Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7277
SECOND DIVISION Docket No. 7098-I
2-D&TS-I-'77

The Second Division consisted of the regular members and in addition Referee C. Robert Roadley when award was rendered.

Parties to Dispute: (Roy Keeling
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(Detroit and Toledo Shoreline Railroad Company

Dispute: Claim of Employes:

Petitioner Roy Keeling, claims that he should be returned to full duty as a carman for the carrier, the Detroit and Toledo Shoreline Railroad Company. Mr. Keeling was injured while on the job with the carrier on February 1, 1969. Said injuries resulted in a disability which did not allow him to do his full duties as a carman for the carrier. On March 3, 1969, Mr. Keeling was placed on a formal leave of absence which continued through April 15, 1969. On April 16, 1969, Mr. Keeling reported back to work on a full duty basis, however, on June 4, 1969, he was again placed on leave until January 4, 1970.

On January 5, 1970, petitioner returned to actual service with the carrier on a light duty basis and remained in this position until October 14, 1970, when the carrier eliminated all light duty positions.

On February 16, 1971, Mr. Keeling was again placed on light duty status and remained in same until February 11, 1972, when the light duty status was again eliminated. The carrier's letter of February 11, 1972, which is marked as "Exhibit A" stated in part as follows:

> "At any time you feel that you are capable of fulfilling all of the duties of a carman, it will be necessary to have a physical examination from Dr. Stockwell in Detroit and release."

The removal of Mr. Keeling from light duty status on February 11, 1972, was a subject of a grievance which this Board heard in case number 73-256 which rejected petitioner's position because of procedural errors.

Petitioner now claims that he is medically and physically able to do full duty as a carman and carrier's refusal to allow him to work in full duty capacity is an arbitrary and capricious decision and petitioner now asks this Board to allow him to return to his position as carman for the carrier.

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.

This dispute emanates from the Carrier's denial of Claimant's request for reinstatement to full duties as a Carman on the grounds of physical disqualification. Claimant's physical ability to perform his normal duties as a Carman has been the subject of considerable exchange between the parties resulting from an on the job injury sustained in February, 1969. Subsequent to the injury, and after numerous visits to doctors for examination and/or treatment, Claimant continued to experience back pain, was returned to service on light duty as provided by Rule 13, of the Agreement, was then layed off account no further light duty available. On January 25, 1972, Claimant accepted an out of court settlement of a lawsuit he filed in 1971 against the Carrier for damages resulting from the 1969 accident.

On February 4, 1972, Claimant was advised by letter from the Carrier that he was disqualified from further employment account "light duty" being no longer available. This notification became the subject of a grievance which was progressed to this Board as Docket No. 6630-I and was dismissed in November, 1974 on the basis of a procedural defect without consideration of the merits. The record shows that, during the interim, Claimant applied for disability annuity from the Railroad Retirement Board and began drawing disability payments as of December 15, 1972. This action was granted on the basis of the report to the RRB from the Carrier's Chief Medical Officer, dated November 24, 1972, to the effect that Claimant had been examined by one Dr. F. E. Foss and was found to be unfit for return to service. Claimant continues to receive his disability annuity.

Under date of February 18, 1974, Claimant's physician, Dr. Ira Weiden, issued a statement that he had examined Claimant on that date and that he now felt "he could return to his normal job as a welder at this time." This statement became the subject of a request upon the Carrier, by Claimant's attorney, dated March 21, 1974, for immediate re-evaluation of Claimant's disqualification from employment. This letter request opened a chain of correspondence with the Carrier resulting in Claimant being directed to report to Dr. Foss (doctor designated by Carrier) for another examination which was conducted on December 30, 1974. Dr. Foss' report of even date simply stated: "May return to work."

The report of Dr. Foss was presented to the Carrier as the basis for reinstatement to service on full duty status. From this point forward there is no further request of record for reinstatement on the basis of light duty, as covered by Rule 13 of the Agreement, captioned "Faithful Service".

