

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20195
Docket Number SG-19877

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railroad Signalmen
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railway Company:

(a) Beginning November 2, 1970, Carrier unjustly held and continues to hold D. B. Swan from the position of Relief Signal Maintainer, Shreveport, La.

(b) Carrier should return D. B. Swan to the position of Relief Signal Maintainer with headquarters at Shreveport, La., with all employment rights and benefits unimpaired, and pay him for all time lost resulting from being held from service. Claim commencing sixty days retroactive from this date (April 2, 1971) and continuing thereafter until a settlement of this issue is made.

/Carrier's File: 013.31-101/

OPINION OF BOARD: The Claimant, a Signal Maintainer, did not work for more than a year, because of sickness, and claim is made that Carrier unjustifiably delayed his return to work after he was physically able to do so.

Claimant obtained permission to be absent from work due to sickness on September 20, 1970, and he did not resume work until November 3, 1971. His personal physician, Dr. Dickinson, found a heart condition; he gave medication therefor, and released Claimant for duty on November 4, 1970. The release by Dr. Dickinson reads as follows:

"This is to certify that Mr. D. B. Swan has been off work since September 20th, 1970.

Mr. Swan is under my care and treatment for Arteriosclerotic Heart Disease with Mild Angina. He occasionally has attacks of Paroxysmal Tachycardia.

According to Mr. Swan he has been doing two men's work, which he can no longer do.

I recommend Mr. Swan return to work and do only one man's job.

"Mr. Swan is taking medication daily."

Claimant was then examined by a Carrier physician on November 11, 1970; this examination did not demonstrate the continued existence of the heart condition; but, because of Claimant's narration of the history of such condition, the Claimant was not cleared for work. A copy of the written report of this exam was not given to Claimant, and he never asked for one. However, Claimant was informed of his non-clearance for work in the following December 21, 1970 letter of the Superintendent of Transportation:

"Chief Medical Officer, Dr. Masucci has reviewed this matter and agrees with Dr. C. N. Jones, that in view of your 'history of possible angina and, even more so, history of tachycardia, to us would indicate that you should not be put in a position such that a fainting condition from either type of potential attack would cause you to be hurt such as falling from a telephone pole or highway signal.' This eliminates you working as a signal maintainer, and that you may engage in other work of a moderate nature only. I do not know whether there is such work in the Signal Department, but would doubt that there is."

Under date of April 2, 1971, a formal claim was filed alleging that, in view of the Dr. Dickenson release, the Claimant had been unjustly held from service since November 2, 1970. In the progression of the claim on the property, the Carrier's viewpoint was that Claimant's medical clearance would not be forthcoming until two conditions were met: (1) Claimant could not be in need of daily medication and (2) there could not be a limitation on his work week. There was no challenge to the validity of these conditions and under date of September 2, 1971, the Organization submitted an August 30, 1971 statement by Dr. Dickinson which read as follows:

"This letter is to state that Mr. D. B. Swan was released by me to resume his normal duties as of November 2, 1970.

This is to further state that Mr. Swan is not taking medication for Heart Disease and, in my opinion, he can and should be returned to work."

After Carrier's receipt of the above statement, the same Carrier physician who had examined Claimant in November of 1970 examined him again on September 21, 1971. The report on this examination mentioned for the first time an epigastric mass which might be an abdominal hernia and which would require surgery for further diagnosis. As to the heart condition, although an electrocardiogram was recommended before return to work, the report indicated that Claimant had been off medication since January 1971 and that the heart condition was no longer an impediment to his ability to work. Subsequent examinations by Claimant's physician on September 22, and by another Carrier physician on October 28, established that the suspected hernia was an insignificant tumor which had been present for three or four years, and which was not in need of surgical repair. On the basis of these findings, and a normal electrocardiogram taken on October 28, the Carrier approved Claimant for duty on November 5 and he resumed work on November 8, 1971.

Petitioner's position is that Claimant's physical condition was no worse when he was not cleared for work on November 4, 1970, than it was when he was cleared for work on November 8, 1971; from this fact, Petitioner then argues that Carrier's actions were unreasonable and in bad faith. The general thrust of the Petitioner's assertion about Claimant's condition is not very wide of the mark, because the instant record indicates that he was probably able to return to work in the early part of 1971. He was off medication after January 1971; also the ultimate clarification of the limitation on his work week resulted more from the elimination of misunderstanding than from a change in his physical condition. We recognize, too, that Claimant might have handled his situation differently, and more effectively, if he had received a copy of the report on the November 17, 1970 examination; however, since no demand for the report was made, the significance of his not having the report is not in issue. In any event, all of these considerations arise from hindsight **whereas** Carrier must be judged by whether its actions were reasonable in light of the information it possessed at a given point in time. By this measure the Carrier was justified in withholding Claimant from service in November and December of 1970. Carrier's physicians held the opinion that Claimant was not ready **for** work at this time and some of the findings of Claimant's physician could be interpreted as being consistent with that opinion. When the claim was filed in April of 1971, no new information was given to Carrier and, thus, Carrier was justified in adhering to its initial position. However, the Organization's letter of September 2, 1971 submitted new information which net Carrier's conditions about Claimant's medication and the limitation of his work week. This new information

warranted Claimant's prompt return to service, but Carrier's physician, in his September 21 examination of **Claimant**, raised a new problem of possible hernia which necessitated the involvement of other physicians before it was put to rest. We conclude that the finding of possible hernia ~~was~~ too uncertain to justify a further withholding from service and that Carrier was arbitrary for doing so. We also conclude that, since Claimant had been withheld from service for a substantial period of time, when Carrier received the new information, the Carrier should have had its physician examine him earlier than **September 21**.

The Organization's Letter **providing** the new information was dated September 2, 1971. We believe that Carrier should have had him examined and cleared for work by Monday, **September 13**, 1971 and we shall therefore sustain the claim from that date.

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 **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

The Carrier was arbitrary in withholding **Claimant** from service ~~on~~ and after September 13, 1971

A W A R D

Claim sustained ~~from~~ September 13, 1971 through November 3, 1971.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1974.