

PUBLIC LAW BOARD NO. 2439

Award No. 65
Case No. 65

PARTIES
TO
DISPUTE

- Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company (Western Lines)

STATEMENT
OF CLAIM

- "1. That the removal of Cayetano R. Silva from the service of the Northwestern Pacific Railroad Company, based on physical disqualifications, was in violation of the applicable agreement. Said act was arbitrary, capricious, and in abuse of discretion.
2. Claimant, Cayetano R. Silva, be returned to his former position with the Northwestern Pacific Railroad Company with compensation for all time lost beginning June 9, 1982, and all days subsequent thereto."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The claimant herein, Mr. Silva, a carpenter with the Bridge and Building Sub-department, had been employed by Carrier in May of 1964. He suffered a back injury on November 3, 1976, which was work incurred. Subsequently, he had a number re-injuries and other problems relating to that back and had been off work periodically since the initial injury. The last incident occurred on May 24, 1982, when he again injured his back on duty. He was released by his own physician with no restrictions and returned to duty notice effective June 1, 1982. Claimant returned to service on June 4, 1982, after clearance through Carrier's Medical Office. The record indicates that claimant returned to work on June 7, 1982, but was not permitted to start his job. On June 9 he was removed from his employment with a letter signed by the Regional Engineer which provided as follows:

"Because of your admitted physical inability to perform your duties as a carpenter, you are hereby removed from active service until such time as you are able to perform all the duties of your position."

On July 7, 1982, claimant reappeared at his work location, after having undergone a physical examination, with a return-to-duty release from his doctor, a Doctor Matheson. He was denied the right to return to work at that time. The claim herein had been filed on June 24, 1982, alleging that claimant has wrongfully been removed from service. The claim was based on the alleged violation of the agreement by Carrier in refusing to recognize the non-restricted doctor's release submitted by claimant. Further, it is alleged, that Carrier violated the agreement when it removed claimant from its service at the close of the shift on June 10 and continued to withhold him from service from that date on, even though it had the non-restricted doctor's release which had been provided by claimant. There followed thereafter a series of exchanges between Carrier's Chief Medical Officer and claimant's physician with respect to claimant's condition. Without detailing the nature of that correspondence, let it suffice to indicate that there apparently was a significant difference in the perspectives of the two physicians as to whether or not the claimant could be permitted to return to work without restriction.

The Organization contends that the Carrier has ignored claimant's rights under the provisions of Rule 30 of the agreement. According to the Petitioner, Paragraph A of that Rule contemplates that the claimant should subject himself to a physical examination prior to returning to service, provided Carrier indicates that such examination is needed. In this case, claimant was examined and subsequently found to be physically fit to return to his former assignment. Carrier simply refused to accept the finding of the physician. Further, according to the Petitioner, Carrier violated Paragraph B of Rule 30 in that claimant was not permitted the privilege which that rule specifically contains of being examined by Carrier's physician and, if dissatisfied, having the matter referred to a neutral, independent doctor selected by the two other physicians. The Organization contends that Carrier's Chief Medical Officer stalled in this situation and finally, on April 7, addressed a letter to claimant informing him that an appointment had been made on his behalf to be evaluated by a Carrier-designated physician. As of the date of this submission herein, the results of that examination were not known.

Carrier insists that there were no jobs available to claimant with the restrictions placed upon him by both claimant's doctor and Carrier's Chief Medical Officer. Carrier argues, further, that there was no dispute between the two

physicians as to the physical condition of the claimant with regard to his back problems and there was no need for an independent panel of doctors.

Carrier insists, from the record of claimant's injuries, that each time he has returned to work, he has reinjured his back within a short time. Carrier feels that it is in claimant's best interests not to be placed back into service on assignments other than those which he can work within the limitations of his physical condition.

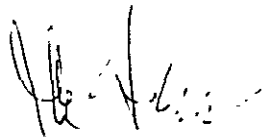
There is no question that Carrier has the right to determine whether, indeed, claimant has the physical capacity to engage in his regular occupation. Furthermore, an examination of the record indicates that there was a significant difference, contrary to Carrier's assertions, between the opinions expressed by claimant's physician and Carrier's Chief Medical Officer. Claimant's physician insisted that the claimant be permitted to work without restrictions. Carrier's Chief Medical Officer felt that, based on his evaluation of the material, a specific lifting restriction was appropriate, thus eliminating the possibility of claimant returning to work as a carpenter. The difficult part of this entire dispute is the fact that it took from June 10, 1982, to April 27, 1983, for Carrier to arrange an appointment for claimant with an appropriate physician designated by Carrier to determine what, indeed, were his physical condition and possible limitations. This delay is simply not acceptable, particularly in view of the loss of pay suffered by claimant during the intervening period. Further, it is obvious that an impartial panel in this case (unless claimant agrees with the finding of Carrier's physician) will be required. For the reasons indicated and the inordinately long period of time for the physical examination to be accorded claimant, claimant will be awarded back pay from June 10, 1982, until the matter is resolved by a medical panel. His return to work will be conditioned upon the conclusion reached by the independent physician in the medical panel (with the exception noted above).

AWARD

Claim sustained in part; claimant will be reimbursed for all time lost from June 10, 1982, until the resolution of this dispute through the use of a medical panel under Rule 30 (b). His return to work will be conditioned upon the medical conclusion reached.

ORDER

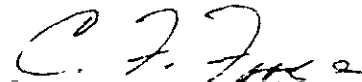
Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I. M. Lieberman, Neutral-Chairman



L. C. Scherling, Carrier Member



C. F. Foote, Employee Member

San Francisco, CA

March 27, 1984