NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21065

THIRD DIVISION Docket Number TD-21096

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(The Central Railroad Company of New Jersey
((R. D. Timpany, Trustee)

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Central Railroad Company of New Jersey (hereinafter referred to as "the Carrier"), unjustly treated Claimant Train Dispatcher F. C. Richardson by arbitrarily refusing to permit him to resume duty on his regular assignment on and subsequent to August 5, 1973 when released for duty by his personal physician-surgeon;

(b) Because of said unjust treatment, Carrier shall now be required to:

(a) Reinstate Claimant F. C. Richardson to his regular train dispatcher assignment with seniority and all other rights including group hospital, medical, surgical and life insurance benefits unimpaired, and

(2) Compensate Claimant F. C. Richardson for all time lost from Train Dispatcher service beginning August 5, 1973 plus interest at the annual rate of six percent (6%) on such compensation.

OPINION OF BOARD: Claimant, a regularly assigned Assistant Chief Train Dispatcher, suffered a cardiac attack on October 4, 1972. He was hospitalized until October 28, 1972 and did not return to duty until January 19, 1973. In the following month, he was again hospitalized and underwent triple vein bypass surgery on April 3, 1973.

Claimant's personal physician certified that he was able to return to his employment in July of 1973. On August 1, 1973, ha sought to be examined by Carrier, and an examination was conducted on August 8, 1973, at which time Carrier rejected e return to the former duties, although the doctor allowed a return to "ticket agent" dutier, subject to certain restrictive conditions.

In August, 1973, two additional personal physicians recommended a return to duty.

On November 19, 1973, Claimant was instructed to obtain an appointment concerning return to service. The appointment was made for November 21,

1973. However, on November 20, 1973, Claimant was cleared to return to work as a Train Dispatcher, without a physical examination being performed.

The law is so well settled in this area that no extensive recitation, or citation of authorities, is deemed necessary. Suffice it to say that the Awards have clearly recognized the responsibility of the Carrier to the employes as well as the public, and that a Carrier has a right to determine the physical fitness of its employes. At the same time, it has been determined that if a Carrier is shown to have been unreasonably restrictive in its exercise of that right, it may suffer certain monetary consequences.

Thus, while the law may be settled, the necessity of weighing the factual circumstances of each individual dispute, remains the function of this Board.

We do not minimize the Carrier's very *serious* responsibility in this type of a case, nor do we fail to recognize that it must place reliance upon its competent professional staff. At the same tine, the opinions of Claimant's physicians may not be ignored. While they may not be exposed, on a regular basis, to occupational medicine, nonetheless, certain of them appear to possess expertise in cardiac surgical procedures and practice.

This Board is not, of course, expert in medical practice and it is indeed difficult to determine these types of cases upon a review of a cold record. It is also highly important to refrain from engaging in "second guessing" the medical profession.

We note that on August 31, 1973, the Organization proposed that a three doctor panel review the records and make any further examinations required. On September 12, 1973, Carrier denied the request "...since there is no agreement for such a procedure..."

We may not rewrite the parties' agreement and impose certain conditions where none exist. Thus, we do not find that Carrier was in a contractual violation when it denied the request. At the same time, we feel that the status of this case was such that Carrier was reasonably required to explore some avenue of resolving the medical dispute between highly competent practitioners. Thus, a refusal to explore avenues of resolution, which was opened by the Organization, does not appear to be conducive to an orderly resolution of the dispute. Prompt attention to, and exploration of, the request could have resulted in a much clearer medical picture for ultimate presentation to this Board, if necessary, within a thirty-day period. Thus, we are inclined to sustain the claim from October 1, 1973, forward.

Again, we wish to emphasize that our Award does not impose a requirement upon the parties to be followed in all cases. Rather, we feel that within the limited framework of this dispute, *Carrier* was unreasonable to the extent stated.

Carrier has cited numerous Awards which have denied interest. We do not dispute the propriety of those Awards. But, we note that on the property, Carrier failed to respond to the claim for interest. Under the Awards of this Board, it is clear that a Carrier may not raise a defense, for the first time, at this level.

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 from October 1, 1973 forward, as stated in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.