

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25848

Docket Number CL-25769

Herbert L. Marx, Jr., Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-9875) that:

Claim No. 1 (Carrier file CG-15825)

(a) The Carrier violated the Clerks' Agreement particularly Rule 27 and others when it held Sandra G. Moore out of service and did not accord her a timely, fair and impartial investigation.

(b) That Sandra G. Moore now be compensated eight (8) hours at the pro rata rate each work day, five days per week beginning sixty (60) days prior to November 15, 1979.

Claim No. 2: (Carrier file CG-25788)

(a) The Carrier violated the Clerk's Agreement, particularly Rule 24, 27, 28(f) and others when it refused to allow Sandra G. Moore to displace on the position of her choice; and when on December 5, 1979, it removed her from service charging her with not being physically qualified to perform service on any clerical position on the Roster of Engineering-Construction and Maintenance, Huntington, West Virginia to which her seniority entitled her and at the December 12, 1979, Board of Inquiry found her not physically qualified to perform service on any clerical position on the Roster of Engineering-Construction and Maintenance, Huntington District, Huntington, W. Va. to which her seniority entitled her, specifically those requiring exertion and heavy lifting - - specific positions being File and Mail Clerk, Positions C-63, C-64, C-65, C-67 and Blue Print Operator Position C-47.

(b) That Sandra G. Moore be compensated under Rule 24 because she was arbitrarily rearranged from the position of her choice (File and Mail Clerk) to Blue Print Operator Position; and that Sandra G. Moore now be allowed to exercise her seniority to the position of her choice (File and Mail Clerk Position C-50 or C-63) providing she is still entitled to do so under the Agreement.

And that Sandra G. Moore be compensated for all wages, wage equivalents and fringe benefits lost as the result of the Carrier's wrongful action of removing her from service December 5, 1979, and for wrongfully disqualifying her from all clerical positions requiring exertion or lifting as the result of the Board of Inquiry held on December 12, 1979.

Claim No. 3: (Carrier file CG-18385)

(a) The Carrier violated Rule 21 and others of the Clerks' General Agreement when they refused to allow Sandra G. Moore to return to work in the Engineering Department from sick leave without just cause.

(b) That Mrs. Sandra G. Moore now be compensated for 8 hours pro rata rate of her guaranteed M & I Clerk rate, \$89.52 per day, beginning July 6, 1981 and continuing until such time as claimant is returned to work and compensation is paid.

OPINION OF BOARD: These Claims center on the determinations of physical status and work assignment of the Claimant following a work-related accident on January 17, 1977, and, 17 months later, an absence owing to personal illness.

Following the injury and resulting back surgery, the Claimant was out of work for more than two years. On July 11, 1979, she was released by her doctor for "light duty" and then on July 23, 1979, for regular duty. The Carrier's medical doctors, upon examining the Claimant, made a determination that she was not capable of return to any position involving heavy lifting. She was, however, permitted to return to work on November 26, 1979. She attempted to return to the position of Mail and File Clerk, but was instead directed by the Carrier to the position of Blueprint Operator. The Carrier had apparently determined that the lifting requirements of the Mail and File Clerk were beyond the Claimant's physical capability.

On December 5, however, the Carrier apparently determined that the lifting requirements in the Blueprint Operator's position were also excessive, and the Claimant was notified of an Investigative Hearing on the matter and simultaneously was removed from service pending the Hearing. The Hearing, which occurred on December 12, 1979, charged Claimant "with not being physically qualified to perform service on any clerical positions . . . which your seniority entitles you to." By letter dated December 18, 1979, the Claimant was advised that she was "disqualified" from any position. She was nevertheless permitted to exercise seniority rights on December 19, 1979 to the position of Material and Inventory Clerk - - a position different from those from which she had been "disqualified".

Claim Nos. 1 and 2 concerned the Organization's argument that the Claimant should have been entitled to return to work sooner and that her disqualification from specific positions was improper in view of the medical findings of her own physicians.

The Board has reviewed the positions of the parties as to the Claimant's medical status, as well as the somewhat complex processing of Claim No. 1 and 2. While the exchange of information concerning medical findings left much to be desired, the Board finds that the Carrier did not unreasonably question the Claimant's ability to undertake a position involving strenuous physical exertion at the time. There was no "rearrangement" of her position, as argued by the Organization, but rather an attempt to match the Claimant's seniority with a position which, in the Carrier's view, would meet what it

considered her physical limitations. The Claimant, supported by reports from her own doctors, continued to argue that she should not be subject to any physical limitations. As the Board views it, however, the matter was equitably resolved by the Claimant's placement in the Material and Inventory Clerk position on December 19, 1979, - - within two weeks of her removal from the briefly held Blueprint Operator position.

On April 28, 1981, the Claimant marked off sick because of personal illness, which required surgery and after care. Her doctor found her capable of return to "full duty" on July 6, 1981. By this time, the position which she had held prior to April 28, 1981, was no longer available to the Claimant based on her seniority. There was, apparently, no dispute as to the Claimant's full recovery from surgery owing to her personal illness. The Carrier, however, again asserted its position from 1979 that the 1977 injury and resulting back condition did not permit the Claimant to exercise her seniority on a position involving physical exertion. The Claimant and the Organization reasserted their previous position that medical findings by her own doctors had determined she need be subject to no such limitations.

Between the two periods of absence, the parties had adopted Rule 21, Physical Examinations, which grants employees "the right to challenge the determination of the Carrier's medical examiner, based on any contrary findings or determination made by a competent medical doctor". Such challenge may be made through appointment of a Board of Examiners, involving doctors appointed by the Carrier and the Employee, who in turn select a third Neutral Doctor.

As the dispute concerning the Claimant's return to work was progressed, the Carrier was in receipt on September 14, 1981, of a request to invoke the three-doctor review procedure. On November 6, 1981, the Neutral Doctor issued his report stating:

"I think this woman has made a beautiful and complete recovery from a herniated lumbar disc. She can return to work on 11-9-81 and without any limitations."

The Claimant then returned to full duty on November 19, 1981. The Carrier argues that Claim No. 3 should nevertheless be denied since the Carrier in good faith believed in the propriety of its judgment that physical restrictions should be imposed based on the back surgery and noted that the Neutral Doctor simply stated she should return to work on November 9, 1981.

However, Rule 21(d) 5 provides as follows:

"In the event the board of examiners determines that the employee is in fact physically or mentally competent to perform the duties of the position, the employee will be returned to the position and compensated for any monetary losses sustained as a result of having been removed from the position."

The Board finds no basis to believe that the Claimant's medical condition as a result of the injury suddenly changed upon the Neutral Doctor's examination. Rather, the Board of Examiners' report confirmed the position taken by the Organization and the Claimant. The Board, however, finds no basis to support the Claim prior to the request, under Rule 21, for a Board of Examiners review. The Carrier received such request on September 14, 1981, and we will sustain Claim No. 3 for monetary losses from September 14, 1981 through November 18, 1981 in accordance with Rule 21(d)5.

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

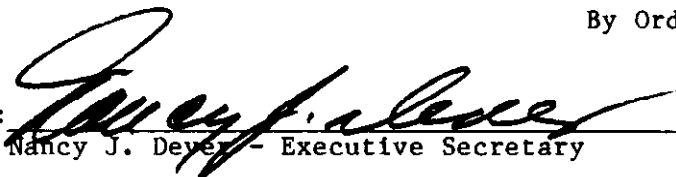
That the Agreement was violated.

A W A R D

Claim Nos. 1 and 2 denied. Claim No. 3 sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1986.

