Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28181
THIRD DIVISION Docket No. MW-26886
89-3-85-3-716

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

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

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

Trackman J. Melbourne shall be compensated for all compensation loss suffered by him as a result of being improperly withheld from service May 21, 1984 to June 22, 1984 (System File NEC-BMWE-SD-1067)."

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 May 20, 1984, Claimant, who held the position of Trackman with Tie and Surfacing Gang Z-382, was assigned by his new supervisor the duties of installing rail anchors with a rail anchor wrench. Claimant informed his supervisor that he felt that if he had to use the rail anchor wrench he would have a recurrence of an on-the-job injury suffered on a prior occasion. According to the Organization, Claimant suffered a neck injury on the job approximately eight years ago which resulted in eight (8) weeks of lost time. On his return to duty, Claimant allegedly continued to experience some discomfort as a result of that injury, particularly when he used an anchor wrench. As a result, the Organization contends that Carrier permitted the Claimant to avoid the use of anchor wrenches whenever possible, a practice which continued until Claimant returned from furlough, and on the date in question, informed his new supervisor of the above-described circumstances. That supervisor then removed Claimant from service and advised him that he would be required to take a physical examination to determine his fitness to return to duty as a Trackman.

According to a Carrier letter dated May 29, 1984, Claimant was given two letters dated May 21, 1984, explaining why he had been removed from service. In addition, the letter stated that Claimant was scheduled for a physical evaluation on May 24, 1984, and that this information was given to someone at Claimant's home on May 22, 1984. The letter further states that Claimant failed to appear for the physical exam and instructs the Claimant to contact the Carrier to reschedule the evaluation.

On May 31, 1984, Claimant contacted the Carrier and arrangements were made for him to report to the Osteopathic Medical Center of Philadelphia. On June 6, 1984, Claimant was examined by Dr. John J. McPhileny, Sr., an orthopedic surgeon, who concluded that he could "find no reason at this time why [Claimant] cannot return to work in unlimited capacity."

Carrier was advised by the Osteopathic Center on June 14, 1984, of the results of Claimant's medical evaluation. The next day, June 15, Claimant was advised that he could return to duty immediately. On June 18, 1984, Claimant attempted to return to service by filling a vacancy in the Paoli Maintenance Gang G-362. However, since that position was already filled by a senior employee, Claimant was told he could not fill the vacancy. It was not until June 22, 1984, that Claimant returned to his former position with Tie and Resurfacing Gang G-382 and assumed his former duties as Trackman.

The Organization contends that Claimant was improperly withheld from service commencing May 21, 1984, and that he should have been allowed to continue in service as contemplated by Rule 62, which reads:

> "RULE 62
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> EXAMINATIONS - PHYSICAL AND OTHER
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> When examinations are required by AMTRAK, arrangements shall be made to take them without loss of time except:
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> a. Examinations required of an employe returning from furlough or from absence caused by sickness or disability need not be given during the employe's tour of duty.
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> b. Employes required to take examinations, other than those covered by paragraph (a) of this Rule 62, outside the hours of their regular tour of duty will be paid therefor under the provisions of Rules 44 or 53, whichever is applicable."

Carrier, on the other hand, argues that no rule of the Agreement requires it to keep an employee under pay when the employee advises the Carrier that he feels he is not medically fit for service, as Claimant did in

the case at bar. In fact, Carrier stresses its right to withhold an employee from service to determine medical qualifications to perform a job under such conditions is well established. Claimant was not disciplined in any manner, Carrier asserts, but was simply removed from service until his medical status could be determined, an action which was reasonable and proper under the circumstances, in the Carrier's view.

We find no fault with Carrier's well-documented argument that it has the right to assure itself of the physical condition of its employees, and that this right also includes Carrier's privilege of requiring a physical examination to determine the employee's fitness for duty. However, those rights are circumscribed by the rules of the parties. In this case, Rule 62 clearly provides that when examinations are required by the Carrier, arrangements shall be made to take them "without loss of time" except in limited circumstances which have no application here.

Carrier has argued that it should have the right to withhold an employee from service when the employee himself has raised doubts about his fitness to perform the work. In this case, however, the record does not establish that Claimant had suffered any new disability or suffered a recurrence of the old injury. He simply informed his supervisor about the circumstances involved in the previous on-the-job injury and also of the fact that he had previously been permitted to avoid the use of the anchor wrench in the past whenever possible. We cannot discern from the record before us why this particular supervisor decided to withhold Claimant from service when there had been an eight year interval where Claimant had apparently worked without a problem. We do find, however, that Carrier has failed to establish that it had justification for holding Claimant out of service on May 20, 1984.

Carrier has also asserted that even assuming arguendo that this Claim has merit, Claimant is barred from claiming any loss of compensation from June 16, 1984, the date on which he could have first returned to service, until June 22, 1984, when Claimant actually returned. Apparently, Carrier is suggesting that Claimant voluntarily chose not to report for duty or deliberately made himself unavailable for service. The record does not support that contention. Claimant was advised on June 15, 1984, that he could return to duty. He was told by a Carrier Representative to report to Paoli, Pennsylvania, on Monday, June 18, 1984, after the intervening weekend. The Claimant reported as directed but was not allowed to displace the position. Finally, according to the Organization's unrefuted evidence, on June 21, 1984, Claimant received a letter from the Carrier dated June 18, 1984, directing him to report for duty with the Tie Gang at Downingtown, Pennsylvania. Claimant did so the next day. Under these circumstances, we conclude that Carrier has not shown that Claimant was dilatory or somehow responsible for any delay in returning to duty, and the full time period sought in the Claim will be allowed.

Finally, the Carrier urges that any compensation owing the Claimant should be limited to the straight time rate. We agree that this is the majority view and the Claim will be sustained on that basis.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1989.