

PUBLIC LAW BOARD NO. 6596

**Case No. 3
Award No. 3**

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier withheld Mr. R. B. Muilenburg from service beginning June 15, 1995 and refused to establish a Medical Board of physicians as required by Rule 50 (System File N-284/1013000).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall promptly establish a Medical Board to examine Mr. Muilenburg and he shall be compensated for all wage 'loss suffered beginning January 24, 1996 and continuing until he is returned to service with all rights unimpaired.'"**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

This is a complex and multilayered case best presented in the background of the initial claim above which was presented January 24, 1996 arguing that the Claimant was unjustly withheld from service in violation of Rules 1, 20, 48 and 50. The Organization maintained that the Claimant was inappropriately disqualified from service for medical reasons and requested all wages lost. It provided a signed medical opinion that the Claimant "does not have a mental condition which would necessarily preclude him from safely performing his duties as a track laborer." It requested a Medical Board under Rule 50.

The Organization has raised issues of both procedures and merits. The Board

notes that the Carrier's response of March 29, 1996 to the claim confirmed a 30-day extension for its response. There is no question after full review that the Carrier did not respond in a timely manner. Therefore, the claim must be sustained.

The Carrier's response of June 10, 1996 tolls all liability thereafter. In that response, the Division Engineer stated that the Claimant was withheld from service as medically disqualified. He notes that the Claimant "had been removed from service the previous month for observed unsafe practices."

The Board finds that the substance of correspondence and evidence is over the Claimant's medical conditions. The extensive details in this record of the Claimant's "Attention Deficit Disorder and Hyperactivity Disorder" are beyond this Board's authority and competence to consider, except to note that the Carrier's Medical Director found that the Claimant was "not considered to be medically qualified." The liability therefore cannot be for back pay in that the Claimant was unable to perform his work to the safety requirements of his job.

Additionally, there is in this record the further issue of Rule 50 on Physical Disqualification. There is no question in this case, that the Claimant was physically disqualified and that makes Rule 50 relevant. It states:

(a) Disqualification. When an employe is withheld from duty because of his physical or mental condition, the employe or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employe's physical or mental condition by a competent physician, make written request upon his employing officer for a Medical Board.

The initial claim by the Organization included the affidavit of a physician which concluded that "it is my medical opinion that [Claimant] does not have a mental condition which would necessarily preclude him from safely performing his duties as a track laborer." There is no question that the Carrier failed to fulfill its responsibilities under Rule 50 to convene a Medical Board.

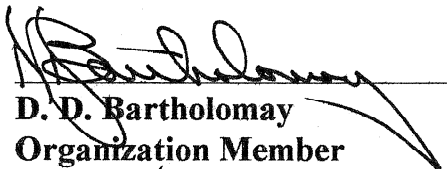
The Board must find that the Carrier is required under this record to convene a Medical Board as requested in the Claim. There is no question in the facts at bar that the Organization presented a qualified dissenting opinion and proper written request. While we cannot find the Carrier's disqualification improper and will not return the Claimant to service under the full record of evidence, nor grant back pay, we are

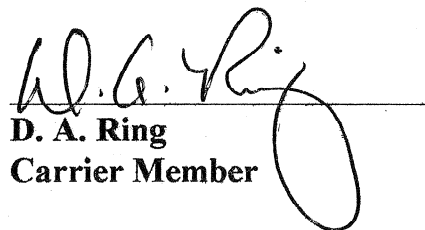
constrained to find a Rule 50 violation and order Carrier compliance.

AWARD:

Claim sustained as indicated in the Findings. This Board after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made. The Carrier is ordered to make this Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.


Marty E. Zusman, Chairman
Neutral Member


D. D. Bartholomay
Organization Member


D. A. Ring
Carrier Member

Date: 6/30/03

**PUBLIC LAW BOARD NO. 6596
INTERPRETATION NO. 1 TO AWARD NO. 3
CASE NO. 3**

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

This case involves an Interpretation of Public Law Board No. 6596, Award No. 3, Case No. 3. In that dispute the Board partially sustained the claim of the Organization. In pertinent part, the Claim requested that:

the Carrier shall promptly establish a Medical Board to examine Mr. Muilenburg and he shall be compensated for all wage 'loss suffered beginning January 24, 1996 and continuing until he is returned to service with all rights unimpaired.'

The Board carefully reviewed what it termed "a complex and multilayered case" and reached the determination that the Carrier was required to comply with Rule 50, as claimed by the Organization. It further concluded that,

While we cannot find the Carrier's disqualification improper and will not return the Claimant to service under the full record of evidence, nor grant back pay, we are constrained to find a Rule 50 violation and order Carrier compliance.

The language the Neutral Member used, supra, was questioned as to its meaning. Specifically, the Organization has requested an Interpretation of the meaning of Carrier compliance with Rule 50.

The Organization argues that the Award required the Carrier to comply with Rule 50. A Medical Review Board was therefore convened and the Claimant was returned to service by decision of January 30, 2004. Rule 50(e) states:

COMPENSATION – If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Company doctors, the original medical findings which disclose his condition at the time disqualified will be furnished to the neutral doctor for his consideration and he will specify whether or not, in his opinion, there was justification

for the original disqualification. The opinion of the neutral doctor will be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section (a) of this rule.

The Organization argues that the Carrier has failed to properly apply the Award. The Organization maintains that compliance with Rule 50, includes full compliance with all aspects of Rule 50, including Section (e), supra. As the Medical Review Board found the Claimant fit for service during the time dismissed, the Claimant is due pack pay under Rule 50, to January 24, 1996.

The Carrier denies the merit of the Organization's arguments. It maintains that the original claim before this Board issued Award No. 3 requested, "all wages lost while withheld from service, beginning on January 24, 1996, continuing until such time as he is rightfully reinstated." It points out that the Award considered that element of Rule 50 and specifically stated in its partially sustaining decision that, "... we cannot find the Carrier's disqualification improper and will not return the Claimant to service . . . , nor grant back pay . ." The Carrier holds that the decision is clear and no back pay is to be awarded.

The Board specifically considered all elements of the Claim in Award No. 3. It found the facts therein to be unique. In the Board's study of the Medical Review Board's decision, there is nothing that indicates the Claimant was ever fit for duty during the time dismissed. The review discusses prior letters from Dr. Preyer, Dr. Barnett and others, as well as what the Claimant had been doing during the time he had been dismissed. It does not state that the original determination that the Claimant was "not considered to be medically qualified" was inaccurate. While the review points out that the Claimant is now capable of working as a track laborer, it notes that the Claimant:

... reports some improvement in his ability to sustain focused attention with psychostimulant medication and unless this were abused, there should be no negative impact to work safety issues.

The Board finds that the Medical Review Board ordered a conditional release

to work. Under the unique conditions of this instant case, we specifically did not grant back pay. Rule 50(e) on compensation finds no facts in this record wherein there is an opinion by a neutral doctor that there was or was not "justification for the original disqualification." There is no explicit statement by the Medical Review Board that the original medical disqualification was "improper." In the Board's review, the medical re-examination finds that over eight years later, the Claimant is capable of track labor service while on medication. This does not change our initial decision. Under these instant circumstances, no back pay is due to the Claimant.

Referee Marty E. Zusman sat with the Members of Public Law Board No. 6596 when Award No. 3 was rendered, and also presided over the Executive Session in making this Interpretation.


Marty E. Zusman, Chairman
Neutral Member

Date: 3/31/2006