in Award 23427, an accuser/witness decided the discipline, imposed the discipline and ultimately handled the appeal at the initial stage. We informed Referee Malin that those factual circumstances were non-existent in our case and, thus, the award was without precedent. Nevertheless, Referee Malin ignored our strenuous objections that Award 23427 was without force or effect in our case and went on to say that it did serve as precedent. As if that were not enough, Referee Malin cited a portion of Award 23427 in his final ruling. Given the factual conflict between that case and this one, the illogical rationale of Referee Malin is self-evident.

Regardless of Referee Malin's stated view in our case, it was unavoidable that two witnesses at the investigation were involved at two separate stages of the appeal. We indeed explained that at a small company like this one, with a supervisory staff of only three, it is inevitable that a co-mingling of roles may occur in disciplinary cases. There were no other supervisors available to handle the appeal of this case. That fact was argued both in our submission and at the oral hearing. The resulting absurdity in this award is self-evident: this company is necessarily restrained from exercising its collectively bargained rights under the express terms of the parties' agreed-to discipline rule in similar factual settings.

Additionally, Referee Malin conveniently disregarded crucial facts in the record which support a view that the TCU had tacitly and formally acquiesced to the claim handling procedures and, thus, waived any and all complaints with respect to the multiplicity of roles issue. For example, Local Chairman Jim Rogers initially addressed the letter of appeal to General Manager Macormic. That initial claim was subsequently directed to Mr. Chalmers for his handling and Mr. Rogers was accordingly notified. Nevertheless, it is markedly significant that Mr. Rogers did not generate any complaint whatsoever regarding this multiplicity of roles theme.

Thus, it is reasonable to conclude that the TCU representative had no reason to question Mr. Macormic's ability to fairly analyze and consider the appeal. If that were not true, the TCU representative would have undoubtedly said otherwise in his initial appeal to Mr. Macormic. Some would argue that this thought calls for some speculation and perhaps that is true. However, what is not subject to speculation and what we can conclude as an absolute certainty is the fact that the company was, at the time of the initial appeal, completely unaware of any alleged difficulties regarding those officers who would hear and decide the appeal. Thus, there was no reason for the company to consider a modification of the decision-makers at that juncture of the claim.

Neither was there a timely objection at the final appeal stage that would have prompted the company to reconsider its lines of appeal. It will be recalled from the record in this case that the General Chairman's representative telephoned Mr. Macormic and inquired as to where he could direct the final appeal. During that telephone call, Mr. Macormic explained that the final appeal should be directed to him. At no time during that telephone conversation did the TCU representative suggest that such appeal handling would result in a violation of the claimant's due process rights.

Nor was any such allegation raised in a letter dispatched by the TCU representative several days later that confirmed the parties' telephone discussion regarding the final appeal officer. Indeed, even after a first TCU generated appeal; even after a TCU generated telephone conversation directly related to appropriate appeal officers; even after a TCU generated letter confirming the understanding reached during the telephone conversation; even after all that TCU generated stuff; it had yet to generate a complaint regarding multiplicity of roles. In short, in light of the TCU's silence, the company still had no reason to question the designated line of appeal.

The TCU first mentioned something about the appeal process when it issued its final appeal. Yet, even then, the TCU was rather elusive with respect to this specific issue. One need only review the August 6, 1996, letter of appeal issued by General Chairman Arndt to confirm that fact. While the TCU's letter reflected a sub-heading related to multiple roles, its express argument that followed the sub-heading was focused more along the lines that decision makers subordinate to Mr. Macormic couldn't be expected to overturn his decision. The TCU surmised in its submission that these officers could not fairly evaluate the appeal because, as the TCU incorrectly alleged, Mr. Macormic had already decided that Claimant was

guilty. That was still the TCU's misguided view even though Mr. Macormic had nothing whatsoever to do with conducting the investigation and issuing the discipline. Thus, the TCU argument went more to an allegation of prejudgment. The argument in that appeal letter did not go directly to the issue of whether Claimant's due process rights were adversely impacted when witnesses at the investigation also handled and decided the appeal. It was only in its submission before the Board that the TCU articulated an argument on the multiplicity of roles theme.

