Award No. 15933
Docket No. SG-16746

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

NEW YORK CENTRAL RAILROAD
(Western District)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the New York Central Railroad Company (Lines West of Buffalo) that:

(a) Carrier violated the current Signalmen's Agreement and, since April 15, 1966, has continued to do so inasmuch as Maintainer R. A. Pomeroy is being held out of service unjustly, and Carrier refuses to have him examined by a neutral and impartial doctor.

(b) Carrier be required to reinstate Signal Maintainer R. A. Pomeroy and pay him for all wages lost from April 18, 1966, until he is properly returned to service.

(c) Carrier violated Article V of the August 21, 1954 National Agreement when it failed to render a decision within 60 days after receipt of the appeal of this claim by General Chairman R. T. McGill on August 11, 1966.

EMPLOYES' STATEMENT OF FACTS: This dispute involves an employe, who since April 15, 1966, has been held out of service for alleged physical reasons and Carrier's refusal to join the Organization in having him examined by a neutral doctor.

While cutting brush on Carrier's right of way in Westfield, New York, on March 16, 1966, Signal Maintainer R. A. Pomeroy suffered a fainting spell. He is regularly assigned to a small gang so the other with whom he was working took him to the hospital where he was admitted for observation. He stayed overnight and returned to work on March 18.

After Mr. Pomeroy was released from the hospital, he went to his family physician R. C. Hopkins, M.D., M.P.H., who requested that he refrain from driving an automobile until after he had been examined by a neuro-surgeon.

On March 24, 1966, Carrier required Claimant Pomeroy to undergo a physical examination by its doctor in Erie, Pennsylvania. Following the examination he was permitted to return to duty, but the Company doctor urged

This was followed by another letter from the B. of R. S. Local Chairman to Carrier's Signal Supervisor dated June 16, 1966 and reading as follows:

> "This is to advise Grievance Committee is filing a continues penalty time claim in behalf of Mr. R. A. Pomeroy Signal Maintainer. Committee contends Mr. Pomeroy has been kept from employment unjustly.
>
> Dr. Mainzer Neuro-Surgeon examined Mr. Pomeroy and advised him, he was well enough to return to work on April 18, 1966. Company Doctor examined him on April 15, 1966.
>
> Therefore the Brotherhood of Railroad Signalmen are time slipping for Mr. Pomeroy as of April 18, 1966 and continued until him is returned to work.
>
> As I requested in my letter of June 8, 1966 I feel Carrier has no rights to let these cases drag on which has to been it's policy. If. Dr. Mainzer and Dr. Wolkins can not agree on the fitness of an employe an exam by a impartial Physician should be call in such cases.
>
> Please advise if this claim will be allow, and date Mr. Pomeroy shall return to work." [sic]

On July 7, 1966 the Signal Supervisor responded to the Local Chairman's above-quoted letters that — "* * * the decision made by our Medical Director will govern in this case and your above-mentioned claims are, therefore, declined."

On July 28, 1966 the Organization's General Chairman notified the Signal Supervisor that his decision was not acceptable and, on the same date, appealed the case to Carrier's District Engineer of Communications and Signals. Copy of the letter of appeal is appended as Carrier's Exhibit A. The District Engineer of Communications and Signals responded to and denied that appeal by letter dated August 8, 1966, copy appended as Carrier's Exhibit B.

Copy of the General Chairman's letter appealing the case to Carrier's final appeals officer dated August 11th and received on August 15, 1966, is appended as Carrier's Exhibit C. This was acknowledged by letter dated August 15th, appended as Carrier's Exhibit D. Copy of the General Chairman's letter of October 24, 1966, taking the position that Carrier had violated the Time Limit on Claims rule, is appended as Carrier's Exhibit E and copy of Carrier's letter of November 4, 1966 is appended as Carrier's Exhibit F.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, a Signal Maintainer, suffered a fainting spell while cutting brush on Carrier's right of way in Westfield, New York on March 16, 1966. Following a period of convalescence as well as examination by both his family physician and Carrier's local physician at Erie, Pennsylvania, he returned to work on March 25, 1966. Thereafter, further examination of the Claimant was made by a neurosurgeon recommended by his family physician between April 1 and April 13, 1966 and by a consultant neurologist designated by Carrier's Medical Director on April 16, 1966. The record reflects that Claimant continued to work intermittently between March 25, 1966 and

April 5, 1966, when he entered a hospital at Erie, Pennsylvania for a special examination by a neurologist recommended by his family physician. However, the Claimant has not worked since his examination by Carrier's consultant neurologist on April 16, 1966. Petitioner addressed correspondence to Carrier dated June 8, 1966 and June 16, 1966, which together constitute the initial claim in this dispute on the property. Specifically, Petitioner urged that Claimant be returned to work without further delay or that an impartial physician be selected to examine Claimant if the respective physicians selected by the parties could not agree as to the Claimant's physicial qualifications to continue working as a Signal Maintainer.

Initially, Petitioner urges that the instant claim must be sustained because Carrier failed to comply with the applicable provisions of Article V of the National Agreement of August 21, 1954. Carrier contends that the alleged claim is not covered by the time limitations contained in said Agreement as disputes concerning physical qualifications of employes do not come within the purview of any rule in the Signalmens' Agreement and thus do not constitute controversies over the interpretation or application of existing collective bargaining agreements subject to the jurisdiction of the National Railroad Adjustment Board as defined in Section 3, First (i) of the Railway Labor Act.

