NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25866

THIRD DIVISION

Docket Number SG-25954

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of T. J. Didyoung, Jr., Electronic Technician, headquartered at West Haverstraw, New York, for Electronic Technician's rate of pay from December 21, 1982, until July 27, 1983, less any amounts that he has received from the Carrier during this period, account of being disqualified by the Carrier and for not being able to receive a Third Party Doctor examination under Rule 8-D-3 of the Agreement between the Consolidated Rail Corporation and the Brotherhood of Railroad Signalmen effective September 1, 1981. System Docket 2047C."

OPINION OF BOARD: This matter really involves two Claims, SG-25954 and SG-25955. One, (SG-25954) was a Claim for money allegedly due and the other (SG-25955) involved a refusal by the Carrier to agree to a mutal selection of a Third Doctor. The Claims have a common origin and were handled together, or nearly so, on the property. During the handling, the money claim was resolved and in this Award it has not been considered.

Claimant Didyoung, an Electronic Technician, suffered a serious non-occupational head injury in December 1978. He returned to work in May, 1980 with restrictions against working near rapid moving machinery and, apparently at his own request was placed in a position requiring less skill and stress.

On September 26, 1980 while on duty Claimant had a seizure and lost consciousness. It was determined the seizure was a result of the 1978 injury and was apparently brought on by his taking a sub theraputic dose of medication. He was found fit to return to work October 8, 1980 with restrictions that he was not to operate rapid machinery or be around trains while alone. One Electronic Technician's position meeting the requirements was available at Bethlehem, Pa. and Claimant was assigned to it. On December 10, 1982 as a result of re-examination Carriers Medical Director, Dr. Niak, found Claimant qualified to continue in his position but restrictions were placed against working around moving machinery, operating "dangerous" equipment and working at heights.

The Electronic Technician position Claimant held was abolished on December 17, 1982. After he attempted to displace a Junior Employee and was refused due to his restrictions Claimant was again examined. This resulted in further restrictions, including prohibitions against operating machinery of any kind, working around moving equipment, working on ladders, scaffolds, or at unprotected heights, use of potentially dangerous equipment and driving company vehicles. The restriction also required Claimant be on appropriate anti-convulsant medication prescribed by his attending physician.

"Rule 8-D-3 of the Agreement states:

> When an employee has been disqualified on account of his physical condition and the General Chairman desires the question of his physical fitness to be decided, the case shall be handled in the following manner:"
>
> * * *

The Agreement then provides mechanics whereby the Carrier and the General Chairman each select a Doctor and the two Doctors then "confer and appoint a third Doctor" . . .and:

> "The decision of the third doctor setting forth the employee's physical fitness and his conclusions as to whether the employee meets the requirements of the Company's physical examination policy shall be final, but this does not mean that if there is a change in his physical condition a reexamination will be precluded."

On April 26, 1983 the General Chairman wrote Carrier requesting Rule 8-D-3 be implemented. On May 27, 1983 Carrier responded, questioning use of the procedure but naming Dr. Niak as its selection. On July 28, 1983 the General Chairman designated Dr. C. Koprowski.

On August 10, 1983 Dr. Koprowski, after examination, wrote that Claimant's seizure was not work related. Dr. Niak then wrote Dr. Koprowski stating:

> "It is Conrail medical policy to keep an employee with a seizure disorder or loss of consciousness currently on medication restricted . . .
> These restrictions can be lifted only if the employee has been taken off medication by his treating physician, and if the treating physician certifies that the employee has been seizure free or has not suffered a loss of consciousness for a two year period off medication."

Dr. Koprowski responded he initially understood he had been asked if Claimant's seizure was work related. He stated he would advise Claimant:

> "1. Since he is not having any side effects from the medication I would continue his medication until he was seizure free for at least five years.
>
> * * *
>
> 3. I would not seek to contradict company policy in relation to activities that might put others at risk."

Thereafter Carrier took the position "there is no apparent dispute that (Claimant) has a seizure disorder, that he is taking medication in connection therewith and that he is unable to meet the requirements of the Company's physical standards." Carrier then declined to proceed with selection of a Third Doctor.

The Organization argues that even if Carrier and Claimant's Doctor are in total agreement (which it does not concede is the case here) the Rule requires selection of a Third Doctor when the General Chairman "desires the question of physical fitness to be decided". It acknowledges generally the question arises when there is a dispute between Doctors but insists such disagreement is not a prerequisite.

Given the language of the Rule the Organization's position is attractive at first glance. The first paragraph of 8-D-3 by its terms seems to require only that the General Chairman desire the resolution of the question of physical fitness in order to activate the selection of a Third Doctor. Yet the overwhelming weight of precedent is contrary to that position.

In Third Division Award 16579 we held:

> "While it is acknowledged that Regulation 8-E-1 provides for the procedure to be followed in the establishment of a Board of Doctors when the General Chairman desires the question of physical fitness of an employee to be decided upon finally before he is permanently removed from his position, this regulation contemplates a difference of opinion concerning the physical condition of the employee . . .
>
> Inasmuch as Carrier was within its prerogatives in determining the physical qualifications for the position and there is no question that Mr. Strickling's left eye deficiency was such as to make him unable to satisfy the vision standards, an examination . . . by a Board of Doctors would not change the requirements of the position or disprove the fact that his left eye was impaired. For those reasons we hold the Agreement was not violated."

In an earlier Second Division Award 4721 involving an employee that had suffered loss of an eye it was held:

> "Rule 8-K-2 provides that when . . . the General Chairman desires the question of physical fitness to be finally determined . . . a Board of Doctors will be selected . . . The provision has no application to this situation. The employee lost the sight in his left eye . . . ".

Third Division Award 15387 concluded:

> "We will here follow the long line of Third Division Awards that through the years have held a Carrier has the right to determine the physical fitness of its employees; and in so doing has the right if not an obligation, to accept the recommendations of its chief medical officer . . ."

This principle has been almost universally followed. Here Carrier has a requirement which disqualifies Electronic Technicians and/or Signal Maintainers who have has seizure disorders until such time as they have been off medication and seizure free for a two year period. There is no dispute that what Claimant does not meet requirements. In point of fact Dr. Koprowski states he would continue medication until Claimant is seizure free for a five year period.

The purpose of appointing a Third Doctor under Rule 8-D-3 is revealed in the fourth paragraph of the Rule, which provides:

> "The decision of the Third Doctor setting forth the employee's physical fitness and his conclusions as to whether the employee meets the requirements of the Company's physical examination policy shall be final." (Emphasis Supplied)

Thus it is apparent the Rule contemplates Third Doctor selection when the question is whether a Claimant's physical condition in fact meets the requirements of a policy, or whether a Claimant's physical condition is disqualifying where no specific policy is involved. Clearly from the text of the Rule itself its purpose is not to question the validity of a Carrier's medical policy. In effect, that is what is attempted here.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD AJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1986.