

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21576
Docket Number SC-29047

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Robert W. Blanchette, Richard C. Bond
{ and John H. **McArthur**, Trustees of the
{ **Property** of Penn Central Transportation
(Company, Debtor

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

System Docket W-35

Claim on behalf of Signal Maintainer V. E. **Knop**, who was removed from service on April 13, 1973, as a result of restrictions placed against him because of medical findings by Dr. **H. B. Hamilton**.

OPINION OF BOARD: **This** dispute arises from the Carrier's action in taking the Claimant out of service for the period April 13, 1973 to February 25, **1974**, because of medical considerations., The Organization seeks to have the Claimant compensated for time lost from May **21, 1973** through February 25, **1974**, both on the merits and on the grounds that the Carrier violated the time limit provisions. The Carrier denies the claim on the merits and also asserts that the claim is procedurally barred because the claim was not timely filed and because the claim was changed on appeal.

As a result of an April 3, **1973** medical examination of the Claimant Signal Maintainer by the Carrier's Divisional Medical Officer, H. B. Hamilton, M.D., the Claimant was placed on medical work restrictions (no climbing, no solitary work, and no auto driving on company business) , which were inconsistent with the duties available to **him**. As a consequence the Claimant was taken out of service from April 13, **1973** to February 25, **1974**. Pursuant to the request of the Organization, the Claimant was examined again by the Carrier physician, Dr. Hamilton, on June **12, 1973**. The restrictions were continued in effect after this examination. In July 1973 the Claimant was examined by Jean **W. Moore**, M.D., **Danville**, Illinois, the Claimant's personal physician, who wrote a July 16, **1973** note stating that her examination of the Claimant had revealed no reason for the Claimant "**not** to be able to resume his previous occupation." Under date of July 19, 1973, a claim was submitted in

behalf of the **Claimant** asserting that the Carrier had wrongfully removed the Claimant from service and requesting **pay for all** time lost. The Carrier denied this claim by letter dated August 10, 1973. The Organization then wrote an August 14, 1973 appeal letter to the Chief Engineer which stated that the claim involved a conflict of medical opinion **concerning** the status of the Claimant's health, and which requested the Carrier to agree to retain a **neutral** physician to resolve the medical conflict. The Carrier agreed and the result was that a neutral physician issued a January 29, 1974 report that the Claimant could perform his job without restriction. The Carrier returned the Claimant to service on February 25, 1974 and paid him (or offered to pay him) for the **normal** work days in the period February 6-24, 1974; the Carrier states that this payment (or offer of payment) was made because it recognized that there was some delay in returning the Claimant to service after the neutral physician issued his report.

The Carrier argues that the original claim is barred by the time **limits** in that the Claimant was removed from service on April 13, 1973 and that the filing of the claim on July 19 was more **than** sixty (60) days after such removal. The Organization's response is that the sixty (60) day **period** for filing the claim runs from June 12, 1973, because the Organization requested another examination by the Carrier's **physician** and the Carrier agreed thereto. The Organization's position is sound. Once the **Carrier** agreed to the second examination by its own physician, the original opinion of the Carrier's physician was subject to a change which would have removed the work restrictions. The Carrier thus waived its right **to assert** April 13 as the date of the commencement of the claim. When the opinion from the second examination on June 12 resulted **in** a negative finding on the Claimant's request for the lifting of the restrictions, this constituted a separate Carrier action which was timely protested by the claim filing on July 19, 1973. **The** Carrier's second procedural argument is based on the insertion of the request for a neutral physician in the Organization's August 14, 1973 appeal letter to the Chief Engineer. However, the parties do not have a contract requirement for such a neutral **physician**. Consequently, the request for the **physician** cannot be treated as a claim within the purview of the parties' **Agreement** and **thus** the **making** of the request in the appeal letter cannot be deemed a change of the original claim. **The** Organization's time **limits** argument is that its appeal letter to the Chief Engineer of August 14, 1973 was not answered until the Chief Engineer issued his denial under date of November 26, 1973. The record **bears** out the procedural facts as asserted by the Organization; accordingly, it is concluded that the Carrier failed to meet the time limit requirements in respect to the Organization's August 14 appeal letter and that an award based on such time limit violation is appropriate. The Carrier's liability was stopped, however, by the Chief Engineer's denial on November 26, 1973 (Award No. 20268), so the claim will be determined on the merits for the period following this date.

With regard to the merits, the Organization argues that the Carrier's removal of the Claimant from service in April 1973 was the wrongful result of the harassment of the Claimant by his supervisor. This **argument** does receive some support from Dr. Moore, the Claimant's personal physician, who stated in a November 13, 1973 letter to another doctor that in her opinion "the trouble that is occurring is due to personalities rather than physical inability" of the Claimant. **However**, this is merely opinion evidence which is apparently based solely on the **Claimant's** representations to Dr. Moore. The record is barren of any direct evidence of specific examples of episodes which could be given probative value in assessing the charge of harassment and consequently, there is no basis for a finding in support of this charge.

With respect to the compensation to be awarded, the **Organization** asks for compensation **from May 21, 1973**. However, the Organization provides no explanation for the basis of this date and no **explanation** is apparent of record. Accordingly, compensation will be allowed from July 16, 1973, the date of the opinion of the Claimant's physician which **challenged** the findings of the Carrier's physician, through November 26, 1973, the date of the Chief **Engineer's** denial of the August 14, 1973 appeal letter. **With respect to the events following the neutral physician's clearance of the Claimant for work, the Carrier has acknowledged that there was some delay in returning the Claimant to work and has paid (or offered to pay) the Claimant for the normal work days during February 6-24, 1974. Although this leaves a span of time between the neutral physician's clearance on January 29, 1974, and February 6, the record does not reflect any basis for questioning the Carrier's assessment of the appropriate compensation for the delay in returning the Claimant to service. Accordingly, the Carrier shall pay the Claimant compensation for time lost during the period July 16, 1973 to November 26, 1973 and during the period February 6 through February 24, 1974.**

In light of the foregoing, the claim is sustained in part on the basis of a time limits violation by the Carrier and in part on the basis of **delay in** returning the Claimant to service after January 29, 1974.

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;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Carrier violated the time limits provisions.

A W A R D

The claim is sustained as per the **opinion.**

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1977.