Further, the final appeal came on the very heels of a conversation, and subsequent letter, confirming that Mr. Macormic would be the appropriate officer to consider and decide the final appeal. Therefore, if the company had elected to alter the final appeal officer, it would have done so only upon receipt of the final appeal letter. And that modification would have been in direct defiance of the agreed-to and confirmed understanding reached between Mr. Macormic and the TCU representative during their telephone conversation and subsequent letter confirming the understanding. The TCU would have undoubtedly complained since such handling was a clear departure from an understanding reached several weeks earlier.

In any event, by remaining silent on the subject and, in fact, by expressly agreeing to the final appeal officer—without complaint, the TCU effectively waived any complaints with respect to the appeal procedures of this claim. It is inappropriate for the TCU to remain silent over a potential procedural issue that could have been discussed and perhaps remedied if timely asserted. That is especially true given the emphasis that the TCU ultimately placed on this issue in its submission before the Board. And in this case there was ample opportunity at several stages of the appeal for the TCU to broach the subject. Yet, it chose to remain silent, vague and, as shown by its letter confirming the telephone conversation, agreeable until the last possible moment. In short, the SSRC was ambushed. More disturbing, given the final outcome of the award, is that Referee Malin has, in essence, endorsed the TCU's bushwhacking ways.

Even if the previously expressed views were incorrect, there simply was no prejudicial harm shown in this case. It is not enough to merely issue a bare declaration that the appeal process prejudiced the claimant in this case. Actual evidence of prejudice must be shown. And to that end, the TCU failed miserably. There simply was no probative evidence presented by the TCU to prove that the appeal officers shirked their duty and ignored crucial evidence developed at the investigation that undeniably

proved that the claimant was innocent of all charges. In the end, the decisions of the appeal officers were fully supported by and wholly consistent with, the evidentiary record.

Carried to its fullest extent, a conclusion that Claimant's rights of due process were adversely impacted suggests that some other independent reviewer would have reached a different outcome. Yet, the facts of this case effectively preclude such a conclusion. It is noteworthy that Referee Malin briefly remarked in the award that the claimant's behavior was indeed suspicious in this case. We must conclude, therefore, that the transcript of investigation was adequate in establishing Claimant's guilt. After all, if that were not the case, Referee Malin most certainly would not have remarked that the claimant's behavior was rather suspicious. To that end, if Referee Malin found Claimant suspicious based on the substantial transcript of investigation, then, another independent reviewer of appeals would have undoubtedly shared that same view. Thus, prejudicial harm based on the appeal procedures simply cannot be manifested in the facts of this case.

Finally, Referee Malin apparently expresses some sort of logic that his decision must hold because, if not, employees of short line railroads would be treated as "second-class." We are appalled by this distorted view

of Referee Malin. As the record in this case clearly confirms, the SSRC went well beyond what it was required to do under the agreement in order to insure that the claimant's due process rights were not violated. An independent consultant was hired to conduct the investigation; the discipline was determined and assessed by an officer of the company who had no other involvement in the case. And unlike standard procedures at Class I Railroads, the TCU was not required to direct the initial claim to the same person who conducted the investigation and issued the discipline. In short, even with its extremely limited resources, the SSRC extended this claimant much more favorable handling than he would have been extended at Class I roads. Indeed, our efforts to afford the claimant with due process rights that were in excess of those required under the agreement meant nothing whatsoever to Referee Malin

As this narrative reflects, Referee Malin's conclusion in this award is best described as erroneous. As we have stated, the facts of this record do not support Referee Malin's ultimate decision. Based on the most serious errors committed by Referee Malin in deciding the case, he did, in essence, relegate the SSRC to the status of a "second class citizen." We had hoped that Referee Malin would fairly evaluate the case on its merits. However, rather than resolving this case in a fair and reasonable

manner, Referee Malin was more intent on aiding and abetting a guilty culprit to escape well-deserved discipline.

Another example of Referee Malin's flawed rationale is found at page 4 of the decision, where he further elaborates as to why the Controller and Vice President could not be expected to fairly consider this case during appeal. He asserts "...at issue was not only the doctor's oral statement to the Controller and the Vice President-General Manager, but also the two Carrier's Officer's credibility, including the accuracy of their recollection of the statement and any interest they might have which could influence their testimony reporting the statement." Given those remarks, it is obvious that Referee Malin believes that the Controller and the Vice President could not objectively consider, on appeal, the credibility of their own statements at the investigation.

