Serial No. 337

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 26531

DOCKET NO. MW-26913

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: The Denver and Rio Grande Western Railroad Company

QUESTION FOR INTERPRETATION:

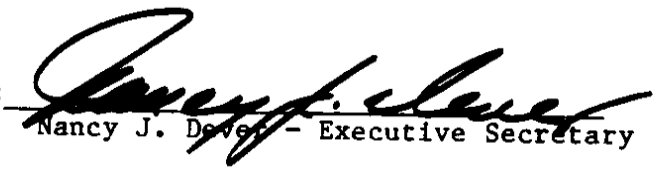
Whether the Carrier has complied with this Board's Award?

This Board previously held "that a Board of Physicians be convened in accord with the procedure set forth in Rule 24." Subsequent to the issuance of our Award, Claimant's physician and the Carrier's physician wrote reports concerning Claimant's medical condition. Based on those reports, the Carrier is again of the opinion that no disagreement exists between the physicians concerning Claimant's physical condition. According to the Carrier, under Rule 24 since no dispute exists, there is "no need for a neutral physician." The Organization argues that a neutral physician must be selected in accord with our Award and the Rule.

We agree with the Organization. As in our initial Award we cannot say that the parties' physicians are in agreement. The parties are therefore directed to proceed with the procedure for selection of a neutral physician under Rule 24 and are further directed to follow the procedures set forth in our Award and in that Rule.

Referee Edwin H. Benn sat with the Division as a Member when Award No. 26531 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1990.

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26531

THIRD DIVISION Docket Number MW-26913

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

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

1. The Agreement was violated when Machine Operator F. A. Rich was improperly withheld from service beginning May 31, 1984 and when it refused to enpanel a Board of Physicians as required by Rule 24 (System File D-46-84/MW-2-85).

2. The claimant's dismissal for alleged engagement in outside employment without proper authority was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-57-84/MW-3-85).

3. The claimant's record shall be cleared of the charge against him, he shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered as a consequence of either Part (1) and/or (2) above subject to the findings of a Board of Physicians."

OPINION OF BOARD: Claimant was a Work Equipment Operator with a seniority date of October 5, 1953.

During the period June, 1968, through March, 1975, Claimant suffered from back problems resulting, in part, from on-duty injuries and consequently had periods of time wherein he was placed in a disability status or otherwise missed work due to his back problems. In March, 1975, Claimant was again placed in a disability status. Claimant performed no work for the Carrier after that time.

Claimant presented the Carrier a letter dated May 31, 1984, wherein Claimant's physician, Dr. Fisher, made the following determination:

> "Frank is here for a work release. He states his symptoms are much less severe than before. Straight leg raising is negative today and motor function is Grade V. I think it is reasonable to return to full work activities."

By letter dated June 5, 1984, the Carrier instructed Claimant to report to Dr. Lockey for a physical examination regarding Claimant's request to return to service. Dr. Lockey's June 18, 1984, assessment of Claimant was as follows:

"At present, Mr. Rich has no current complaints concerning his back. He does state however, that he needs to be careful particularly when doing any heavy lifting associated with twisting motion. His physical examination was felt to be within normal limits except for some decreased lateral motion involving his cervical spine. Cervical and lumbar spine films did demonstrate degenerative changes involving the left neural foramina of C5-C6 and C6-C7.

Because of Mr. Rich's long history of recurrent back pain of unknown etiology and because of the current degenerative changes involving the cervical spine on the left side, I do not feel he is qualified to return to work as a heavy equipment operator. This type of recurrent stress to his cervical and lumbar spine would most likely cause a recurrence of his past symptomatology."

By letter dated July 3, 1984, the Carrier advised Claimant that he was not physically qualified to return to service at that time. Claimant then returned to his physician who made the following assessment on August 2, 1984:

"I see no reason why he cannot return to the type of job he is doing as described to me in the enclosed note.

