

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5244**

<b>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES</b>	)	
	)	Case No. 15
and	)	
	)	Award No. 3
<b>NORTHEAST ILLINOIS REGIONAL COMMUTER</b>	)	
<b>RAILROAD CORPORATION (A PUBLIC CORPORATION)</b>	)	
<hr/>		

Martin H. Malin, Chairman & Neutral Member  
M.J. Schappaugh, Organization Member  
J.S. Morse, Carrier Member

Hearing Date: August 26, 1992

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Trackman L. A. Parham for alleged ". . . failure to properly protect your position . . . on April 4, 1990 and continuing.", violation of Rules B, N(3) and Q, was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (Carrier's File 08-13-101).

2. The Claimant shall be restored to a leave of absence status with all rights and seniority unimpaired, and all reference to this investigation shall be stricken from his personnel record.

**FINDINGS:**

Public Law Board No. 5244, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee 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.

On April 6, 1990, Claimant was notified of a formal hearing to develop the facts relating to his alleged failure to protect his position on April 4, 1990, in violation of Rules B, N(3) and Q.

The hearing was held on April 24, 1990. On May 4, 1990, Claimant was advised that he was found to have violated Rules B, N(3) and Q, and was dismissed.

On June 8, 1988, Claimant sustained an on-the-job injury to his leg. He was out of work for two days, returned to work for four of the next five days and then was out until April or May 1989. During this extended period of absence he underwent surgery.

In January 1990 Claimant again began to miss work. He produced a doctor's note dated January 17, 1990, which indicated that he was unable to work until further notice. As a result of this note, Carrier referred Claimant to its physician, Dr. Barry Fischer, who examined Claimant on February 27, 1990, and, on March 13, 1990, reported his findings that Claimant was fit to resume his normal job duties.

As a result of Dr. Fischer's findings, Carrier ordered Claimant to report for work on March 26, 1990. On March 24, 1990, however, Claimant reported to Carrier with a note from his physician indicating that Claimant remained unable to return to work. Consequently, Carrier ordered Claimant to report to Dr. Anthony Brown for another physical examination. Claimant complied.

Dr. Brown examined Claimant on March 29, 1990, and found him fit for duty. Carrier then ordered Claimant to report for duty on April 4, 1990. Claimant did not report for duty as ordered. Instead, he telephoned the Division Manager and advised that he remained unable to work. The most recent medical evidence in the record consists of notes from Claimant's doctors dated April 21, 1990, indicating that Claimant remained disabled.

Claimant contends that the evidence established that he was physically unable to report for work and therefore, his failure to report for work as ordered was justified. Claimant argues that he was not insubordinate. He reported for all physical exams as required by Carrier and did contact Carrier to advise Carrier of his inability to comply with Carrier's orders to return to work. Claimant relies on his doctor notes to establish that he was in fact disabled. Without prejudice to his arguments regarding the offense, Claimant contends that his physical condition was a

mitigating factor, in light of which, the penalty of dismissal was excessively harsh.

Carrier contends that Claimant violated Rules B, N and Q by failing to report for work as directed. Carrier relies on the findings of its two physicians who agreed that there was no objective reason why Claimant could not perform his regular duties. Carrier contends that it has the ultimate authority to evaluate the physical qualifications of its employees. In Carrier's view, its order to Claimant to report for work on April 4, 1990, was justified, and Claimant's failure to report for work on that date justified his dismissal.

Claimant and Carrier have each cited several prior awards which they contend govern this case. We find none of these to be controlling. The awards cited by Claimant do not involve situations where the employee's medical evidence of disability was contradicted by the carrier's medical evidence. The awards cited by Carrier also do not involve bona fide conflicts in the medical evidence. For example, in Second Division Award No. 9813, the claimant was observed engaged in off duty activities which were inconsistent with his claim of disabling back pain. In Public Law Board 3721, Award No. 1, claimant's own doctor indicated that he should work, and claimant left work, not because of medical disability, but instead to obtain medical documentation after being denied permission to do so.

As an appellate body, we do not review the case de novo. We have carefully reviewed the record and find that substantial evidence supports Carrier's finding of the alleged rule violations. Dr. B. Fischer examined Claimant and found him fit for duty. When Claimant produced contradictory medical documentation, however, Carrier did not rely on Dr. Fischer's findings. Instead of insisting that Claimant report for work as ordered, Carrier referred Claimant to another doctor, Dr. Brown.

Claimant's medical documentation refers to three allegedly disabling conditions: pain in the leg, swelling and a separation in the bone which was healing but not yet completely healed. Dr. Brown's report was quite thorough and addressed each of these conditions. He found no swelling in each area of the leg and foot that he examined. He noted the separated bone in his report, but, nonetheless, concluded that there was no objective reason why Claimant could not report to work. Dr. Brown's finding that Claimant's complaints were subjective in nature is supported by his observation that although Claimant walked with a cane, the cane appeared to be ornamental and lacking in a medical purpose.

Dr. Brown's report provided substantial evidence for Carrier's conclusion that there was no objective disability and its order that Claimant report for work on April 4, 1990. Claimant's telephone call on April 4 reiterating his subjective complaints gave Carrier no reason to discount Dr. Brown's report. The post-incident medical reports of April 21, 1990, merely reiterated the same conditions which Dr. Brown considered in his report.

Accordingly, we conclude that substantial evidence supports Carrier's findings of violations of Rules B, N(3) and Q. We next turn to the penalty. We do not overturn a penalty unless it is arbitrary, capricious or excessive. In the instant case, we are forced to conclude that the penalty of dismissal was excessive.

The only conclusion which we are able to draw from the record is that Claimant was acting in good faith. Claimant complied with each of Carrier's orders to report for a physical exam. Claimant never ignored Carrier's orders to report to work. He responded to the first order with medical documentation of his inability to work. He responded to the second order by telephoning Carrier and advising of his continued inability to work.

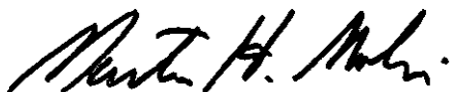
There is no evidence that Claimant's subjective complaints were not real to Claimant. Furthermore, there is no evidence that Claimant's doctors were acting in bad faith in reporting Claimant's disability, even though the evidence suggests that those reports may have been influenced by Claimant's subjective complaints. Under these circumstances, we find that discharge was an excessive penalty, and that Claimant should have been given a lesser penalty, which would have communicated to Claimant the seriousness of his failure to report for work despite the absence of an objective medical reason for not working. Accordingly, we shall reduce Claimant's discipline to a suspension for the period he was held out of service, i.e., for the period running from the date he was discharged to the date he is reinstated in accordance with this award. Claimant shall receive no back pay or other make whole relief, although his seniority rights shall be unimpaired.

#### AWARD

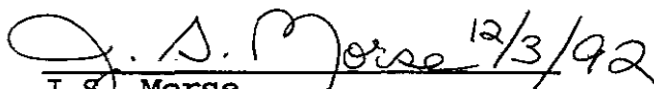
Claim sustained, but only to the extent indicated in the findings.

## ORDER

Carrier is ordered to comply with this Award within thirty (30) calendar days of the date two or more members affix their signatures hereto.



Martin H. Malin, Chairman



J.S. Morse  
Carrier Member



M.J. Schappaugh  
Organization Member

Dated at Chicago, Illinois, November 23, 1992.