By letter dated January 8, 1975, from Chief Mechanical Officer Warner, Claimant was advised as follows:

> "Dear Mr. Keeling: This is to advise that your request to return to work cannot be granted by this office."

The next letter of record is one from the Manager, Labor Relations and Personnel to Claimant's attorney, dated February 25, 1975, which reads as follows:

> "I regret that due to arbitration proceedings and other committments, both in and out of the city, I was unable to either return your telephone call or to reply to your letter until this time.
>
> This is relative to the matter of your client Roy E. Keeling.
>
> Please be advised that at the present time no final decision has been made on Mr. Keeling, however, as soon as it is finalized you will be so informed."

The record fails to show any further exchange between the parties until, by letter dated March 14, 1975, the Chief Mechanical Officer advised the Claimant as follows:

> "After careful consideration of your entire record, it is this Carrier's position that you are not qualified to return to work in your regular position as Carman."

There followed an exchange of correspondence between Claimant's attorney and the Chief Mechanical Officer regarding the subject of the January 8 and March 14, 1975 letters and then on April 28, 1975, Claimant's attorney wrote to General Car Foreman Bowman, the officer of the carrier authorized to receive the initial presentation of a claim and/or grievance, and formally served notice "of Mr. Keeling's grievance and claim pursuant to Rule 19 of the bargaining agreement." Said letter closes with the following:

> "Mr. Keeling submits that in light of the most recent medical opinions, his seniority, and faithful service that he is qualified to return to his regular position as carman and that the carrier's refusal to allow him to do so as set forth in Mr. Warner's letter of March 14, 1975 violates the collective bargaining agreement and the Railway Labor Act.
>
> Mr. Keeling therefore makes demand upon you to qualify him for return to work and to pay him such compensation due him under the collective bargaining agreement and the Railway Labor Act.

> "We also make demand on you for you to be scheduled a conference on the property pursuant to the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board.
>
> If you reject said grievance and claim that you advise us of the name of the individual to whom to appear pursuant to Rule 19 (a) 2."

This letter was acknowledged by the General Car Foreman on May 13, 1975, in which it was stated, in part:

> "You are correct in that I am the officer of the carrier authorized to receive the initial presentation of a claim and/or grievance, and, in that sense, this matter is properly before me.

Said letter then refers to the letters of January 8 and March 14, 1975 and then, in that regard, states:

> "The First letter was dated January 8, 1975 and that date was the incident or 'occurrence' on which this 'grievance and claim' must necessarily be based. Given this fact your filing of the 'grievance and claim' was not submitted within the sixty (60) days provided for in Rule 19(a) of the collective bargaining agreement and, therefore, it is procedurally defective and need not be considered on its merits."

The letter then denied the claim on the grounds that the Carrier did not agree that Claimant should be considered qualified to return to work and, further, that the claim was procedurally defective. The letter closed with the following statement:

> "The individual next in line in the appeal procedure is Mr. D. C. Warner, Chief Mechanical Officer."

This exchange of correspondence, beginning with the January 8, 1975, letter, gave birth to the dispute as presented to this Board for a determination.

The Carrier, at the hearing before this Board, strongly argued that this dispute should be dismissed on the grounds of a procedural defect, i.e. that the occurrence or incident that gave rise to the grievance or claim was the January 8, 1975 letter from the Chief Mechanical Officer and that, therefore, the claim should have been made on or before sixty (60) days from that date; the formal notice of the claim having been served upon the Carrier on April 28, 1975 exceeded the sixty day time limit, so averred the Carrier.

Assuming, arguendo, that this position of the Carrier is sound then how does one with any element of logic successfully assert that the Carrier letters of February 25, 1975 and March 14, 1975 should be ignored insofar as the orderly progressing of the claim is concerned. Additionally, it is noted that the January 8, 1975 letter was written by the officer "next in line in the appeal procedure" and not by the officer authorized to receive, and who did receive, the initial presentation of the claim. The denial by the initial officer, the General Car Foreman, was rendered on May 13, 1975!