* * *

PHYSICAL EXAMINATION: I went over him today. He had a full range of motion of his back. Straight leg raising is negative. Major function is grade 5 throughout. Deep tendon reflexes are 2+ and equal throughout. He has no significant limitation of motion of his cervical spine.

X-RAYS: I did not obtain x-rays today.

RECOMMENDATION: There is nothing on examination nor in his history today that would prevent him from returning to any sort of work activity with the exception of the heavy kind of recurrent manual labor. He describes his job to me as being one where he sits and moves levers and brake pedals. I see no reason at all why he could not do that kind of job."

By letter dated August 13, 1984, the Organization requested that Claimant be given further examination by a Board of Physicians in accord with Rule 24 of the Agreement and filed a Claim for unjust physical disqualification. By letter dated October 3, 1984, the Carrier's System Superintendent A. L. Marzano informed Claimant that he was dismissed from service under Rule 25(f) asserting that "while on leave you engaged in other employment without the permission of the Company." By letter dated October 9, 1984, the Carrier's Division Engineer M. B. Davis denied the disqualification Claim and further declined to convene a Board of Physicians since "Mr. Rich is no longer an employee, Rule 24 and Rule 29 are not available to him and the claim is without merit." On October 23, 1984, the Organization filed a Claim on the dismissal. Both Claims are presently before this Board for adjudication.

The record discloses that the Carrier's determination that Claimant was engaged in outside employment was based upon the following memorandum dated September 12, 1984, from Claims Agent D. Nearing:

> "Per J. L. Groves' request, I went to the Colorado Real Estate Commission office, 1776 Logan St., Denver, Colo, date, to check for any records on Rich. Current records were checked and it was determined Rich was not licensed as a salesman or broker, 1983 to present. Ms. Judy Espinoza checked their dead file and found that Frank A. Rich had been licensed as a salesman but the license expired 12/31/81. He had two years (til 12/31/83) to reinstate his license just by paying a fee, but he did not reinstate the license.
>
> Records indicated Rich had worked for United International, Inc, 5/31/78 to 4/2/79, in Grand Junction. His license was issued 5/31/78 and expired 12/31/81."

The Organization asserts that Claimant has denied engaging in any outside employment after his last day of actual work with the Carrier, but was forced to sell his farm and instead has lived off the proceeds of that sale.

Rule 25 provides in pertinent part:

> "Sickness or Disability - (d). Employees sick or physically disabled will not be required to obtain leave of absence. They may, however, be required periodically, either prior to and/or upon their return to service to furnish satisfactory evidence of such sickness or disability.

* * *

Outside Employment - (f). Employes on leave of absence who engage in other employment will lose their seniority unless they have secured permission through the proper officials of the Company and General Chairman."

Initially, we must address Claimant's alleged forfeiture of seniority. The Carrier argues that Rule 25(f)'s restriction against outside employment applies to employes on disability leave such as Claimant and therefore, under the self-executing provisions of Rule 25(f), Claimant forfeited his seniority by the fact of his engaging in outside employment during his period of disability. The Organization argues that Rule 25(f) has no application to this case since Claimant was in a disability status thereby falling under the provisions of Rule 25(d) which exempts Claimant from having the need to obtain a leave of absence and therefore permits outside employment during the time an employee is in a disability status. Further and alternatively, the Organization argues that there is insufficient showing by the Carrier that Claimant was engaged in outside employment during the period of his physical disability.

We find that it is unnecessary to reach the broader question presented by the parties concerning the relationship between Rules 25(d) and (f) and whether outside employment is permissible for employees in a disability status as opposed to a leave of absence status. In Third Division Award 25522 on this property which involved a similar set of facts concerning an employee on sick leave, we noted the distinctions made by the Rules ("the rules clearly distinguish between a person being off sick or disabled and other types of leaves of absence"). However, we specifically resolved that case on the basis of there being an insufficient showing concerning the fact of the alleged outside employment.

