PUBLIC LAW BOARD 6721

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY

and

NMB Case No. 12
Claim of D.A. Brown
Difference in Pay

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request of Los Angeles Division Conductor D.A. Brown for difference in pay in what he has earned and what he could have earned on the Fifth Watson road switcher (1984 to 1991). Plus all monetary losses and interest, including lump sum payments and the trust fund that were lost because the Carrier failed to comply with Article 51(A)(B)(C)(D)(E) and (F) and the restrictions placed on him between 1984 and 1991.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on July 2, 2004 at Washington, D.C. Although Claimant was timely notified by the Organization to attend, he was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant commenced his employment with Carrier in the early 1960's. While working as a conductor on March 16, 1979, Claimant sustained an injury to his right foot. Claimant continued in service but did have surgery on his injured foot in January 1980. He returned to service in April 1980 and worked until September 1981 at which time he had another operation on his foot. In April 1982, he again had surgery. Although he continued to work, the medical procedures evidently did not ease the pain or heal his injury. Claimant brought suit against Carrier under the Federal Employer's Liability Act in September 1984. Records indicate that during the trial Claimant and his physicians testified he had a permanent and painful injury to his right foot and continuing to work would aggravate the injury. Moreover, it was reported to the court that within five to 10 years Claimant would not be able to perform the duties of his position and additional surgery would be needed in the near future. The jury found in favor of Claimant and awarded him $172,900 on September 25, 1984.

Rather than undergo further medical procedures for rehabilitation, Claimant contacted the Carrier the day after he received the court verdict expressing his desire to immediately return to service. Claimant was advised that he would be withheld from service pending evaluation by the Carrier's medical department in light of the evidence presented at the trial concerning his physical condition to perform work. Claimant was notified by letter dated December 10, 1984 that he could resume work which was restricted to passenger service. Claimant accepted this conditional work opportunity. He subsequently became an Amtrak employee when that company acquired all passenger service in 1986.

The Organization challenged the need for Claimant's restricted service and insisted the Claimant was entitled to be examined by a tri-doctor panel as outlined in Article 51 of the controlling Agreement. These two issues were addressed in Public Law Board 4315, Award No. 1 which was issued on October 11, 1988. That Board denied the Organization's request to remove Claimant's restriction to only passenger service but did hold the Claimant should be afforded an examination by a tri-doctor panel pursuant to Article 51. It held in pertinent part:

> *Claim sustained to the extent that the Claimant will be afforded an examination by a tri-doctor panel pursuant to Article 51 of the schedule agreement. Claim denied in all other respects.*

Claimant continued service with Amtrak. Carrier's medical department contacted Claimant's doctors in December 1988 for the establishment of the tri-doctor panel. A third doctor accepted the appointment to the panel and agreed to examine Claimant on April 27, 1989. Carrier notified Claimant of this examination by letter dated March 28, 1989. Claimant failed to report for his physical examination on the specified date. The record also indicates Claimant made no effort to contact the proper authorities at Amtrak to be absent from service for the examination. Carrier advised Claimant on May 5, 1989, that it had fulfilled its obligation of Award No. 1 of Public Law Board 4315 and closed the file.

The Organization insisted that Claimant be given another opportunity to submit to a physical examination by the agreed

upon physician. The Organization requested an Interpretation of Award No. 1 which would permit the Claimant a second chance to complete the physical examination. The Board agreed on September 25, 1990 that Claimant should be afforded another opportunity. The Organization notified Claimant on October 1, 1990 that he had thirty days from the date notified by the Carrier to submit for the examination. The record indicates there was some delay on the Claimant's part to comply, and he was not examined until November 8, 1990. The examining doctor held that Claimant was physically able to return to freight service of the Carrier without medical restrictions.

On March 14, 1991, Carrier notified Claimant of the medical findings and indicated that he had twenty-one days to meet the pre-service requirements and report to work. Claimant expressed no interest in returning to freight service for the Carrier. Instead, he requested a leave of absence and continued to work for Amtrak. The parties subsequently reached an understanding on May 24, 1991 that Claimant was on leave of absence while working for Amtrak; thus, he relinquished any contractual right to return to his former position with the Carrier pursuant to Article 51. The leave agreement reads in pertinent part:

> *This is to confirm that it was our decision in conference that Mr. Brown is on leave of absence working for Amtrak. Accordingly, since two years have passed since Mr. Brown went to Amtrak, he can only return to Santa Fe if he is unable to hold a regular assignment or an extra board position with Amtrak (except for disciplinary reason) according to the terms of the Amtrak leave of absence agreement.*

Just prior to this specific agreement, Claimant had requested that the Carrier pay him for all time lost until he was authorized to resume duty on March 14, 1991.