Nor can one ignore the Carrier letter of February 25, 1975, advising that no decision had yet been made and that "as soon as it is finalized you will be so informed." It would be naive, indeed, to argue that such letter was merely a continuation of the chain of correspondence initiated by letter of March 21, 1974, in light of the intervening events, as asserted by the Carrier at the hearing or to, by inference at least, have one assume that the existance of the January 8th letter was not known when the Carrier wrote to Claimant's attorney on February 25, 1975. In the same vein, why then was it necessary for the Chief Mechanical Officer to write the letter of March 14, 1975, if, in fact, the January 8th letter was to have been construed as the controlling denial letter since he had not, as the individual next in line in the appeal procedure, received an appeal as such, as of that date?

We are persuaded by the foregoing circumstances that the February 25, 1975 letter carried with it, at least, a tacit waiver of time limits and that a dismissal of this dispute on the grounds of a procedural defect would be improper.

As was previously noted, this dispute is based on a claim for reinstatement by Claimant to full duty status. The matter of light duty, as contemplated by Rule 13, of the Agreement, is not before us. Therefore, this claim asserts that Claimant is, or was as of early 1975, physically qualified to perform the duties of a Carman, previous physical impairments notwithstanding. Rule 81, Classification of Work, of the controlling Agreement, sets forth in detail the work functions allocated specifically to the craft or class of Carmen on this property. We have reviewed this Rule in detail and find it to be reasonably standard in scope, comparably similar to such rules in most other like agreements on rail carriers in general, and find that the Rule covers a multitude of duties or work, one of which is welding.

It is also noted that Rule 80, Qualifications, of the Agreement, states in pertinent part:

> "Any man ... who with the aid of tools, with or without drawings, can lay out, build, or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman."

It is clear from a review of the foregoing that the work or duties of a Carman encompasses more than welding even though certain employees perform welding functions as a portion of their duties depending on the needs of the service. In any event, a carrier has the right to expect that such employee is capable to "perform the work of his craft or occupation" as assigned.

In order to reach any logical determination in this dispute one must recognize the events preceding the date of claim since the dispute centers on Claimant's physical qualifications. It is clear from the record that ever since the incident in 1969 Claimant has consistently been unable to function on the job to the full, or acceptable, capacity of a Carman, as set forth above. This is evidenced by his self-imposed limitation to light duty, if nothing else. His remittent complaint of back pain is attested to in the various medical reports of record. There can be no question that during the period prior to early 1975 the Carrier was justified in not returning Claimant to full duty status. The record shows that as late as May 21, 1974, the Claimant stated to the Railroad Retirement Board that he was, as of that date, still disabled for work in his regular railroad occupation, which statement was supported by a report from his personal physician. Based upon this report Claimant continued to receive his disability benefits. It is of interest to note that this medical confirmation was supplied to the RRB approximately three months after Claimant's doctor issued a statement, February 18, 1974, that Claimant was then physically able to return to his normal job.

It was the position of Claimant's attorney, at the hearing before this Board, that the medical report of February 18, 1974, should be read in consort with that doctor's report to Dr. Foss, dated November 26, 1974, which was considered by Dr. Foss in his examination, and resulting release, of December 30, 1974. Accepting that urging on the part of counsel one would then have to consider the November 26, 1974 report as part and parcel of the December 30, 1974 medical report which consisted, in total, of one sentence, "May return to work." The record of medical findings is replete with vacillating opinions as to Claimant's physical condition as it relates to his ability to work on a full duty basis. The report of November 26, 1974, the latest comprehensive report - which spanned a period of approximately four years history of treatment and/or examinations - closed with the following summation to add to the confusion:

> "He (Claimant) felt that he was well enough to go back to work as a welder on the railroad and from his performance the past year it certainly would be worth a try as he seems to be anxious to go to work and heavy work did not aggravate his pain during the past year. I felt that it would be worth his trying to return to his normal job as welder." (emphasis added) Carrier Exhibit "V".