However, Referee Malin has ignored the fact that any questions regarding the credibility of witnesses at the investigation are questions that can never be resolved during the appeal process. Indeed, the four divisions of the NRAB have consistently held that questions surrounding the credibility of witnesses at an investigation rest solely with the individual who conducted the investigation. In other words, appeal officers cannot overturn the credibility determinations decided by the officer who conducted the investigation. Thus, in this case, it is palpably erroneous for Referee Malin to charge that the two appeal officers could not fairly judge the credibility of their own statements

when, in fact, that wasn't even an issue that could be considered on appeal.

In closing, we are extremely displeased with the ultimate decision of Referee Malin in this case of unequivocal fraud. We find that he committed gross error by overturning the case strictly on procedural grounds, and for that matter, unsound procedural grounds. Referee Malin, altogether, ignored the merits of the case, which clearly confirmed that the charges of fraudulent conduct were fully proved at the investigation.

Fortunately, the company has not been severely damaged by Referee Malin's erroneous ways. The claimant here will not be returning to active duty under the award and neither will he receive any back pay because of this overturned discipline. Shortly after our submission was filed with the NRAB, the principal involved in this matter filed a lawsuit against the company, claiming permanent total and disabling injuries. In short, the claimant charges that he cannot work due to medical reasons. Therefore, he is unable to return to active duty by virtue of the pending lawsuit and the evidence surrounding that action.

Moreover, His claim for remedy in that legal action encompasses the identical period involved in this award's statement of claim – and in fact actually precedes the disciplinary action. Thus, when the SSRC complies with the award, the claimant has precluded himself from returning to active duty. Neither will this errant individual be receiving any back pay. Awards of this board have consistently upheld the "make whole" standard when determining back pay and when that standard is applied here, where the claimant would not have worked anyway, it necessarily holds that no payment is necessary.

. A Final Word of Caution, to all other Carriers, take nothing for granted whenever presenting cases to Referee Malin.

We respectfully dissent.

Respectfully Submitted:

William Macormic

Vice President and General Manager

LABOR MEMBER'S RESPONSE
TO
SAND SPRINGS RAILWAY COMPANY'S DISSENT
TO
THIRD DIVISION AWARD 33944 (Docket CL-34020)
(Referee M. H. Malin)

In response to the "Carrier Members Dissent", it should be noted that the author, Mr. Macormic, has no standing before this Board and therefore his Dissent is improper.

Despite the impropriety of the Dissent, I feel I must respond to this collection of misinformation with unwarranted and meanspirited attacks on the Referee.

The right of Dissent remains valuable only when it is exercised with due regard to the facts and constructive criticism of opinion. The Dissent here has neither of these redeeming features, and is, therefore, valueless. A review of the Dissent indicates that the author is ignorant of arbitration under the Railway Labor Act. On page 9 of the Dissent he states that Claimant's alleged guilt of the charges should somehow mitigate the Carrier's complete disregard for Claimant's due process rights. In railroad arbitration, procedural objections, particularly due process violations, are threshold issues which must be ruled on before the Arbitrator can reach the merits of the dispute and arbitral precedent on this subject since time immemorial has not wavered. In the instant case, the Carrier's violation of the Claimant's due process rights was so egregious that the Arbitrator had no choice but to overturn the discipline.

There can be no mitigating such actions. As the Referee herein recognized, to do so would have left the Claimant defenseless against the charges of the Carrier.

It is also apparent that the author of the Dissent has utilized this forum to regurgitate his case offering inaccurate and unproven assertions which were rejected by the Neutral. I won't waste the Board's time with meaningless reargument of every issue, however, there are some particularly erroneous statements which must be addressed.

The author's skewed view of the issue of the multiple roles defies logical thought. At the heart of the issue is the fact that the Controller and President/General Manager (and author of this Dissent) were instrumental in the issuance of the charges, they testified against the Claimant at the investigation and served as appeal officers at the two levels of appeal on the property. As the Referee properly ruled, "the conflict between the roles of critical witness against Claimant and Officer on appeal is manifest."

The Dissent reached its pinnacle of absurdity when on page 11, the author stated: "...it is obvious that Referee Malin believes that the Controller and the Vice President could not objectively consider, on appeal, the credibility of their own statements at the investigation." This man has personally conducted this entire case, from the issuance of charges up to and including the final appeal and argument before this Board.