The Carrier replied to the initial claim by letter dated July 7, 1966, in which Petitioner was advised that Carrier's Medical Director had recommended that Claimant be disqualified as physically unfit to work as a Signal Maintainer. Said letter also contained the following reference to Petitioner's claim on behalf of Claimant.

> "It is our position that the decision made by our Medical Director will govern in this case and your above mentioned claims are, therefore, declined."

On July 28, 1966, Petitioner advised Carrier's Supervisor in writing that the denial of claims would be appealed. Such appeal was duly filed on the same date with Carrier's District Engineer, which again requested that Claimant be restored to service of the Carrier, with all rights unimpaired and that he be paid for all time lost as stated in the initial claim filed on his behalf. On August 8, 1966, the District Engineer denied the claim on appeal for the reasons stated in the earlier denial.

On August 11, 1966, Petitioner filed the ultimate appeal on the property with the highest officer of the Carrier designated to receive such appeals. This was acknowledged on August 15, 1966. The final appeal requested that "the Carrier either agree to the examination of Mr. Pomeroy by a neutral physician or a specialist in neurosurgery, or if the Carrier does not agree that Mr. Pomeroy be examined by a neutral physical examiner that, he, Mr. Pomeroy will be restored to the service of the Carrier with all his rights unimpaired, and that he be paid for all time lost, as stated in the initial claim filed in his behalf."

On October 24, 1966, Petitioner again wrote Carrier's highest designated officer advising that the Carrier had violated the provisions of Article V of the August 21, 1954 Agreement and reiterating the request that Claimant be restored to his position with all rights unimpaired as stated in the initial claim.

Finally, Carrier responded by letter dated November 4, 1966, in which it asserted that Article V of the August 21, 1954 Agreement was inapplicable as the issue involved the physical qualifications of Claimant. Furthermore, Carrier again declined to arrange for an examination by another physician or to restore Claimant to service with pay for time lost.

Carrier has presented numerous Awards in support of its contention that Article V of the 1954 Agreement is not applicable because the Petitioner's initial communications did not constitute a valid claim or grievance. Many of these Awards concern a Carrier's right to require physical examinations of employes in the absence of contractual language in applicable Agreements. This particular issue is not before us in this dispute as Claimant has been fully examined by Carrier's physicians as well as physicians selected by himself. Other awards cited by Carrier as controlling concern such matters as claims for broken eye glasses, personal injury claims and the failure of another Carrier to furnish first aid kits and thermo water cans. All such awards are clearly distinguishable from the particular situation involved in this dispute.

Petitioner filed the initial claim on the property in June 1699, after Claimant had been fully examined by medical specialists. The initial claim sought either reinstatement with back pay and all other rights unimpaired or further examination of Claimant by an impartial physician. Whether or not the claim had substantive merit, it was handled procedurally by the Carrier as a bona fide claim while being processed through the appeals procedure on the property through submission to the highest designated officer of Carrier. Only after the sixty (60) day period for declining such appeals had expired, did the Carrier contend that the claim was invalid in its inception because of the subject matter. Furthermore, an inordinate period of time had passed since the Claimant's physical examinations and his involuntary leave of absence because of physical disability.

In light of all the facts in this case, including Carrier's unwarranted delays, we must conclude that the initial claim constituted a valid continuing claim for reinstatement subject to the time limit provisions of Article V of the August 14, 1954 Agreement. Therefore, Carrier's failure to respond to the claim on appeal to the highest officer within sixty (60) days, under Article V, 1(a) thereof, entitles Claimant to a sustaining award as to the period from April 18, 1966 to November 4, 1966, the date on which the claim was actually denied. Such conclusion is in accordance with Decision 16 of the National Disputes Committee and prior awards of this Board. (Awards 15723, 15069, 13780 and others.)

As to the merits of the instant claim, Petitioner cites no rule in the Signalmens' Agreement which has been violated by Carrier. The record discloses that Carrier's Medical Director concluded that Claimant was not physically qualified to perform the work of his former position after review of the findings made by a consultant neurosurgeon retained by the Carrier as well as the recommendations of a neurosurgeon selected by Claimant's own physician. After such review of available medical information, Carrier determined that Claimant was not qualified to perform all of the work encompassed within the normal requirements of the Signal Maintainer position, including the performance of work some distance from the ground.

There is no evidence that basic disagreement actually exists between medical authorities as to the Claimant's physical condition because the neuro-

surgeon recommended by his own physician advised that the Claimant be limited to working on the ground for a period of at least six months. Accordingly, we find no probative evidence that the final recommendation of Carrier's Medical Director was arbitrary, capricious or conceived in bad faith. Therefore, paragraphs (a) and (b) of the instant claim must be denied.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Article V, 1(a) of the National Agreement of August 21, 1954 was violated by Carrier and that paragraph (c) of the claim should be sustained to the extent indicated in the opinion.

AWARD

1. Paragraphs (a) and (b) of the Claim are denied.

2. Paragraph (c) of the Claim is sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of November 1967.

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