NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21015
THIRD DIVISION Docket Number CL-20949

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (CL-7665) that:

(a) The Carrier violated the terms of the General Clerical Agreement, specifically Rule 27 thereof, when it arbitrarily discharged Mrs. Agnes A. Stuebgen from its service and also the Letter Agreement dated January 18, 1973, when it failed to reinstate and compensate her in accordance with its requirements, and

(b) The Carrier shall now be required to compensate Mrs. Agnes A. Stuebgen for each and every work day lost during the period she was arbitrarily withheld from Carrier's service until she was reinstated to service on July 20, 1973 as provided in Section 5 of Letter Agreement dated January 18, 1973, and

(c) In addition to the amount claimed above, the Carrier shall pay Mrs. Agnes A. Stuebgen interest of 8% per annum compounded annually from the date Carrier was notified Claimant was physically qualified to perform service.

OPINION OF BOARD: Claimant, a clerical employe, was employed by Carrier in 1563. In the spring of 1969, Claimant, suffering fmm periodic (monthly) pain and dizziness, including fainting-or blackouts, was sent to the Carrier's Medical Department where her condition was diagnosed as epilepsy, After continued medication and some intermittent time off, Claimant returned to duty after her last period of time off on September 1, 1972. On December 8, 1972, several days after one of her "spells", she was asked to report to the Medical Department where she was informed that she was being disqualified from Carrier's service for physics1 reasons.

A claim was filed, on Claimant's behalf, on December 15, 1972 and on December 26, 1972 Carrier notified her of an Investigatory Hearing on the charge of physical disqualification. Following the hearing Carrier found that Claimant was disqualified due to a "physical condition". In the course of the appellate process, Carrier and the Organization entered into an agreement, dated January 18, 1973, in an effort to resolve the dispute.

This dispute contains a host of peripheral issues and contentions in a very complex and lengthy record. In our judgment the only significant issue b&ore us is whether or not the parties conformed to the letter Agreement of January 18, 1973, and how that Agreement should be construed. The Agreement provides:

> "This refers to our discussion today, concerning the physical disqualification of Mrs. Agnes A. Stuebgen, Per Diem Clerk-Foreign, in the Superintendent Car Service Office at Baltimore, and claim covered by Local Chairman Dotson's letter of December 15, 1972, his file 176-72-311.
>
> Due the particular circumstances involved the Carrier is agreeable to disposing of this particular case on the following basis:
>
> 1. Allow Mrs. Stuebgen what she would have earned during the period from December 11, 1972 to and including December 25, 1972, less any compensation earned in outside employment.
>
> 2. Mrs. Stuebgen will submit herself to, and be examined by, a neutral doctor to determine whether she is physically qualified to work under the Clerks' Agreement. Such neutral shall be a doctor agreed upon between the Carrier's Director, Medical and Surgical Services, or his representative, and her (Mrs. Stuebgen's) doctor.
>
> 3. The neutral doctor selected will make his findings in writing, furnishing copies to the representatives of both parties.
>
> 4. Mrs. Stuebgen and the Carrier will each assume one-half of the cost of the neutral doctor.
>
> 5. In the event Mrs. Stuebgen is found qualified for serf-ice under the Clerks' Agreement, she will be reinstated and paid as provided in Rule 27(d) of the Clerical Agreement.
>
> If you are agreeable to the foregoing, please sign in the space provided below."

Rule 27 (d) of the Agreement provides:

"RULE 27 - INVESTIGATIONS, REPRESENTATION, APPEAL, ETC.

(d) If the final decision decrees that the charges against the employe were not sustained, his record shall be cleared of the charge. If dismissed or suspended (or disqualified as provided in Section (e) of this rule) on account of unsustained charge, the employe will be reinstated and paid what he would have earned had he not been taken out of service, less any compensation earned in outside employment."

Pursuant to the procedure described in Section 2 of the January 18, 1973 letter Agreement, Claimant was sent to see a specialist in epilepsy at Johns Hopkins Hospital, That physician, Dr. Livingston, rendered his final report on April 23, 1973, which read, in pertinent part:

"It is my definite impression that this patient does not present specific evidence of epilepsy, either clinical or electroencephalographic.