The Carrier declined the claim as without basis; the Organization appealed the denial and, as the claim was not resolved on the property, it was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Organization avers that Claimant was withheld from service by misuse of the estoppel argument raised by Carrier. Claimant is entitled to be paid the

compensation which he could have made working the Fifth Watson road switcher from 1984 to 1991 based on the findings of Award No. 1 of Public Law Board 4315 and the conclusion of the tri-doctor panel which found Claimant fit for service as of March 1991. The Organization maintains that Claimant is entitled to compensatory damages under the provisions of Article 51 of the schedule agreement.

The Organization readily acknowledges Claimant is not entitled to any additional compensation beyond March 1991 as a result of his request for leave of absence from the Carrier. The Organization states that Claimant's leave of absence was necessary because he felt he would suffer discrimination and retribution by the Carrier had he returned to service.

In citing authority for its position, Organization relies upon the findings of three sustaining awards, i.e., Award No. 1 of Public Law Board 3237, Award No. 664 of Special Board of Adjustment 910 and First Division Award No. 18532.

The Organization argues that Carrier's action violated the schedule agreement and requires that the claim be sustained.

The Carrier states that Claimant is fully responsible for any lost wages and he is not due any additional compensation. Carrier relies upon the findings of Award No. 1 of Public Law Board 4315 to support its position that Carrier retained the authority to place a medical restriction upon Claimant's service. Also, Carrier complied with the findings of this same award by the establishment of a tri-doctor panel to review Carrier's imposed restriction by determining the physical ability of Claimant to perform service.

Carrier denotes the lack of cooperation from Claimant to take the steps necessary to return to service. Claimant made no effort to keep his medical appointment on April 27, 1989 with the panel selected doctor. Also, after Claimant was approved to return to Carrier's service, he refused to work and immediately requested leave of absence. Carrier affirms that when the parties agreed to grant Claimant a leave of absence under the conditions of the 1986 Agreement, all claims concerning the Claimant were resolved.

In addition to the findings of Award No. 1 of Public Law Board 4315 to support its position, Carrier relies upon the findings of Award No. 89 of Public Law Board 4228 and Award No. 163 of Public Law Board 901.

The Carrier insists that Claimant is attempting to gain compensation without working and that the claim should be denied.

DISCUSSION AND ANALYSIS: Upon the whole of the record and after review of the argument of the Parties, the Board is convinced that the Organization failed to prove that Claimant is entitled to the compensation requested.

Carrier had sufficient medical evidence to make the initial decision on December 10, 1984 to restrict Claimant to only passenger service. During the FELA trial in September 1984, Claimant and his physicians testified he had a permanent and painful injury to his right foot and continuing to work would aggravate the injury. The first part of the statement of claim in Award No. 1 of Public Law Board 4315 was a request to remove Claimant's passenger service only restriction. The request was rejected by the Board which held, "... we find no basis upon which to remove Claimant's restriction to passenger service." That Board denied that portion of the claim. Carrier never forwent its right and obligation to determine the fitness and ability of the Claimant for service.

That being said, the record establishes that the Parties have provided in Article 51 (PHYSICAL EXAMINATIONS) of the schedule agreement a medical review process for those medically disqualified employees who desire to be returned to service. The article provides, among other things, the selection of a third physician who will be a part of a panel selected to "...examine the employee and render a report of their findings setting forth the employee's physical condition and their conclusion as to whether he meets the requirements of the Company's physical examination rules." The establishment of the tri-doctor panel to review Claimant's medical disqualification was the second part of the statement of claim in Award No. 1 of Public Law Board 4315. The Board held, "Claim sustained to the extent that Claimant will be afforded an examination by a tri-doctor panel pursuant to Article 51 of the schedule agreement."

The question for consideration by this Board is whether Claimant is due the difference in compensation as outlined in the statement of claim based upon the findings of the tri-doctor panel which found Claimant physically fit to return to Carrier's service as opposed to the economic consequences of Claimant's ultimate decision to remain with Amtrak on leave of absence.

The Organization cites Award No. 1 of Public Law Board 4315 in support of its claim. The extent of that Award rejected the Organization's request to remove the claimant's medical restriction and simply upheld the request for a tri-doctor panel to be established under Article 51. It made no effort to address the compensation issue presented in the claim before this Board.

