NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24254
Docket Number CL-24314

Robert W. McAllister, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9550) that:

1. Carrier violated the effective Clerks' Agreement When it refused to comply with the prwisions of Rule 62 in the case of Ms. Diane Winsor, thereby improperly withholding her from service;

2. Carrier shall now be required to afford Ms. Winsor the rights accorded her by Rule 62 effective as of March 18, 1981.

OPINION OF BOARD: The Claimant, Clerk Diane Winsor, has a seniority date of Nwember 10, 1967. The Organization claims the Carrier violated the agreement (Rule 62) when it failed to participate in the selection of a physician in order to determine Whether or not the Claimant was unfit to perform her usual duties. Notwithstanding procedural arguments, the Carrier asserts the Claimant's personal physician rendered an opinion which does not differ from the Company's physician and, therefore, no dispute exists over the medical findings.

The background of this claim requires a brief outline of past events. The Claimant last Worked for Carrier on April 19, 1976. Thereafter, she has been generally disabled by reason of allergic reaction to cigarette smoke and other airborne stimuli. On July 20, 1978, Claimant filed a civil action against Carrier to recover damages for personal injuries sustained on the job. Subsequently, the Carrier and Claimant settled out of court, and the complaint was dismissed by the Federal District Court.

On Nwember 3, 1980, the Carrier received a note from the Claimant requesting the attached note from her personal physician, Jack D. Clemis, M.D., be accepted as indicating she could return to work, The note stated in part:

> "Her treatment of desensitization through injection has been very successful and Mrs. Winsor feels she can now Work in an unrestricted environment."

The Carrier's chief surgeon responded to Claimant and informed her that, after receiving certain clarifications from Dr. Clemis, he would advise her of his assessment of her medical status. This was done on November 26,1980, and Claimant was advised the reports from Dr. Clemis established she was still subject to upperairway allergic deficits and, therefore, failed to meet minimum medical standards for the position of clerk.

By letter of March 2, 1981, the Organization formalized a prior request that the provisions of Rule 62 be implemented to determine whether or not the Claimant was physically fit to perform her usual duties. The Carrier responded and indicated that absent a statement from Claimant's physician that Claimant could work in an unrestricted environment, there was no contractual basis at the time to initiate any action with respect to Rule 62. On March 10, 1981, Dr. Clemis repeated his statement of September 5,1980, and added this last sentence:

> "Also, it is my opinion that Mrs. Wfnsor should have no problems with her allergies should she return to work."

On March 20, 1981, the Carrier informed the Organization that Dr. Clemis' March 10 letter had been sent to the Carrier's Chief Surgeon for evaluation and determination. The Carrier indicated that as soon as the chief surgeon provided his results, the Organization would be notffied of the Carrier's decision pertaining to the invocation of Rule 62.

The chief surgeon immediately wrote to Dr. Clemis posing several questions to which that physician responded by letter dated March 27, 1981. On April 6, the Carrier informed the Organization:

> "In view of Dr. Clemis' most recent recorded opinion, there appears to be no contractual basis to initiate any action at this time with respect to the request made in your letter dated March 16, 1981."

The pertinent language of Rule 62 is as follows:

> "(b) An employe 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 employe is unfit to perform his usual duties. If the employe is removed orwithheld from service, prompt written notice will be given by the Carrier to the employe setting forth the physical condition of the employe and the reason why the Company physician determined the employe is unfit to perform his usual duties.
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> (c) In the event an employe 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 dfffers from that of the Company physician's report and opinion, an examination will be made by a mutually agreed to physician, not an employe of the Carrier, who shall render a written report to the parties as to the physical condition of the employe 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 or removed from service."

There can be no doubt the Claimant has on several, prior occasions been informed by Carrier's physician why her condition rendered her unfit to perform her usual duties. There also can be no question the Claimant beginning November 3,1980, considered herself fit to perform her usual duties. A careful review of the extensive medical information contained in this record requires this Board to hold that on March 10, 1981, the Claimant's physician apparently substantiated her belief, and this did differ from the then existing view of the Carrier's chief surgeon. Notwithstanding, the chief surgeon posed specific questions to Dr. Clemis whose reply triggered the Carrier's present position that Claimant remained unfit to perform her usual duties.

The Organization views the inclusion of Rule 62 into the parties' agreement as intended to avoid disputes such as this. It stresses the parties' representatives agreed they did not possess the qualifications to determine when an employe was physically fit to perform the duties of his or her position; thus, the concept of a neutral opinion was introduced. This Board generally agrees with those statements, but cautions that Rule 62 requires that, when an employe "so withheld or removed from service considers himself fit to perform his usual duties", this fact be substantiated by that employe's personal physician and that opinion must differ from that of Carrier's physician before resorting to the so-called neutral. Thus, we arrive at the nub of this claim.

The employe's physician, Dr. Jack D. Clemis, did state on March 10, 1981:

"Mrs. Winsor should have no problems with her allergies should she return to work."

In other words, Dr. Clemis was stating that in all 'probability the Claimant's prior, allergic condition was not likely to return when she was exposed to her normal working environment, which included airborne, stimuli, such as smoke and dust. As stated previously, this opinion would be sufficient for us to hold a valid difference in medical opinion existed. The Claimant's physician, however, in response to questions from Carrier's chief surgeon clearly offered a differing opinion when on March 27, 1981, he wrote:

"Your question regarding further exposure to tobacco smoke is pertinent and that type of exposure may rekindle the symptomatic state that she had a few years ago. The same couldhold true for outdoor air pollution. The proof Of the puddingwouldbeto put her inthattype of environment to see whet happens and if both you and she are willing to do so, I would see no particular reason not to proceed. I do not have a crystal ball and cannot project whether she is going to remain asymptomatic when she returns to any of these types of environment or not. In general, however, allergice patients on re-exposure do become symptomatic."

This Board finds the purpose of determining an employe's fitness, or lack thereof, to perform his usual duties is to protect both the employe and the Carrier. In determining an individual's capability to perform his usual duties, we are seeking medical guidance indicating it would be prudent and safe to allow the employe to return to work. Neither parties' interests are served when such a return to duty cannot be undertaken without a degree of medical certainty that the prior condition will present no problem in the performance of an employe's usual duties.

In our review of the entire medical record, the Board finds but one document which purports to substantiate Claimant's belief that she is physically able to perform her normal duties without problems. When considered in light of Claimant's entire medical record and her physician's subsequent statement on March 27, 1981, we conclude that insignificant differences exist between her physician's conclusions and those of the Company's physician. From this we must hold, based upon the evidence before us, that the opinion of Claimant's physician and the opinion of the Company physician are not in disagreement about Claimant's condition. Rule 62(c) requires that such disagreement be present before its mechanics be instituted. Accordingly, we find no error in Carrier's conclusion that the mechanics of Rule 62 are presently inapplicable to Claimant's situation.

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 withinthe 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 not violated.

A W A R D

Claimdenied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.