NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5732

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	Case No. 3
and	)	
	)	Award No. 3
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY	)	
	)	

Martin H. Malin, Chairman & Neutral Member
Donald D. Bartholmay, Employee Member
John H. Young, Carrier Member

Hearing Date: January 13, 1997

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed and refused to institute a three (3) physician panel pursuant to Rule 29 when Maintenance of Way employe Richard P. Wilhelm was released for service by his physician which was disputed by the Carrier (Claim No. 27-95).

3. Maintenance of Way employe Richard P. Wilhelm shall now be compensated for all wage loss suffered as a result of being improperly withheld from service commencing sixty (60) days prior to December 6, 1995 and continuing until he is returned to service.

FINDINGS:

Public Law Board No. 5732, upon the whole record and all the evidence, finds and holds that Employees and Carrier are employees and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant was hired by Carrier in 1981. He was laid off due to a reduction in force from 1986 until 1995. In 1995, Carrier recalled Claimant, but Carrier's physician determined that Claimant was not physically qualified to

return to duty. Consequently, Claimant continued in inactive status.

Claimant submitted a letter from his doctor which the Organization contends disputes the findings of Carrier's doctor. The Organization argues that, because of the dispute between the two physicians, Claimant was entitled to have the matter resolved by a third, mutually selected physician. The Organization relies on Rule 29(b).

Carrier denied the Organization's request to invoke the procedure called for in Rule 29(b). Carrier maintains that the two doctors did not disagree over Claimant's physical or visual condition. Rather, in Carrier's view, the two doctors, at most, disagreed whether, in light of Claimant's physical condition, he was capable of performing the work of an employee in the B & B Department. Carrier maintains that such judgments are committed to Carrier's discretion as long as Carrier does not exercise that discretion arbitrarily or unreasonably.

Rule 29(b) provides:

> If the two physicians selected in accordance with paragraph (a) should disagree as to the physical or visual condition of such employee, they will select a third physician to be agreed upon by them, who shall be a practitioner of recognized standing in the medical profession and a specialist in the disease or diseases from which the employee is alleged to be suffering. If the two physicians selected by the Railway Company and the employee fail to agree in the selection of a third physician, both parties agree that the third physician may be selected by the Duluth Clinic. The Board of Medical Examiners thus selected will examine the employee and will render a report within a reasonable time, not exceeding fifteen calendar days after selection, setting forth his physical or visual condition, as the case may be, and their opinion as to his fitness to continue service in his regular employment, which will be accepted as final. Should the decision be adverse to the employee and it later definitely appears that his physical or visual condition, as the case may be, has improved, a reexamination will be arranged after a reasonable interval upon request of the employee.

Our review of the record leads us to conclude that the Organization has failed to prove that Claimant qualified for the procedure detailed in Rule 29(b). It is undisputed that Carrier's physician found that Claimant was not physically able to perform the duties of an employee within the B & B

Department. The last communication from Claimant's physician in the record is a letter dated August 10, 1995, which states, in relevant part:

> I have reviewed the duties of a B & B worker and believe that this patient would be able to perform those work duties. If there is serious consideration that he could be hired back to duty then I would recommend to him that we obtain an FCE for completeness to further assure you of his abilities. If, however, you are merely "cleaning out your files" of laid-off workers with little chance of his returning to work despite whatever documentation I could provide, then I will so inform him before he incurs a cost for an FCE.

It is not clear from the record whether the FCE was ever performed. Moreover, there is nothing in the record to indicate, if the FCE was performed, what Claimant's physician's interpretation of the results was. Thus, the Organization has failed to carry its burden to establish that there was a dispute between Claimant's physician and Carrier's physician. We simply do not know what Claimant's physician's ultimate diagnosis and recommendation was, or even if he ever made one.

Although the claim must be denied, we note that Claimant remains an employee. Consequently, he remains free to submit to Carrier any additional medical documentation that he has, including any evidence of improvements in his physical condition since the claim was filed over a year ago. Carrier should consider whatever evidence Claimant might submit and if a dispute arises, a new claim may be filed.

AWARD

Claim denied.

Martin H. Malin, Chairman

John H. Young,
Carrier Member

Donald D. Bartholmay,
Employee Member

Dated at Chicago, Illinois, January 27, 1997.