

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Erie Railroad, that operator-leverman H. Noonburg, Rutherford, New Jersey, be paid under the provisions of Rule 27 of the Telegraphers' Agreement for wages lost November 3 to 22, inclusive, 1943, and February 2 and 3, 1944, account being held out of service on these days to take physical examinations at the office of the Company's Chief Surgeon in Cleveland, Ohio, and awaiting permission from that officer to resume work on his regular position.

EMPLOYES' STATEMENT OF FACTS: An Agreement by and between the parties bearing effective date of January 1, 1939, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Mr. H. Noonburg on the dates involved in this proceeding was regularly assigned as leverman-operator at Rutherford, New Jersey, hours of service 11:00 P. M. to 7:00 P. M., daily.

At or about 5:45 A. M., while on duty October 31, 1943, Mr. Noonburg became ill and the chief dispatcher was advised accordingly. Mr. Noonburg, however, completed his assignment for that date. The chief dispatcher was informed by Mr. Noonburg that he, Mr. Noonburg, would advise when ready to resume duty.

Mr. Noonburg advised the Chief dispatcher that he would resume duty 11:00 P. M., November 3, 1943. The resumption was not permitted; instead, instructions were issued to Noonburg that he should report to Dr. Moriarty, a Company Surgeon, Jersey City, November 4th for examination. Following that examination Mr. Noonburg was informed by Dr. Moriarty that nothing was found wrong but he could not resume duty until a report had been made to and a reply received from the Company's Chief Surgeon at Cleveland Ohio.

Mr. Noonburg remained idle until November 13, 1943, when he received instructions to report to the Company's Chief Surgeon at Cleveland for further examination. The chief surgeon, Dr. Dinnen, did not personally make the examination. Following the examination by a member of the staff, Mr. Noonburg was informed that he could resume duty but that a report would be made to the proper officer of the railroad who in turn would authorize a return to duty.

On his return to place of employment from Cleveland, November 16, 1943, Mr. Noonburg immediately reported for duty. He was not permitted to resume duty until November 23, 1943.

Later, Mr. Noonburg was instructed to report to the Company's Chief Surgeon at Cleveland, Ohio, December 17, 1943. In the absence of a relief

Noonburg was unable to report on December 17th and had the date changed first to January 7th and later to February 3rd on which date he did report at Cleveland and was again approved for work. This latter trip to Cleveland on February 3rd was the result of an agreement reached between Noonburg and the Examining Surgeon and did not result from any instructions that had been issued by the Superintendent.

Because of this situation on December 4, 1943, Local Chairman A. W. Harris, Order of Railroad Telegraphers, filed a claim with the Superintendent at Jersey City, N. J. alleging that Chief Dispatcher had refused to allow Mr. Noonburg pay for time that he was held out of service on Doctor's orders claiming it was a violation of Rule 27. The Local Superintendent informed Harris of the situation and told him that Noonburg has been held out of service because of his physical condition and said that Rule 27 was not applicable in the case of physical re-examinations and that it was designed to cover examinations on book of rules etc.

The claim was thereafter progressed through the usual channels except that later additional pay was claimed because of the second trip to Cleveland on February 3, 1944 which was result of an agreement between the Examining Surgeon and Operator Noonburg.

The Carrier is not informed as to the position of the Employees except as hereinabove stated and accordingly reserves the right to file rebuttal statement after a review of the complete ex parte statement which will be filed by the Telegraphers in this case.

OPINION OF BOARD: Claimant was regularly assigned as an Operator-Leverman, 11:00 P. M. to 7:00 A. M. daily. On October 31, 1943, at about 5:45 A. M. Claimant reported that he had suffered a stroke. Trainmaster Ebert was immediately sent to render assistance to the Claimant. Upon his arrival at about 6:00 A. M., Claimant informed him that as he was standing on the lower floor of the Tower sometime before 5:45 A. M., he had fallen in a heap and had laid there for a period of time before he regained consciousness after which he had dragged himself up the stairs and telephoned the Chief Dispatcher. He informed the Trainmaster that he had suffered a similar stroke on the previous evening. The Trainmaster says that Claimant appeared to be in bad shape.

On November 3, 1943, Claimant reported that he was able to resume his work and he was informed that before resuming duty it would be necessary to obtain the approval of the Carrier's doctor as to his physical fitness. He was examined by the Carrier's doctor at Jersey City on November 4, 1943, and held out of service. On November 15, 1943, he was examined in the Chief Surgeon's Office at Cleveland and was permitted to resume his work on condition that he report back for a further examination at a later date. He returned to work on November 24, 1943, and on February 3, 1944, he reported to the Chief Surgeon as directed at Cleveland and was again approved for work. It is upon these facts that the present claim is based.

The record shows that Claimant on and after October 31, 1943, was suffering from cardio-vascular degeneration and hypertension. The history of two lapses into unconsciousness within a two day period when considered with Claimant's age of 63 years, clearly indicated a condition of health requiring caution on the part of the Carrier in continuing him on his position. It is the duty of the Carrier not only to protect the health of the employe but the safety of the traveling public as well. It is within the rule that when a serious accident has occurred or a serious illness experienced, indicating that his resumption of his employment would constitute a serious hazard to his fellow employes or the public, the Carrier may properly require a physical examination to establish the physical fitness of the employe. The instant case presents a situation in which the Carrier was fully justified in requiring a satisfactory physical examination as a condition precedent to Claimant's return to work. Pursuant to Carrier's requirement, Claimant was examined on November 4, 1943, and was disqualified from further service because of the medical findings hereinbefore set forth. On November 15, 1943, he was again

examined in the office of the Chief Surgeon in Cleveland. The Chief Surgeon permitted Claimant to return to work conditioned upon close observation and frequent examinations. We think under such circumstances that the Carrier may properly take a reasonable time in ascertaining whether the employee is physically fit to resume his position. We do not think the time taken in so doing in the present case was unreasonable.

It is provided by Rule 27 of the applicable Agreement as follows:

"Employee required to lose time for the purpose of taking specified examinations will be paid therefor at their regular rate of pay."

The Carrier contends that this rule applies only to examinations on operating rules and has no application to physical examinations. With this, we do not agree for several reasons. In the first place, if that were the intent of the rule it would have been a simple matter to have so stated. In the second place, there is nothing in the rule inferring that such was the intent. We conclude, therefore, that Rule 27 contemplates payment for physical examinations of employees to the same extent as examinations upon the operating rules. The claim should be sustained as to November 4, 1943, November 14 and 15, 1943, and February 2 and 3, 1944, by virtue of Rule 27.

Carrier contends that the rule has been mutually interpreted to the contrary and is evidenced by the fact that no claims for pay for attendance at physical examinations have been made previous to the present claim during the existence of Rule 27. We doubt if a failure to file claims can be construed as a mutual interpretation of the rule. If claims had been filed, denied by the Carrier and acquiesced in by the employees, the basis might well exist for such a contention. But that does not appear to have been the situation here.

The record further shows that Claimant reported as being able and ready to work on November 17, 1943. At that time the Chief Surgeon had approved his physical fitness to resume work. He was not permitted to resume work until November 24, 1943, through no fault of his own. We think he was wrongfully deprived of work on November 18, 19, 20, 21 and 22, 1943, and that he is entitled to be paid for those dates at the rate of his regular assignment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated to the extent shown by the Opinion.

AWARD

Claim sustained for November 4, 14, 15, 18, 19, 20, 21 and 22, 1943, and February 2 and 3, 1944.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1946.