

SPECIAL BOARD OF ADJUSTMENT 1016

Parties
to the
Dispute

*	*		*
*	*		*
*	*	Brotherhood of Maintenance of Way Employees	*
*	*		*
*	*	vs.	*
*	*		*
*	*	Consolidated Rail Corporation	*
*	*		*
*	*		*

Award No. 23

Case No. 23

STATEMENT OF CLAIM

(1) The Carrier violated the Agreement when it failed and refused to comply with the General Chairman's written request dated March 23, 1987, to establish a Board of Doctors in accordance with Rule 29 to examine Mr. J.E. Dillon.

(2) The Carrier also violated the Agreement when it failed and refused to permit Mr. J.E. Dillon to fill a Trackman position on Gang SE-253 on November 5, 6, 7, 10, 11, 12, and 13, 1986 (System Docket CR-2948).

(3) As a consequence of the violation referred to in Part (1) above, the Carrier shall be required to comply with Rule 29 and promptly establish a Board of Doctors to examine Mr. Dillon.

(4) As a consequence of the violation referred to in Part (2) above, Mr. Dillon shall be allowed fifty-six (56) hours of pay at the Trackman's rate.

FINDINGS

Claimant, J.E. Dillon, holds seniority in various classes in Carrier's Track Department. While working as a Welder on March 22, 1982, he sustained an on-duty injury. He brought suit against Carrier pursuant to the Federal Employers' Liability Act (FELA). The case was tried before a jury and on July 18, 1984, a verdict was returned and Claimant was awarded \$200,000.00. The jury, however, concluded that Claimant was 50 percent negligent in the accident and reduced the judgment to \$100,000. Carrier satisfied the judgment shortly thereafter.

On October 27, 1986, Claimant notified the Division Engineer's office at Youngstown, Ohio, that he was able to return to duty. A medical examination was scheduled on November 4, 1986. The examination never took place and Claimant was not allowed to return to work. A claim was filed requesting that Claimant be examined in accordance with Rule 29 (Board of Doctors) and that he be paid for six days in November 1986, when he should have been allowed to work. Carrier denied the claim at every level and it has been placed before this Board for resolution.

Petitioner takes the position that the jury in Claimant's case did not conclude that Claimant could never work for the railroad again. If it did, it would have granted a much larger judgment and would have stated its

conclusion in this regard.

Carrier concludes that since both Claimant and his doctor stated emphatically to the jury that Claimant would never again be able to work on the railroad, it is only logical that this fact weighed heavily in the jury's consideration when it awarded him \$200,000. The judgment was reduced to \$100,000 only because Claimant contributed to the accident through his own negligence.

This Board has reviewed the record and the many cases on both sides of the issue submitted by the parties. Based on that review, it is the opinion that Petitioner is not on solid ground in this instance. This Board finds it difficult to accept the fact that a Claimant can base his case before a jury on the grounds that he is permanently incapacitated and is incapable of performing railroad work and then when he is successful with that plea, turn around and request his railroad job back. This Board is of the opinion that the jury took all of Claimant's statements and his doctor's statements about his ability to perform railroad work into account. It awarded him \$200,000; this is not an insignificant amount. The award was only reduced to \$100,000 because Claimant contributed to the accident.

This Board is persuaded that the award Claimant received was based on his position that he was permanently

incapacitated and incapable of ever returning to railroad work. Carrier has a right to hold Claimant to that position. Carrier is not obligated in this situation to set up a Board of Doctors or to pay Claimant for any time claimed.

AWARD

The claim is denied.

R.E. Dennis
R.E. Dennis
Neutral Member

R. O'Neil
R. O'Neil
Carrier Member

Steven V. Powers
S.V. Powers
Employee Member
I dissent

September 18, 1989
Date of Approval