To say that he could objectively analyze and consider the credibility of his own testimony in a case he has orchestrated from start to finish is ludicrous and is exemplified in his trashing of the Referee under the guise of a Dissent.

Furthermore, his statements that the Organization is somehow responsible for the Carrier's due process violations are so far over the top as to defy description. This is just one more example of his total lack of understanding of railroad arbitration. Arbitral precedent has held that the Organization is under no obligation to advise the Carrier of the error of its ways or to instruct the Carrier on the proper handling of claims.

Mr. Macormic's arrogance knows no bounds. He openly states that the Carrier will not comply with the Award and that Claimant will never return to work based upon his skewed version of the facts. Referee Malin's Award is clear, well-reasoned, supported by the facts, and in accordance with arbitral precedent. The Carrier's open defiance of the Board's authority is unconscionable.

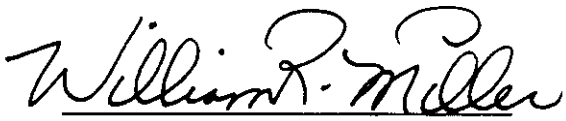
As the record proved, the author of the Dissent was the driving force in the charging and dismissal of Claimant, up to and including, argument before this Board. The Organization can only speculate as to his motives for becoming so personally committed to preventing the Claimant's return to work. Suffice it to say that his son has replaced the Claimant on his position. Is it any wonder Mr. Macormic has so arrogantly stated that "The

Claimant here will not be returning to active duty under the Award and neither will he receive any back pay because of his overturned discipline."

The Award is correct and precedential for any future disciplinary disputes, and all the sour grapes complaining does not change the fact that the Carrier violated the Claimant's right to due process.

The Dissent, therefore, registers only the disagreement of a Minority Opinion who should recognize and understand that verbiage without substance serves no useful purpose.

Respectfully submitted,



William R. Miller
TCU Labor Member, NRAB
April 14, 2000

SERIAL NO. 390

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 33944

DOCKET NO. CL-34020

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (Sand Springs Railway Company

This matter has been returned to the Board on the request of the Organization for an Interpretation. In Award 33944, issued February 22, 2000, we sustained the claim which sought the Claimant's reinstatement to service with seniority, vacation, backpay, wage increases, health and welfare benefits and all other rights unimpaired; and pay for all time lost commencing March 1, 1996. On December 4, 2001, the Organization filed suit in United States District Court for the Northern District of Oklahoma seeking to enforce the Award. The Carrier responded that it had fully complied with the Award. The Carrier maintained that it had reinstated the Claimant's seniority and removed all references to his dismissal from his record. The Carrier admitted that it had not recalled the Claimant to service and had not paid him for lost wages. The Carrier maintained that prior to his dismissal, the Claimant's position had been abolished, and that since his dismissal there was no other position that the Claimant could have held in light of his seniority. The Carrier further maintained that the Claimant was not available for work for any of the time he was dismissed or since because he was permanently disabled or because he had not been released to return to service by his doctors. Finally, the Carrier maintained that the Claimant was not available for work beginning February 2, 2000, when he failed to appear in connection with felony charges pending against him in Washington County, Alabama, and became a fugitive from justice. The court remanded the matter

> "For a determination of what is required of Defendant for compliance with Award No. 33944, and whether Defendant has in fact complied, considering all the facts and circumstances in this case, including but not limited to (1) Mr. Vawter's medical condition; (2) Defendant's

elimination of Mr. Vawter's position; and (3) Mr. Vawter's arrest, incarceration, and subsequent fugitive status. . . ."

Based on a careful review of the record, we find that the Carrier failed to establish that the Claimant was unavailable for work because of his alleged fugitive status, but we further find that for the entire period of his dismissal and continuing to date, the Claimant has been unavailable due to his medical condition.

The Carrier bases its entire position concerning the Claimant's alleged fugitive status on a single report from a private background check company. The Carrier submitted no official court records showing the Claimant's alleged fugitive status. Moreover, as the Organization argued, the Carrier is and has been aware of the Claimant's whereabouts. If the Carrier truly believed that the Claimant was a fugitive from justice, there would be no reason for the Carrier to refrain from contacting the relevant law enforcement authorities. The Carrier offered no explanation as to why it has not contacted the appropriate authorities. Accordingly, based on the record before us, we cannot say that the Claimant's alleged fugitive status rendered him unavailable for service.

