

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22944
Docket Number MW-22273

Dana E. Eischen, Referee

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

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

(1) The Carrier shall reinstate Bridgeman-Helper Frank J. Bertucci, Jr. to service with all seniority, vacation rights, insurance coverage and any other rights unimpaired

and

(2) Claimant Bertucci shall be reimbursed for all compensation loss suffered by him as a result of being withheld from service commencing September 16, 1976 (System File 013.7)."

OPINION OF BOARD: The operative factual situation and respective positions of the parties in this case were clearly and completely set forth in our Award No. 22640 dated November 30, 1979.

In our Award No. 22640 we indicated that this Board would retain jurisdiction of this dispute pending the outcome of Carrier's directed compliance with the provisions of Rule 29(a) which requires:

"(a) The employe involved, or his Representative, will, at his expense, select a physician to represent him and the Railroad, at its expense, will select a physician to represent it, in conducting a further physical examination. If the two physicians thus selected shall agree the conclusions reached by them will be final."

The Board has now been advised by Carrier that they have made no less than five (5) separate attempts - including the sending of a letter via Certified U. S. Mail for which a signed receipt was received - to contact Claimant Bertucci to arrange for the examination required by Rule 29(a). To date, claimant has not responded to any of the communications directed toward him in this regard. Carrier has, therefore, petitioned this Board to dismiss this claim because:

"Carrier has made every attempt to comply with Third Division Order, Award No. 22640, Docket No. MW-22273, and Claimant has made no effort on his behalf to co-operate in fulfilling his part, in relation to Rule 29(a)."

From the record of events now before this Board, it is apparent that claimant is attempting, for reasons known only to him, to prevent the orderly progression ordered by this Board for the resolution of this dispute. As we observed in Award No. 13941 (Dorsey) of this Division:

"There must be a termination to an adversary proceeding and the parties bear the responsibility of protection of their respective interests. The situation herein presented is analogous to a party failing to appear at a trial in a civil action set for a day certain, whereupon the court enters judgment on the pleadings or ex parte evidence. ***."

Here likewise, Claimant Bertucci, on whose behalf this proceeding was initiated and progressed bears the responsibility of protection of his claimed rights. He cannot, with impunity, ignore Carrier's attempts to arrange for the examination which is required to resolve this dispute.

Therefore, this Board now directs that Carrier will make one final attempt via certified mail, return receipt requested, or by personal delivery evidenced by receipt, to notify Claimant Bertucci to appear for an examination on a day certain on which an appointment can be arranged with the appropriate physician(s). If claimant fails to appear for and submit to the scheduled examination, this Board will conclude that he is no longer interested in pursuing this dispute and we will thereupon order that it be dismissed with prejudice.

The retention of jurisdiction as stipulated in Award No. 22640 is hereby repeated and renewed pending the outcome of the action directed hereby.

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 jurisdiction is retained in this Board as indicated in the Opinion.

A W A R D

Claim remanded to the property for handling consistent with the foregoing Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of August 1980.