NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24277

THIRD DIVISION Docket Number MW-24146

John B. La Rocco, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) Claimant Andrew L. Young shall be reimbursed for all compensation loss suffered by him AS A result of being improperly withheld from service beginning January 31, 1980 (System File D-8-80/MW-25-80)."

OPINION OF BOARD: To fully understand the issue presented in this case, we must relate the facts in sum detail.

During the period from 1972 to January 2, 1980, Claimant, a section laborer, was medically disqualified from service. In the latter part of 1979, Dr. Boyd, A physician affiliated with the Carrier, thoroughly examined Claimant and concluded that he could return to his former position on the section gang on January 2, 1980. There is some confusion in the record regarding whether or not Claimant misled Dr. Boyd concerning the job duties of A section laborer. The Organization asserts Dr. Boyd was fully aware that Claimant would be working around moving trains and power equipment. However, the Carrier declares that Dr. Boyd thought he was returning Claimant to a job where Claimant would not be working around mechanical equipment.

While sweeping A switch on January 30, 1980, Claimant suddenly-lost consciousness for several minutes. Claimant was treated at A hospital and released the next day. The attending physician at the hospital instructed Claimant to undergo an examination by Dr. Nay, a neurologist. Dr. Nay certified that Claimant could return to service on February 5, 1980. A cardiologist also examined Claimant and said he could return to service on February 11, 1980. The cardiologist surmised that since Claimant wes suffering from acute bronchitis with pleurisy, his loss of consciousness on January 30, 1980 was probably due to his temporary lung illness.

Dr. Boyd reexamined Claimant on February 15, 1980. After talking with the Section Foreman who witnessed Claimant's loss of consciousness and evaluating the results of his February 15, 1980 examination, Dr. Boyd recommended that the Carrier disqualify Claimant from service due to a seizure disorder. In his report dated February 15, 1980, Dr. Boyd referred to Claimant's loss of consciousness on January 30, 1980 and stated as follows: "It is possible, as Doctor Nay believes, that the patient (Claimant) merely fainted and that this was the result of his lung problem". However, Dr. Boyd concluded that Claimant had suffered a grand mal seizure. On March 15, 1980 the Carrier physically disqualified Claimant from service.

After the Organization instituted this claim, in a letter dated September 30, 1980, Dr. Nay reiterated his opinion that Claimant "... did not have a grand mal convulsion, but rather he fainted". Dr. Nay again emphasized that "... Claimant should be released to return to work as a section laborer".

The Organization urges this Board to convene a Board of Physicians in accord with Rule 24(a), (b), and (c). According to the Organization, a panel of doctors is necessary because the attending hospital physician, the cardiologist, and Dr. Nay all authorized Claimant to return to work. The opinions of these medical experts, the Organization argues, constitute evidence that the Carrier arbitrarily disqualified Claimant. We note that the Organization is not directly challenging the Carrier's medical standards for a section laborer, but rather the Organization contests the manner in which the Carrier has applied those medical standards to Claimant.

On the merits, the Carrier avers that Claimant's first disqualification (in 1972) continues to be effective because Claimant misrepresented his job duties in order to gain Dr. Boyd's approval to return to service on January 2, 1980. If Claimant had accurately articulated the tasks which a section laborer regularly performs, Dr. Boyd would not have rescinded the 1972 disqualification. Lastly. the Carrier contends that a Rule 24 Board of physicians is unnecessary since there is no real conflict among the doctors who examined Claimant. The Carrier maintains that all the medical data in the record conclusively demonstrates that Claimant suffers from epilepsy and he was properly disqualified under the Carder's applicable medical standards.

As a threshold issue, the Carrier contends that the claim presented to this Board for adjudication is not the same claim which the Organization filed and progressed on the property. This Board notes that the claimbefore this Board contains different language but the fundamental essence of the claim (as well as the Organization's requested relief) is exactly the same as the claim handled on the property.

The question before us is whether there is substantial disagreement wer Claimant's physical condition among the examining physicians to warrant the establishment of a Board of Physicians as provided by Rule 24 of the applicable Agreement. Claimant's disqualification in 1972 is not pertinent since the Carrier found him physically fit to return to service as a section laborer on January 2, 1980.

After Claimant lost consciousness on January 30, 1980, Doctors Boyd and Nay both recognized that the black out could have been either a fainting spell induced by severe bronchitis or an epileptic convulsion caused by a seizure disorder. Dr. Boyd eventually concluded (especially after talking with the Section Foremanwho observed the incident) that Claimant had suffered a grand mal seizure. While Dr. Way was originally unsure of the cause of Claimant's loss of consciousness, by September 30, 1980, it was his fins medical opinion that Claimant merely fainted. Not only did Dr. Nay's medical conclusion conflict with Dr. Boyd's diagnosis, but also Dr. Nay declared that Claimant was fit to return to service as a section laborer.

This Board is faced with a difficult dilemma. We recognize that both Dr. Boyd and Dr. Nay were exercising their best medical judgment. Nonetheless, we lack the medical expertise to adequately resolve the areas of disagreement between Dr. Boyd and Dr. Nay. Thus, the best forum for evaluating Claimant's medical condition is a Rule 24 Board of Physicians.