If this report was intended to be persuasive upon the Carrier it obviously fell short of the mark! There is nothing in the record before us, or in the controlling Agreement, that places a burden upon the Carrier to seek further

medical opinion in reaching its conclusions. Nor is there anything in this record that demonstrates, even by inference, that the procedures followed by the Carrier in reaching its conclusions were at variance with, or a departure from, the usual and customary procedures followed in such cases on this property.

It should be noted that nowhere in the Petitioner's submissions, or at the hearing, has any allegation been made of a Rule violation. The Statement of Claim merely says, in pertinent part:

> "... carrier's refusal to allow him (Claimant) to work in full duty capacity is an arbitrary and capricious decision and petitioner now asks this Board to allow him to return to his position as carman for the carrier." (emphasis added)

Nor is there any allegation of record that this dispute is a discipline case. Carrier's refusal to reinstate Claimant to full duty work status is, and has been from the inception of this dispute, based solely upon the question of Claimant's physical qualifications to perform such work.

Petitioner has cited Second Division Award No. 6561 in support of his position. We have reviewed that award in detail and find that the facts and circumstances are sufficiently at variance with the subject dispute as to make it distinguishable. For example, in that dispute:

1. The Organization cited the Discipline Rule of the agreement as being applicable;

2. The facts and circumstances concerning the background of claimant's state of health were significantly different;

3. The medical findings furnished by the claimant were conclusive and positive;

4. The Referee noted that claimant was eligible for assignment to light work which, by inference, should have been offered him; and

5. That the carrier's finding of physical disqualification was not absolute, under the facts and circumstances in that case.

Had Claimant, in the subject dispute, furnished the Carrier a conclusive and positive medical report clearing him for full duty then, in that event, we agree that the burden of proof would have shifted to the Carrier to show by substantial evidence of probative value that Claimant was physically disqualified, as in Award 6561. Such was not the case herein.

Petitioner, in his submission to this Board, and at the hearing, made the following observation:

> "The decision by management has no current medical opinion behind it and relies solely upon past medical opinions which are outdated and said decision also does not recognize the medical concept that people 'do get better'."

Carrier readily admitted that the Claimant's past medical history, stemming from the 1969 accident, was reviewed in reaching its determination, which included the medical reports of November 26 and December 30, 1974 - the latest such reports of record. We do not find, in the light of all the circumstances extant in this dispute, that it was improper for the Carrier to review such medical history, especially in view of the fact that just six months prior to the November 26 report the same physician had substantiated Claimant's statement to the Railroad Retirement Board that Claimant was "disabled for work". Carrier's Exhibit "BB".

Nor do we agree that the one sentence medical report of December 30, 1974, in and of itself, was of sufficient substance to cause the Carrier to accept it at face value as being conclusive under the circumstances. Again, at the risk of repetition, it was the rejection of that report that precipitated the case at bar.

We are cognizant of the grave responsibility placed upon this Board by statute and by the parties, particularly in matters involving a claimant's continuity of employment. However,it is well established that the Board's deliberations and determinations are limited, and confined, to the issues, facts and evidence as developed by the parties on the property and presented to the Board in due form.

Based upon a thorough review of all the facts and evidence contained in the record before us, including testimony presented at the hearing before this Board, and for the reasons set forth herein, we are, therefore, constrained to deny the claim. The claim is being denied rather than being dismissed because of the possibility that this claimant may, at some future date, be in position to submit a new request to the Carrier for reinstatement based upon facts and circumstances then present. In anticipation of that eventuality it is urged that the parties meet, at the request of Claimant, and reach an understanding as to the conditions under which such request for reinstatement would receive action favorable to Claimant.

A W A R D

Claim disposed of per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Award No. 7277
Docket No. 7098-I
2-D&TS-I-'77

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of April, 1977.