

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { Roy Keeling
 {
 { Detroit and Toledo Shore Line Railroad Company

Dispute: Claim of Employees:

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.

On March 21, 1974, petitioner pursuant to a medical report from Dr. Ira Weiden dated February 18, 1974 requested that the carrier re-evaluate the petitioner's disqualification from employment. This letter set up a chain of events and correspondence which culminated in Award No 7277 Docket No 7098-I rendered by Referee C. Robert Roadley before this honorable board. (Petitioner Exhibit B).

Pursuant to the recommendation contained in the last paragraph of Petitioner's Exhibit B, the petitioner, through his attorney sent a letter to Mr. D. G. Vane dated April 13, 1977 (Exhibit C) indicating that based on the above decision they were going to have Mr. Keeling re-

examined and also offered to discuss with the carrier the circumstances under which Mr. Keeling would receive favorable consideration of his request to go back to work on full duty.

Having received no response to that letter Mr. Keeling was examined by Dr. Ira Weiden on May 2, 1977 and his findings are contained in his letter of May 4, 1977 (Exhibit D).

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 and award him back pay from June 1977 to the date he is reinstated.

Petitioner also claims as set forth in the Statement of Facts below that carrier is in violation of Rule 19 of the Agreement and for that reason demands immediate reinstatement and back pay from June 1977 to date of reinstatement.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The Employee rests his case in this dispute on two bases:

"First: The Carrier is in violation of Rule 19 of the Agreement between the carrier and the union. Rule 19 paragraph A says that the carrier within 60 days will notify the employee in writing of the reasons for disallowance of the claim. The Rule goes on to state that if not so notified, the claim will be allowed.

Second: Without waiving the above, petitioner states that it is his position that carrier's decision against re-qualification for full duty on the question of his current medical condition is arbitrary and capricious and should be overturned by this Board."

The subject matter of this dispute arises from an injury suffered by the employee, Roy Keeling, in the course of his employment on February 1, 1969. Since that time, Keeling has worked for the Carrier at several intervals at "light duty" but at no time since then has been employed by the Carrier in the full range of his duties as a Carman.

An initial dispute arose concerning Keeling's relationship with the Carrier and was processed to the Board. This dispute was dismissed in Award No. 6788 (Zumas) on procedural deficiencies on November 25, 1974. A further dispute was processed to the Board and was disposed of on April 5, 1977 in Award No. 7277 (Roadley) in which the Board made the following Award:

"Claim disposed of per Findings."

The "Findings" referred to stated the following:

"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 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 favourable to Claimant."

Pursuant to the above, Keeling, through his attorney undertook the following steps:

1. On April 13, 1977, Keeling's attorney wrote to D. G. Vane, Carrier's Manager of Labor Relations and Personnel, as follows:

"This letter is to advise you that it is our intention to again request reinstatement on Mr. Keeling's behalf and we are presently having him re-examined by Dr. Weiden.

I would appreciate it if you would call me to meet with me pursuant to the referee's suggestion so that we can reach an understanding as to under what circumstances you would give Mr. Keeling's request favourable consideration.

I would appreciate hearing from you and would be willing to meet with you at any time convenient with you.

Thank you."

(The Carrier denies receiving this letter but acknowledges receipt of a copy of it some months later.)

2. Keeling was examined by Dr. Ira Weiden, his personal physician, on May 2, 1977. This letter concluded, "I give him (Keeling) no job restrictions at this point."

3. Keeling gave a copy of this letter to his Organization representative who, in turn, gave it to Carrier's Chief Mechanical Officer on or about June 7, 1977. Keeling claims that this was accompanied by a oral request "for reinstatement of Mr. Keeling based on Dr. Weiden's report". (The Carrier denies that such oral request accompanied transmission of Dr. Weiden's report. There is no dispute, however, that no claim was filed in writing with the Chief Mechanical Officer.)

4. On August 14, 1977, Keeling claimed that the Chief Mechanical Officer had failed to respond in writing to the "claim" of June 7, 1977, and stated that the claim should be allowed under the provisions of Rule 19(a).

