

Award No. 16884

Docket No. SG-17451

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerry L. Goodman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

**PENNSYLVANIA-NEW YORK CENTRAL TRANSPORTATION
COMPANY — SOUTHERN REGION**

(Formerly New York Central Railroad — Southern 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) Signal Maintainer Herman C. Patrick be paid for all time lost beginning July 18, 1966, and continuing until he is restored to service, account his being disqualified for service on July 15, 1966, following a physical examination by a Consultant Orthopedic Surgeon on May 18, 1966.

(b) 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 claim by General Chairman R. T. McGill on August 12, 1966.

EMPLOYES' STATEMENT OF FACTS: February 16, 1965, Signal Maintainer Herman C. Patrick was given a return-to-service examination by Railroad Company Doctor F. B. Webster. As a result of the examination Mr. Patrick was returned to service until May 18, 1966, when the Carrier had him examined by Dr. Thomas Horwitz, Consultant Orthopedic Surgeon.

Following this examination, Mr. Patrick was disqualified for service by the Carrier's Medical Director A. W. Nickels and was so notified by letter dated July 15, 1966. (Brotherhood's Exhibit No. 1.)

Mr. Patrick was taken out of service on July 18, 1966 and so remains until this date. August 12, 1966, the Brotherhood's General Chairman filed a claim with Carrier's Signal Supervisor Mr. A. W. Coffman on behalf of Mr. Patrick, "for all time lost as of July 18, 1966, inclusive, and continuing until he is restored to the service of the Carrier." The Carrier was informed that Mr. Patrick had been examined by Charles Browning M.D. on August 1, 1966, and in a signed statement Dr. Browning had indicated Mr. Patrick's physical condition was such that he could return to employment as a signal maintainer.

However, during the period the Carrier's and Mr. Patrick's doctors were attempting to agree upon a neutral doctor to conduct the examination, General Chairman McGill, in his letter of February 16, 1967, to Signal Supervisor Coffman (Carrier's Exhibit No. 7) claimed payment for all time lost by Mr. Patrick on the basis that Carrier had violated the Time Limit on Claims Rule account not denying the claim filed in his letter of August 12, 1966, within the 60-day time limitation. Claim has been appealed on that basis through the supervisory levels to the undersigned, Highest Officer of Appeal.

(Exhibits not reproduced.)

OPINION OF BOARD: Sometime during the month of November, 1965, Claimant, a Signal Maintainer sustained a non-service-connected back injury requiring that he be absent from duty.

During February, 1966, Claimant requested that he be returned to service and was given a return to service examination. Upon receiving the results of this examination, Carrier's Medical Director ordered Claimant to be further examined by a Consultant Orthopedic Surgeon. This examination was made in May, 1966, and resulted in Carrier's Medical Director recommending that Claimant be disqualified as physically unfit to perform the duties of a Signal Maintainer. In accordance with this recommendation, Claimant was removed from service effective July 18, 1966.

On August 1, 1966, Claimant was examined by his own physician who found him physically qualified to perform the duties of Signal Maintainer. Consequently, on August 12, 1966, Organization addressed correspondence to Carrier embodying the initial claim "... for all time lost as of July 18, 1966, inclusive, and continuing until he is restored to the service of the Carrier ... and unless or until Mr. Patrick is examined by a neutral doctor, I will appreciate an early advising he will be restored to his position as Signal Maintainer with the Carrier, with all his rights unimpaired, and he will be paid for all time lost."

By letters dated September 13 and 21, 1966, the parties entered into an agreement under the terms of which a neutral physician would be appointed whose opinion about Claimant's physical fitness to perform the duties of Signal Maintainer would be binding on both parties.

On February 16, 1967, Organization advised Carrier's Signal Supervisor that since the claim had neither been denied nor allowed within sixty days after being filed, the claim must now be allowed as originally presented under Article V, 1(a), the so-called Time Limit on Claims Rule, of the Agreement. The claim was progressed on this basis to the highest officer who denied same on April 17, 1967.

In the meantime, Claimant was examined by a neutral physician who found him physically unfit to perform the duties of Signal Maintainer and Organization was advised on April 10, 1967, that in accordance with the opinion of the neutral physician Claimant would not be restored to service.

Thus we come to the central issue: Did Carrier's failure to notify Organization within sixty days from the date the claim was filed that the claim was disallowed result in the claim being allowed as originally presented?

The resolution of this issue turns on the effect to be accorded the agreement for the appointment of a neutral physician whose opinion as to Claimant's physical qualifications to perform the duties of Signal Maintainer would be binding on the parties consummated on September 21, 1966.

The agreement itself neither allowed nor denied the claim. By its terms, the parties merely agreed that they would be bound by a neutral physician's opinion about Claimant's physical qualifications to perform his duties as a Signal Maintainer.

Thus the burden remained on Carrier to either allow or deny the claim within sixty days from the date it was filed. Since this was not done, the claim was automatically allowed as originally presented under Article V, 1(a) of the Agreement. Therefore, Claimant is entitled to be paid for time lost during the period from July 18, 1966 to April 17, 1967, the date on which the claim was actually denied. He is not entitled to be restored to service since the parties agreed with respect to this portion of the claim that they would be bound by the opinion of the neutral physician who as previously stated found Claimant physically unqualified to perform the duties of Signal Maintainer.

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 the Agreement was violated in accordance with Opinion.

AWARD

Claim sustained in part and denied in part 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 24th day of January, 1969.