As in Third Division Award 25522, "[w]e conclude that more evidence . . . was needed to justify the closing of Claimant's record." Here, the evidence indicates that the Colorado Real Estate Commission's records show that Claimant obtained a real estate license for a portion of the period that he was disabled. Although, according to the Carrier, the records of the Colorado Real Estate Commission show that Claimant "worked for United International Inc.", the Organization has denied the same in the on-property handling of the Claim indicating that Claimant asserts he had no outside employment but lived off the proceeds of a note from the sale of his farm. Although we do not believe that the Organization's mere denial can be taken as fact, the burden is on the Carrier to establish that Claimant was working elsewhere and a mere check of the Colorado Real Estate Commission's records, as in Third Division Award 25522, is not a sufficiently "thorough investigation" to justify closing Claimant's record. We note that as pointed out in the appeals, the Organization also spoke to Ms. Espinoza of the Colorado Real Estate Commission and although verifying that Claimant had a real estate license as asserted by the Carrier, the Organization asserts that the Commission's records indicate that the license was merely held by United International and not that Claimant performed work or drew compensation from that Company. Sufficient doubt has therefore been cast upon the Carrier's conclusion that Claimant engaged in outside employment.

The Carrier has directed our attention to four Awards concerning outside employment when such conduct was prohibited (Third Division Awards 21864, 16835, Second Division Award 7515, Fourth Division Award 4242). However, in each of those Awards, there was no dispute that the employee was engaged in outside employment and the Investigation clearly disclosed the fact of outside employment. Fourth Division Award 4242 is further not applicable to this case inasmuch as although the employee had a real estate license, there was further evidence that the employee owned a real estate company and conducted business. Such is not the case herein. Therefore, even assuming that the Carrier's position is correct and that the prohibition against outside employment found in Rule 25(f) extends to employees falling under the provisions of Rule 25(d) (an issue we do not reach), we conclude that there is insufficient evidence in this record to establish that Claimant was engaged in outside employment. We shall therefore award that Claimant's seniority be restored.

Since we have found that Claimant did not forfeit his seniority as argued by the Carrier, the Carrier's argument that Claimant was not entitled to the convening of a Board of Physicians under Rule 24 because Claimant was no longer an employee must therefore fail. Under the circumstances of this case, we must also reject the Carrier's assertion that Claimant's doctor and the Carrier's designated physician were not in disagreement so as to preclude the convening of a Board of Physicians. We are cognizant of the fact that Claimant's doctor was under the impression (perhaps mistaken or mislead) that Claimant's duties consisted of mere moving of levers and brake pedals and that, in fact, Claimant's duties may involve much more strenuous activities that would ultimately preclude Claimant from working due to his physical condition. However, as laymen, we note the specific diagnosis made by each physician and we conclude that we are unable to determine Claimant's precise physical condition from this record and we are further unable to determine if Claimant can work with that condition in light of his specific job requirements. We believe that such determination must be made by a Board of Physicians who, in its expertise, can take into account the specific job duties involved paying particular attention to the existence of "any heavy kind of recurrent manual labor" (which Claimant's doctor concluded would not permit a return to work) and assess those duties in light of Claimant's physical condition. We shall therefore require that a Board of Physicians be convened in accord with the procedure set forth in Rule 24. The Awards cited by the Carrier (Third Division Awards 24254, 22553, and 21136) are distinguishable in that in those cases the record satisfactorily demonstrated that no disagreement existed between the designated physicians opinions in light of the specific job duties involved. We cannot say the same in this case.

Under Rule 24, the Board of Physicians has the authority to award compensation for time lost if it determines that Claimant should have been permitted to return to service when he so applied. It may well be that Claimant was not physically qualified and/or not entitled to compensation for time lost. However, under the facts of this case, that determination must be made by the Board of Physicians taking into account Claimant's medical record and the specific job duties involved. Therefore, as requested in the Claim, compensation for time lost, if any, shall be decided by the Board of Physicians in accord with provisions of Rule 24.

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 Employes involved in this dispute are respectively Carrier and Employes 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 the Agreement was violated.

A W A R D

Claims sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.