Within sixty days of the date of this Award, the parties shall establish a panel of physicians as set forth in Rule 24(b). Should the physicians be unable to agree on Claimant's fitness and ability to perform service as a section laborer, we expect the parties to thereafter comply with subsections (c) through (e) of Rule 24. Before evaluating Claimant's medical condition, the Board of Physicians should fully understand the nature of Claimant's job, the Carrier's medical standards, and Claimant's medical history.

In addition to determining if Claimant is presently fit for service, the Board of Physicians will pass on the propriety of Claimant's disqualification from service on March 5, 1980. However, we must impose one restriction on the Board of physicians authority. In this case, the substantial disagreement over Claimant's physical condition did not come into clear focus until Dr. Nay issued his complete medical opinion on September 30, 1980. Therefore, the Carrier cannot be held accountable for any back pay liability prior to October 20, 1980 (which was the date the Carrier received a copy of Dr. Nay's September 30, 1980 letter). Nothing in our opinion should be construed to mean that the Board of Physicians must award Claimant any back pay even if the Board decides Claimant is physically fit to return to service as a section laborer.

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 tha dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

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 31st day of May 1983.

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Serial No. 329

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 24277

DOCKET NO. MU-24146

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: Denver and Rio Grande Western Railroad Company

The Organization petitioned this Division to interpret Award No. 24277.

In Award No. 24277, we ruled that as of October 20, 1980. there was a conflict between the Carrier's doctor (Dr. Boyd) and Claimant's personal physician (Dr. Nay) over Claimant's fitness for service. Specifically, the two medical experts disagreed on the cause of Claimant's loss of consciousness while on duty on January 30, 1980. As a result of the incident, the Carrier disqualified Claimant from service. Due to the conflicting medical evidence, we ordered the parties to establish a panel of physicians pursuant to Rule 24.

Subsequent to the issuance of Award No. 24277, Doctors Nay and Boyd examined Claimant on or about June 20, 1983. Dr. Nay, a Neurologist, could not find any disturbances of cognitive function. Dr. Nay concluded:

> "The present examination is entirely normal. I sea no reason to alter the position I took some years ago--this man does not have a convulsive disorder and in fact has no neurological disability".

Dr. Boyd concurred and wrote:

> "Patient presently exhibits no objective evidence of any organic neurological disease or injury. Hfs history suggests that he may have had some type of altered state of consciousness at the time of his problem in 1980....At present, I find no reason why the patient should not be back in service."

Inasmuch as the two doctors resolved the prior conflict. it was not necessary for the parties to utilize the services of a neutral physician. On August 1. 1983, the Carrier reinstated Claimant to service but without back pay.

The issue presented to us is whether our Award No. 24277 granted Claimant an entitlement to wages lost in view of the congruent evaluation8 of Claimant's physical condition rendered by the panel of two physicians.

The Carrier resisted paying Claimant any back compensation for two reasons. First, the reports submitted by Doctors Nay and Boyd merely reflected Claimant's fitness for service in June, 1983. Dr. Boyd referred to Claimant's present physical condition and implicitly endorsed the propriety of his 1980 medical analysis. Neither medical practitioner alluded to back compensation which manifests their recognition that Claimant was properly disqualified from service in 1980. Second, the Carrier stresses the following explanatory observation which this Board included in Award No. 24277, "Nothing in our opinion should be construed to mean that the Board of Physicians must award Claimant any back pay even if the Board decides Claimant is physically fit to return to service...." Pursuant to Award No. 24277, the panel of physicians. as opposed to this Division, was to determine if Claimant was entitled to back compensation. Again, the doctors' silence demonstrates their denial of back pay.

The question of Claimant's entitlement to back pay is expressly addressed in Rule 24(b) which provides in pertinent part: "If they [a two physician panel] agree the employe is qualified he will be returned to the service and paid for any time lost". (Brackets added for clarification.) Thus, by operation of the clear Rule language Claimant was vested with a right to back compensation as soon as Doctors Nay and Boyd reached identical conclusions on Claimant's fitness for service. Thus, it was unnecessary for the two physicians to expressly grant Claimant his lost wages. His back pay entitlement arose from the automatic application of Rule 24(b).

The Carrier's reliance on the final sentence in our main Opinion is misplaced. When rendering Award No. 24277, we could not foresee that the dispute over Claimant's physical condition would be expeditiously resolved without resorting to a neutral physician per Rule 24(c). Given the substantial differences between Dr. Nay and Dr. Boyd over whether Claimant fainted or suffered from a seizure disorder, we anticipated that a neutral physician would be required to resolve the medical disagreement. Our comment on back pay was intended to preserve the neutral doctor's authority to review the correctness of the Carrier's decision to disqualify Claimant in 1980. Compare Rule 24(e) with Rule 24(b). Unlike the former, the latter provision specifically grants back pay when the Carrier doctor and the employe's physician agree that an employe should be returned to service.

In our Opinion, we found that the Carrier violated Rule 24. If the Carrier had followed Rule 24 commencing on October 20, 1980, it would have avoided back pay liability. Although the two physicians examined Claimant almost three years later, the delay stemmed from the Carrier's violation of the contract.

The Carrier has raised allegations that Claimant experienced health problems after his reinstatement to service. These accusations are irrelevant to Claimant's back pay entitlement.

In accord with this Interpretation of Award No. 24277, the Carrier shall pay Claimant back compensation from October 20, 1980, to August 1, 1983, less his outside earnings.

Referee John B. LaRocco, who sat with the Division as the Neutral member when Award No. 24277 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago. Illinois, this 8th day of July 1986.