However, we find the Claimant's medical status dispositive of the issue of the Carrier's compliance with the Award. The record reflects that the Claimant was under the care of three physicians: Dr. Curt Coggins, his general practitioner; Dr. James Rodgers, his neurosurgeon; and Dr. Mark Hayes, his orthopedist. The Claimant was treated for low back pain, right leg pain and numbness in the foot. On July 17, 1996, the Claimant underwent surgery, specifically a bilateral mass fusion, L4-L5, L5-S1; and pedicle screw segmental fixation, L4-L5, L5-S1, and right crest bone graft. The Claimant initially did well following surgery, but by December 19, 1996, his doctors were concerned that he was developing a nonunion. Drs. Rodgers and Hayes performed follow-up surgery on April 16, 1997. They found a solid fusion of the bone and removed the hardware that had been inserted in the prior surgery.

On May 29, 1997, Dr. Hayes released the Claimant to Dr. Rodgers. Dr. Hayes wrote at that time:

"I would concur with Dr. Rodgers he is going to need vocational retraining for sedentary type work activities at best with no lifting over ten pounds nor repetitive bending, stooping and twisting.

'He is released from my care to return on a PRN basis. He is going to follow up with Dr. Rodgers.'

On May 29, 1997, Dr. Rodgers wrote to Dr. Hayes:

'You have released him from your care. We found intraoperatively that his lumbar fusion was solid, and after removal of instrumentation, we neither feel that we have anything more to offer him surgically.

It is obvious that this gentleman has no job to return to with Sand Springs Railway. This gentleman will have to be retrained for more sedentary type duties. I will not rate and release him until that is accomplished. Vocational evaluation for transferable skills and aid in job placement also is a must.'"

The Organization concedes that, due to his medical condition, the Claimant is not entitled to backpay for the period held out of service prior to June 1, 1997. However, the Organization contends that the Claimant is entitled to be returned to service and to be compensated for all time held out of service beginning June 1, 1997. The Organization bases its position on what purports to be a complete release from Dr. Hayes, dated June 1, 1997. The sole restriction on that release is no lifting of more than 50 pounds.

The release does not appear to be signed by Dr. Hayes. Rather, Dr. Hayes' name appears to be hand-printed, followed by a signature that purports to be that of an R.N. The record contains no explanation as to how, on May 29, 1997, Dr. Hayes could have stated that the Claimant was unable to lift more than ten pounds and then three days later, on June 1, 1997, opine that he could lift up to 50 pounds. Furthermore, on May 29, 1997, Dr. Hayes released the Claimant to Dr. Rodgers' care. Thus, we are left wondering how Dr. Hayes would come to write a release to return to work for a patient who was no longer under his care.

Other evidence in the record further questions the probative value of the purported release. The Claimant filed an FELA lawsuit against the Carrier over the accident that led to his back injuries. On May 27, 1998, in answering interrogatories and document requests in the FELA lawsuit, the Claimant indicated that he had not yet been released by his doctors to return to work. In his deposition on March 24, 1999, the Claimant testified that he still was in constant pain and that his doctors had recommended that he undergo retraining.

Finally, we note that in responding to the Organization's lawsuit to enforce our Award, the Carrier questioned the authenticity of the purported June 1, 1997 release. However, the Organization offered no further evidence substantiating the release. It offered no statement from Dr. Hayes reaffirming the release or explaining the apparent inconsistency between the purported release and the May 29, 1997 reports.

Accordingly, considering the record as a whole, we cannot find substantial evidence that the Claimant has been released by his treating physicians to return to service. Accordingly, until such time as the Claimant presents appropriate medical releases, the Carrier is not obligated to return the Claimant to service. Because the Claimant's medical condition made the Claimant unavailable to perform service for the Carrier, the Carrier was not obligated to compensate him for the time he has been out of service. Therefore, we find that by removing the dismissal from the Claimant's record and restoring the Claimant's seniority, the Carrier has complied with our Award.

Referee Martin H. Malin who sat with the Division as a neutral member when Award 33944 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of March 2004.