Also, Award No. 1 of Public Law Board 3237 is referenced by the Organization in its submission. The findings of this award address a procedural issue concerning an employee's request for medical re-examination under Article 51 which occurred less than a year after a tri-doctor panel found him not fit for service. The Organization's request was sustained by a finding, not on the merits, but rather a procedural issue, "[t]he material submitted to this board does not support a finding that the issues are res-judicata." The fact patterns and findings of that award are unlike those of the instant case. They offer no guidance in respect to the claim for compensation in the case at bar.

Cited in conclusion of the Organization's position are findings of Award No. 664 of Special Board of Adjustment 910 and First Division Award No. 18532. Award No. 664 is an off-property award which does not contain any reference to a provision similar to Article 51 but it does involve an injured employee who brought legal action against a carrier under the Federal Employers Liability Act. Unlike the instant case, the jury therein found in favor of the carrier, and the employee received no monetary award. Also, unlike the Claimant's case, the employee did not immediately attempt to return to service after the court verdict. He presented himself for work well over a year after the court decision and only after he had completed a rehabilitation program. Consequently, the Board held that the employee was not estopped from return to work. The facts of Award No. 18532 contain a similar story of an employee's rehabilitation as in Award No. 664 whereas the employee under went two corrective operations subsequent to his medical disqualification. In the latter award, while the Board held that the employee should be

paid for time lost, if he was found fit to resume his duties, there was no factor of a leave of absence agreement considered by the Board as in the present case.

Here, Carrier stated that Claimant is not due any additional compensation in denial of the claim. Carrier insisted Claimant is attempting to gain a windfall payment rather than making a sincere effort to return to service. Touted by the Carrier are the Claimant's court testimony about his permanent injury, delays in the medical review process, refusal to return to work and subsequent leave of absence to continue working for Amtrak as reasons for disallowance of the compensation claim.

Cited in support of the Carrier's position are findings of Award No. 89 of Public Law Board 4228 and Award No. 163 of Public Law Board 4901. Award No. 89 is an off-property award which centers on wage loss by an employee who incurred a nine-month delay from October 1982 until July 1983 in returning to service after an injury. The claim was denied on the basis that the claimant had failed to obtain adequate medical clearances until July 1983 when he finally obtained an unconditional medical release to return to service. In the findings of off-property Award No. 163, the Board considered a discipline case wherein the claimant was dismissed in June 1998 and after conference and reconsideration, the carrier issued claimant a recall notice in January 1999. He did not return to service as directed, and consequently, his records were closed. The Board, having found the assessment of a suspension was supported by substantial evidence, denied the claim. Mentioned was the fact that reinstatement of the claimant was stymied by claimant's failure to return to service at the earlier direction of the carrier. The value of these findings is relative to the instant case. They confer an employee, such as Claimant Brown, must be sincere and willing to return to service when involved in a labor dispute inclusive of loss of earnings.

There is sufficient evidence in the instant dispute to suggest Claimant was less than sincere in his attempt to return to service based upon his foot-dragging during the entire medical review procedure which prevented an earlier resolution of the entire matter.

The evidence in the instant case is that Claimant ultimately elected to remain in restricted service with Amtrak rather than

return to the service of the Carrier. At the insistency of the Claimant, the Organization on May 24, 1991 secured his leave of absence for him to continue working for Amtrak. This leave of absence was voluntary and retroactive. The record is bereft of any evidence to support the Claimant's belated contention that the leave was necessary because, "...he would suffer discrimination and retribution by the same Carrier officer that had held him from service." The leave agreement acknowledged that two years had passed since Claimant had been with Amtrak. Claimant was tenured with Amtrak. The leave conditions applicable to Claimant reflected the same intent contained in the 1986 Agreement for Amtrak leave service. Claimant retained his contractual rights and benefits with Amtrak. By his leave agreement, Claimant relinquished any contractual right to return to his former position with the Carrier pursuant to Article 51.

As mentioned earlier, Article 51 provides a medical review process for those disqualified employees who desire to be returned to service. Also, it provides for payment of a loss in compensation, if any, for those reinstated employees. The evidence established that Claimant volunteered not to return to service. Claimant had no real interest in returning to work for Carrier. It was his decision to remain where he had been for several years; hence, his claim for a loss in compensation from the lack of service with Carrier under Article 51 is without basis and must be denied.

AWARD: The Organization failed to meet its burden to prove that the Carrier's actions were in violation of the governing Agreement. The claim is denied.

Dated this 14th day of September, 2004.

M. David Vaughn, Neutral Member

Gene L. Shire, Carrier Member

R. L. Marceau, Employee Member