

PUBLIC LAW BOARD 2366

Illinois Central Gulf Railroad	:	
	:	Award No. 104 89
v.	:	Docket No. 104
	:	
Brotherhood of Maintenance of	:	
Way Employees	:	

STATEMENT OF CLAIM

1. The Company violated the agreement when it removed R. A. Parish's name from the roster on February 25, 1985.

2. The company should now be required to restore the Claimant to the seniority roster and allow him to return to work when released by his doctor.

OPINION OF THE BOARD

The Claimant was on a leave of absence for an on-duty injury, but the Carrier removed his name from the seniority roster when he allegedly failed to comply with certain written instructions to report for a special physical examination.

The Carrier notes that the Claimant subsequently received a court verdict in excess of \$142,000 against the Carrier for permanent injury and resulting disability concerning past and future wage losses dealing with the injury in question. Thus, Carrier argues that Claimant would be unable to return to work as a Trackman.

The leave of absence started in August of 1984 and on February 5, 1985 the Carrier advised the Employee to report for a physical on February 12. He did not report for the physical as instructed, and (according to the Carrier) never notified the Company that he would not attend that physical examination. As a result, the Company notified him by letter on February 25, 1985 that his record was closed and his name was removed from the seniority roster.

In its presentation to the Board, the Carrier has made specific reference to the fact that he called the doctor's office on the morning of the exam to advise that he would not attend. That was not sufficient according to the Carrier, since the Claimant should also have contacted the Carrier to advise it of his intentions.

The decision to terminate the Employee results from Rule 38. That Rule states that an Employee will be considered as having abandoned his position and resigned from service when he is absent from his assigned position without permission for seven (7) consecutive work days.

The record shows that this Claimant was injured in April of 1983 and he had not performed any subsequent service due to that injury. In fact, the Employee had filed a claim in Court for damages and his case was scheduled for trial in the same month that he was instructed to report for a physical examination. Thus, the Organization argues that the Carrier cannot suggest that they were unaware of the Employee's physical condition since he was clearly on a medical leave of absence. There also appears to be an underlying assertion of insubordination for failure to report for the medical examination.

The Organization argues that the Carrier did not have the right to order an Employee to undergo a physical examination when there was a lawsuit pending, especially since trial was imminent.

Quite candidly, the Board confesses that it has struggled with a number of concepts in this case. While this Board has never hesitated to apply Rule 38 in appropriate circumstances, we do have certain misgivings in finding that Rule 38 was ever intended to apply to this type of a situation. Moreover, an instruction to report for a physical examination when the case is ripe for judicial determination would seem to be an effort to bypass the orderly judicial procedures established by our court systems. We are reluctant, however, to issue an Award which is all inclusive to various circumstances whenever an Employee is on a leave of absence, and we are certainly reluctant to issue an Award which suggests that a Carrier does not have a basic right to physically examine an individual who is on a medical leave.

Based strictly upon the limited facts and circumstances of this case and in contemplation of the time elements involved, we feel that the Carrier did not act

properly when it sought to instruct the Employee to report for a physical examination. While it certainly would have been appropriate for the Employee to be more direct with the Company, we are reluctant to issue an Award which upholds a termination from employment under Rule 38 in this case.

At the same time, however, we certainly are unable to issue an Award which states an immediate or future right to restoration of this Employee to service.

Our extensive review of the record shows that significant evidence and testimony was presented in court on behalf of the Claimant to show that he was unable to work and that his injuries were permanent in nature; so that future wage loss was clearly a part of the damage award issued against the Company. Thus, we cannot, in good faith, issue an Award restoring this Claimant to service or awarding back pay. Instead, we will direct that the Carrier's records be changed to delete any possible reference to a discharge for cause or an abandonment or resignation under Rule 38. Rather, the records should show that the medical leave of absence continued until such time as the court issued its judgment and the time that the judgment was satisfied. At that time, we feel it was appropriate to show a deletion of the employee's name from the Carrier's records in compliance with the satisfaction of the Court's verdict of permanent injury with full satisfaction by means of a monetary award.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

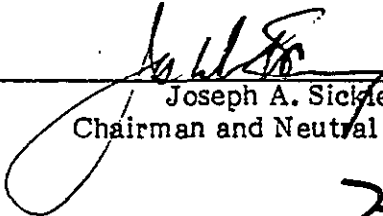
The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

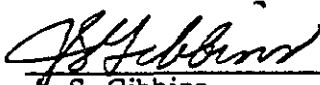
The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

1. Claim sustained to the limited extent described in the Opinion of the Board,
above.
2. Carrier shall comply with this Award within thirty (30) days of the date of this
Award.



Joseph A. Sickles
Chairman and Neutral Member



A. S. Gibbins
Carrier Member



Hugh Harper
Organization Member



Date