

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD** DIVISION

Award Number **22441**  
Docket Number CL-22046

James F. **Scearce**, Referee

**PARTIES TO DISPUTE:** (Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight **Handlers**,  
( Express and Station **Employees**  
(  
(**Elgin, Joliet** and Eastern Railway Company

**STATEMENT OF CLAIM:** Claim of the System Committee **of** the Brotherhood  
(Gt8379) that:

1. The Carrier violated the effective Clerks' Agreement when on or about **March** 31, 1976, it removed Clerk Octavia Jackson **from** its service based upon her alleged physical condition;

2. The Carrier shall **now** compensate Ms. Jackson for eight (8) hours' pay at the pro rata rate of Position GT-572 **commencing** on April 9, 1976 and continuing for each and every day thereafter that the Carrier withheld her from service.

**OPINION OF BOARD:** **Apparently shortly** after **being** awarded a position of Assistant Chief Yard Clerk in November of 1975, the Claimant requested and received medical leave to March 1, 1976. **Prior** to that date, she requested and received a 30-day extension to such leave March 31, 1976.

With a document dated March 30, 1976 and executed by her personal physician (**Nesbitt**) in hand, the grievant apparently presented herself to the Carrier for return to work. The return-to-work approval contained restrictions:

"Pt. **Patient** advised to be **off feet** as **much** as possible; **avoid** extreme **temp/erature** changes & situations of emotional stress; **avoid** climbing; continued observation."

By letter dated April 8, 1976, the Carrier's Chief Surgeon (**Rudman**) advised the Claimant:

"I have reviewed the results of the examination by Dr. **Murphy** and the Medical Report by L. C. Nesbitt, M. D., your personal physician.

"**In** the light of the foregoing, and with particular reference to the medication prescribed for you and the restrictions as to climbing, exertion, stress, etc., indicated by Dr. Nesbitt, you fail to meet the **minimum** medical standards of this Carrier and are, therefore, disqualified.

When your personal physician concludes that you are able to return to work **environment** that includes climbing and descending railroad car ladders, prolonged walking periods, free from the necessity of sedative or **stimulant** prescriptive medications, please arrange to have him submit another 'Verification of Private Medical Care Form' documenting that conclusion. You may then re-present yourself for a physical examination by the Railway Company Physician to determine whether you meet the **minimum** physical standards **of** this Carrier."

Thereafter, a further examination and report by the Claimant's personal physician somewhat limited the restrictions on her return to work, but again Chief Surgeon **Rudman** rejected her request to return to **work**, in a letter 'dated May 11, 1976:

"I have received your 'Verification of Private Medical Care' form from Dr. Nesbitt and he still is restricting you from climbing, etc., and has prescribed medication.

When your private medical doctor reports by means of another 'Verification of Private Medical Care' form that your Return **to Work** is not contingent on restrictions as to climbing, **extremes** of temperatures etc., and prescribed medication, your physical condition will be re-evaluated by this Carrier."

By letter dated May 21, 1976 the Organization submitted a claim on behalf of the Claimant under Section (c) of Rule 62 (hereafter displayed) for all time off work by the Claimant on and after April 9, 1976.

As set forth in Rule 62, Section (c), a "neutral physician" was selected who examined the Claimant and adjudged her fit to "return to her previous position" -- the **one** she was awarded in November, 1975. On July 15, 1976 the **Claimant** was notified to return to **service**; for reasons apparently not **germane** here, the Claimant delayed her return until July 29, 1976.

A "**time** claim" was initiated on July 27, 1976 under Rule 28% by the Organization for the identical period claimed under Rule 62, **as** set forth in the aforementioned **Organization** letter dated May 21, 1976.

**Rule** 62 sets forth a procedure by which **employees** may return to work from illness or accident:

#### **RULE 62**

##### **PHYSICAL EXAMINATIONS - INCAPACITATED EMPLOYEES .**

(a) **Employees** costing within **the** scope of this **Agreement** will not be required to submit to physical examination unless it is apparent their health or physical condition is such that an examination should be made.

(b) An **employee** will not be withheld from **service** or removed from service account physical condition unless it is definitely **determined** by an **examination** by a Company physician that the **employee** is unfit to perform his usual duties. If the employee is **removed** or withheld from service, prompt written notice will be given by the Carrier to the employee setting forth the physical condition of the **employee** and the reason why the **Company** physician determined the employee is unfit to perform his usual duties.

(c) In the event **an** employee so withheld or removed **from service** considers himself fit to perform his usual duties and this is substantiated by his personal physician's recorded opinion **in** this regard which differs from that of the Company physician's report and opinion, an examination will be made by a mutually agreed to physician, **not an** employee of the Carrier, who shall render a written report to the parties as **to** the physical condition of the employee and his

**opinion** as to whether or not the employe is unfit to **perform his usual duties, and** his decision shall be **final**. If his decision is in favor of the employe he shall be **immediately** returned to service and compensated for all monetary loss suffered during the time he was improperly withheld from service.

(d) Should the neutral doctor's decision be adverse to the employe **and** it later is apparent **that his** health or physical condition has improved, a re-examination will be arranged after a reasonable interval upon written request of the **employe**. In such a case should the decision be in favor of the employe he shall be immediately returned to service and **compensated** for all monetary loss suffered from the time he presented **himself** for this re-examination.

(e) All doctor fees incurred in applying the provisions of this rule shall be borne by the Carrier, including those of any neutral doctor but excluding any fees incurred by the **employe** in seeking examination by his personal physician.

(f) Efforts will be made to furnish employment (suited to their capacity) to **employees** who have become physically unable to continue in their present positions.

We need not look beyond the language of this Rule and relate it to a single event to **determine the** validity, or lack of it, for this claim: On March 31, 1976 the Claimant presented herself and the medical release from her personal Physician to Carrier doctor **(Murphy)**. Rule 62 (b) is **unambiguous** in its requirement that such an **employe's** condition be "definitely determined by an **examination** by a Company physician" in order that such employe can be withheld from service. While Chief Surgeon **Rudman's** letter of April 8, 1976 asserts that Dr. Murphy performed such an examination, nothing has been adduced that such an event occurred; to the contrary, the Organization contends that Dr. Murphy merely advised the **Claimant** an **examination** by Dr. **Rudman** would be required. **We** are not unmindful that the burden issues to the initiator of such a claim to establish facts on the record. Here, it is not reasonable to expect the Claimant to produce proof that such examination did not occur; it is equally reasonable to assume that, had such **examination**

---

by Dr. Murphy **been** made, it would have been documented. It is noteworthy that the Organization, in handling this matter on the property, cited this provision and requirement to the Carrier **by** a letter dated April 23, 1976; the Carrier, in response **on** April 29, 1976, references "medical findings . . . of (Dr. Murphy)" as part of its basis for denying the Claimant the opportunity to return to work. At no point **in** the record are the results of such findings of Dr. **Murphy** adduced. The Carrier was **in** error from **that point on, notwithstanding** the parties' eventual selection of a neutral physician, etc.

As to the matter of Rule **28½**, it is well-settled by this Board that duplicative claims are improper. Rule 62 at Section **(c)** is operative in this Claim, and the Organization's efforts relative to Rule **28½** is dismissed.

As to the Award, the grievant shall be compensated for loss of wages at the rate applicable to position GT-192 from April 9 to July 15, 1976 at which **time** she made herself unavailable for work, for other **reasons**, until her actual start date of July 24, 1976.

**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

**That** the Agreement **was** violated.

Award Number 22441  
Docket Number CL-22046

Page 6

A W A R D

Claim sustained as set out in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST: A.W. Paulos  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1979.

