

Award No. 4324

Docket No. 4257

2-AT&SF-EW-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph M. McDonald when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L.—C. I. O. (Electrical Workers)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (Coast Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the current agreement the Carrier erred when they refused to compensate Mrs. Lucy O. Neri, Crane Operator, from the date of August 8, 1960 to the date of September 18, 1961, account Mrs. Neri being held off her regular assigned Crane Operator position during that period.

2. That accordingly, the Carrier be ordered to compensate Mrs. Lucy O. Neri for all time lost from August 8, 1960 until September 18, 1961, at her regular Crane Operator's rate of pay, plus any extra or overtime that she may have been able to earn during this period.

EMPLOYEES' STATEMENT OF FACTS: Mrs. Lucy O. Neri, Crane Operator, and assigned at crane operator of less than 40 tons, hereinafter referred to as the claimant, is an hourly rated employee regularly employed by the Atchison, Topeka and Santa Fe Railroad Company, hereinafter referred to as the carrier, in their Mechanical Department at San Bernardino, California, (Coast Lines).

The claimant is one of a number of electrician helpers assigned as crane operators in the San Bernardino Shops, at San Bernardino, to operate, less than 40 tons overhead cranes. The claimant is also one of several machinist helpers that was assigned to operate less than 40 ton cranes prior to August 1, 1945, the effective date of the current working agreement, and which was assigned to the electrical workers at the inception of the current working agreement August 1, 1945. Machinist helpers who were crane operators prior to August 1, 1945, such as the claimant, were placed on a special roster for crane operators subsequent to August 1, 1945, and assigned to the electrical workers' craft so long as they held that crane operator's position.

These machinist helper crane operators and electrician helpers who are crane operators are assigned a work week of 40 hours, Monday thru Friday,

The carrier does not understand how the employes can find comfort in citing Rule 46 which provides that reasonable protection will be afforded the health and safety of employes, since that is exactly what the carrier was doing when it placed Mrs. Neri on leave of absence following the Consulting Psychiatrist's diagnosis of her paranoid state. We were protecting Mrs. Neri's health since her continuance as crane operator with its attendant mental strain would have undoubtedly worsened her mental condition. The Carrier was also protecting the safety of her fellow employes who were in danger of being injured or killed in the event Mrs. Neri failed to properly control the crane.

Without prejudice to its position as presented herein, that the Employes' claim in the instant dispute is without support of the Agreement rules or merit and should be denied in its entirety, it will be noted that the Employes' claim as presented to this Board includes the entire period August 8, 1960 to September 18, 1961. Mrs. Neri would not under any circumstances be entitled to compensation for the period August 15 to September 2, 1960, inclusive for the reason that was her scheduled vacation period and she has already been compensated therefor. Moreover, the claim for overtime compensation included in Item 2 of the Employes' claim is not a proper claim for consideration of this Board for the reason that it was first presented in General Chairman McLennan's letter to Mr. Comer of October 5, 1961, some three and one-half months after the claim had been finally declined by the Carrier's officer of highest appeal in Mr. Comer's letter to General Chairman McLennan of June 20, 1961. That claim for overtime compensation has not, therefore, been handled in accordance with Rule 33 of the General Shop Crafts Agreement and is not properly before this Board. Furthermore, any allowance for wage loss should be less amounts earned in other employment. Please see in that connection and for instance, Second Division Awards 3084, 2811, 2653 and 1638, First Division Award 15765, Third Division Awards 6074 and 6362, and Fourth Division Award 637.

In conclusion, the Carrier respectfully reasserts that the claim of the employes in the instant dispute is entirely without merit or support under the Agreement rules, and should be either dismissed or denied for the reasons expressed herein.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant herein is a Crane Operator in the Carrier's Mechanical Department at San Bernardino, California.

On the recommendation of her Supervisors, she entered the Santa Fe Hospital at Los Angeles on August 8, 1960 for examination and observation. She was released from the hospital on August 13, 1960.

Claimant was kept out of service until September of 1961, on account of physical disability according to the Carrier, and wrongfully so, according to the Organization.

It appears from the record that while in the hospital, the Claimant was determined to be suffering from diabetes, and was also diagnosed as being in a paranoic state.

We do not have a copy of the Chief Surgeon's letter taking Claimant out of service, but we do have a report of a further examination made at the same hospital on October 6, 1960, the recommendation of that report being that "a work release if and when given will come direct from your Department" (cf. Claimant's Ex. "A").

Claimant submits the results of a physical examination of herself, dated October 20, 1960, and of a psychiatric examination of herself dated May 8, 1961 in support of her contention that she was wrongfully withheld from service during this period. (cf. Claimant's Exhibits "B" and "C").

There is, in the controlling agreement, a procedure for resolving disagreements of Physicians as to the physical condition of an employee. (Item 19 of Appendix "B"; pp. 96 and 97 of the Current Agreement).

On June 20, 1961, Carrier suggested that this procedure be resorted to. On July 31, 1961, the Organization requested that such be done.

In the interim, Carrier having conducted a further examination of Claimant at the Santa Fe Hospital, returned Claimant to service, and so notified the Organization in a letter dated September 15, 1961.

At the hearing conducted before this Division on September 12, 1963, Carrier attempted to show the Claimant's physical condition and activities as of June, 1962, to which objection was made. We now hold that such a showing would have been improper, and sustain the objection to such, inasmuch as this evidence was never adduced on the property in the processing of this claim; was not made a part of the record before us, and would be violative of Circular No. 1 of the National Railroad Adjustment Board and of Circular "A" of the Second Division.

We find that there did exist a conflict of medical opinion concerning this Claimant and her ability to perform her work during the period in question. It does not appear why resort to Item 19 of Appendix "B" was not had earlier in this history, but we are unable to assess the failure to do so upon either party to this dispute.

In accordance with previous awards of this Division, we refuse to substitute our judgment in medical matters to resolve a conflict such as we find here, unless it appears that the Carrier was acting in an arbitrary or capricious manner, under the record before us, in holding Claimant out of service. The record herein supports no such finding by us, and accordingly we must deny the Claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October 1963.