

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

- (1) The Agreement was violated when the Carrier failed and refused to allow Trackman F. Stephens to exercise his seniority upon his medical approval by Carrier physician to return to service beginning January 15, 1990 (System Docket MW-1093).
- (2) The Claimant shall be restored to service and he shall be paid at the trackman's rate for each day held off his position beginning January 15, 1990, and continuing until he is returned 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 waived right of appearance at hearing thereon.

Claimant, who had been off work since August 1989, was given the second of two return to work physicals on January 12, 1990, and approved for service. He attempted to displace on January 15, 1990, but was not allowed to do so when Carrier became aware that an attorney Claimant engaged to pursue a job-related matter concerning a confrontation with a supervisor had made inquiries to its Claim Department. When Claimant was asked about the matter he

refused to answer any questions relative thereto, and instead requested that all such questions be referred to his attorney. Carrier maintains that it is privileged to withhold Claimant from service because the matter being handled by his attorney was allegedly job-related stress. Carrier argues that there exist a number of awards that authorize withholding an employee from duty because of job-related stress.

Carrier is correct that it is not an Agreement violation to withhold an employee from duty because of job-related stress. Withholding an employee from service because of physical and/or mental considerations is not considered a disciplinary suspension. (See First Division Award 23989.) However, the facts involved in those cases differ from the facts involved in this case, Claimant was withheld from duty after he had been found fit for duty by a Carrier medical officer. The examination Claimant submitted to on January 12, 1990, did not find any physical or mental impairments which would make Claimant unfit for duty. It is medical conclusions made as a result of this examination which should be the basis of a determination of Claimant's ability to return to duty, and not an allegation an attorney may advance in the pursuit of a tort which should control. Accordingly, there being no evidence that Carrier had a medical basis for withholding Claimant from duty, the claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 2nd day of December 1993.