5. There followed an exchange of correspondence between Keeling's attorney and Carrier's Manager of Labor Relations and Personnel and, subsequently, a filing of the instant dispute with the Board.

It is clear that at no time did Carrier respond positively to the various means of carrying out the suggested procedure in Award No. 7277 quoted above.

APPLICABILITY OF RULE 19-A

Rule 19(a) reads in pertinent part as follows:

"(a) 1. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances."

Without further examining whether Award No. 7277 and/or the Claimant's physical condition after the issuance of the Award gave proper basis for the filing of a claim, did Keeling in fact present a claim to the Carrier in accordance with the specific provisions of Rule 19(a)?

The Board finds that Keeling did not do so. The presentation of a doctor's report to the Chief Mechanical Officer on June 7, 1977, with or without an oral request, falls woefully short of a claim or grievance "presented in writing" as required by Rule 19(a) 1. Nor can what occurred on June 7, 1977, be considered an "automatic request for reinstatement to full duties", as argued by Keeling. The dispute procedure, well known to Keeling and clearly delineated in the Agreement, requires more than this - and the Board may not and will not ignore such requirements as agreed upon by the parties.

If the matter before it is to be considered a new claim or grievance, then the Board must dismiss it on procedural grounds.

It follows that if the "claim or grievance" was improperly set forth in the first instance, Keeling cannot demand, as he did through his attorney's letter of August 16, 1977, that the claim should be "allowed" by reason of the Carrier's failure to respond within the 60 days specified in Rule 19(a)1.

THE IMPLEMENTATION OF AWARD NO. 7277

The further issue herein deals not with a supposed new claim, but the Claimant's insistence that the Carrier was obligated to take certain actions to implement the Board's Findings and Award in Award No. 7277.

That Award clearly operated to "deny" the claim that, in 1977, Keeling should be allowed "to return to his position as Carman for the Carrier" (from the statement of dispute in Award No. 7277). This denial is found in the first sentence of the final paragraph of the Award, quoted above, and in the Award itself.

The Findings in Award No. 7277 go on to refer to the "possibility" that the "claimant may, at some future date, be in a position to submit a new request ... for reinstatement" (emphasis added), and the Findings further state, "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 favourable to Claimant". (Emphasis added).

It is on these grounds that, in actuality, the Claimant proceeded. Keeling, through his attorney and with a new examination report from his doctor, sought implementation of this part of the Board's findings.

Did the Carrier act in an "arbitrary and capricious" manner, as charged by Keeling, when it failed and/or refused to discuss or implement conditions for once again considering Keeling's return to full duty status? The Board does not find this to be the case.

Of a technical, though persuasive, nature is the Carrier's position that reference in Award No. 7277 as to consultation between Claimant and Carrier is not part of an award which directs the parties to undertake a remedy, but is rather dicta, for guidance to, but not compulsory adherence by the parties. In this, the Board concurs. This dicta refers to what "may" occur in the future and "urges" rather than "directs" certain actions.

As stated in Award No. 12, Public Law Board No. 1922 (Weston):

"Suffice it to say that Decision 200 was a denial award and that the portions of that opinion that are favourable to Petitioner's point of view consist of dicta not germane to the decision. The fact that Carrier accepted Decision 200, a denial award, does not mean that it stand committed to all the extraneous comments contained in the opinion."

In support of this, the record is replete, needing no repetition here, that Keeling's allegations of disability were of a subjective nature. Over and over, medical determination of objective findings were lacking. As the Carrier argues, what purpose would further negative objective findings serve? How could it rely on the permanence of Keeling's subjective conclusions as to his condition? The Carrier's attitude, while uncompromising, was well grounded and rational and cannot be second guessed by the Board.

Thus, the Board finds that the Carrier did not fail to undertake any action required of it in Award No. 7277.

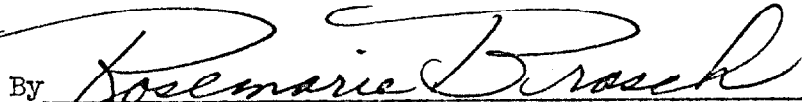
A W A R D

Claim dismissed and denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of July, 1979.