It is my belief that since Mrs. Stuebgen does experience one fainting episode each month in association with her menstrual period, she should remain on sick leave and be followed by Dr. Wharton. If Dr. Wharton is able to control her fainting attacks medically or remedy her condition by surgical intervention, I would certainly recommend that she be allowed to return to work with your company."

Claimant saw the gynecologist, Dr. Wharton, to whom she had been referred by Dr. Livingston, and after examination and medication, Dr. Wharton gave her a letter, dated April 30, 1973, which provided:

"Mrs. Agnes Stuebgen has been troubled with severe dysmenorrhea. It is now under control with medication, and I see no reason why she should not be able to work."

This letter was presented to Carrier that same date. Carrier refused to permit her to return to work. On July 20, 1973 Claimant was examined by Carrier's medical department and was pronounced fit to return to work on July 23, 1973, on which date she resumed her service. Carrier did not compensate her for any period of time she was out of service, except that provided in Section 1 of the letter Agreement. The Organization claims pay for all time lost while she was held out of service together with interest thereon.

Carrier's principle contention, with respect to Claimant's return to work, was that the letter from Dr. Wharton was insufficient under the Agreement and a specific instruction from Dr. Livingston was required. Carrier alleges that on May 14, 1973 Claimant as well as the Local Chairman were advised to secure a note from Dr. Livingston attesting that she was qualified to return to work, but that no such note was secured. Ergo, Claimant's own inaction was the reason for her not returning to work until July 23rd. As part of its argument, Carrier states that under the provisions of the letter Agreement Claimant was sent to a physician for the purpose of a determination of "whether she was physically qualified to work" and not just whether or not she suffered from epilepsy. Petitioner states that although attempts were made, it was impossible to get any further documents from Dr. Livingston.

First it must be noted that Carrier never received further notification from Dr. Livingston and apparently chose to examine and qualify Claimant on July 20th after considerable pressure hod been applied. It is evident that Carrier has the right to determine the physical standards or qualifications to be applied to its employes. In this case, Carrier certainly had the right to try and protect itself from possible liability arising from Claimant's fainting or blackouts. Thus, until Carrier was satisfied that the medical problem was under control, it had no obligation to return Claimant to work; the earlier incorrect diagnosis was immaterial, although unfortunate.

It is difficult to understand the lapse of time from April 30 to July 23rd, in the restoration of Claimant to service. Although Carrier may have had serious questions about Claimant's attendance record, as evidenced in its submission, that has no bearing on whether or not she was qualified to return to work in accordance with the letter Agreement. Carrier's reliance on the literal language of Section 2 of the Agreement is misplaced. That section states that the neutral physician will determine whether she is physically qualified to work and Dr. Livingston performed just that function in his diagnosis and specific recommendation that she be permitted to return to work if Dr. Wharton was able to control her fainting attacks. This is clear and unequivocal. Particularly in view of the serious mistakes in the earlier handling, it does not seem reasonable to delay further for additional meaningless correspondence. However, arguendo, let us assume that Carrier had the right to require tither assurances. It never received any further material from the consulting physician and relied instead on its own medical department's conclusions to reinstate Claimant. Was the delay of almost three months justifiable? We think not. Carrier had an obligation to bring the matter to a close within a reasonable period of time. We have dealt with many analogous problems of delay in physical examinations (Award 14866 for example) and have examined each on the basis of whether or not the delays experienced were reasonable under the peculiar circumstances of each case. In this dispute, we arc convinced that Carrier

should have taken action promptly on April 30, 1973 and delay beyond that time was unreasonable. For all the foregoing reasons, Claimant should be made whole for all time lost from April 30, 1973 until she returned to service on July 23, 1973. With respect to the question of interest claimed, we note that this issue was not raised on the property. Additionally, since such payment is not provided in the Agreement it will not be permitted herein.

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.

A W A R D

Claim sustained: Claimant will be made whole for all time lost from April 30, 1973 to July 23, 1973; no interest will be allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.