Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28064
THIRD DIVISION Docket No. CL-28555
89-3-88-3-382

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Transportation Communication International Union
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10305) that:

1. By letter dated July 14, 1987 Carrier removed Clerk J. A. Boissoneault from service in an arbitrary and capricious manner in violation of Rules 27, 42, 38 and 65 of the Master Clerical Agreement dated April 1, 1973, as amended.

2. As a result of said violation Carrier shall be required to compensate Clerk J. A. Boissoneault eight (8) hours pay per day at the monthly rate $2,257.86 based on her position of Relief Clerk, Sandusky Yard, Sandusky, Ohio commencing July 16, 1987, five (5) days per week, until she is returned to service."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

After nineteen years as a clerk working in an office environment, Claimant was required to exercise her seniority to a relief clerk position which required her, inter alia, to make track checks. Shortly after being placed on this job, Claimant presented a letter from her personal physician advising the Carrier that she suffers from headaches "that have all the characteristics of Classical Migraine Cephalgia." The letter further advised that the symptoms are relieved by medication which cannot be taken while Claimant is on the job because it affects her "in such a way that she does not trust herself to make decisions and operate machinery including an automobile."

Upon receipt of this letter, the Carrier's Medical Director determined that Claimant was medically qualified only for inside clerical work which did not require her to walk tracks, drive a Carrier auto or do heavy lifting, running, jumping, stooping or climbing. Claimant, therefore, was held out of service until a job could be found for her which met these restrictions.

Claimant made a request for medical arbitration by a neutral physician in accordance with amended Rule 65(a). This request was accompanied by a second letter from her physician which noted that Claimant has had migraine headaches throughout her career with the railroad and has to take medication only when she suffers an attack. It is only while under medication that she is unable to work. The physician also noted that Claimant's back x-rays indicated osteoarthritis, but it was asymptomatic and did not restrict her activity. By letter dated August 26, 1987, the Medical Director denied Claimant's request because there was no diagnostic dispute concerning her Classical Migraine Cephalgia.

The Organization progressed a Claim through the grievance procedure, filing the initial Claim and successive appeals to the appropriate officers designated by the Carrier. Denials were made on a timely basis, but, at the first two levels, by officers other than those to whom the Claims were addressed. On this basis, the Organization maintains that the Claim should be sustained up to the time of the final denial by the Carrier without regard to the merits.

The Carrier responds by arguing that the time limit rule requires only that the Carrier deny the Claim, without specifying the officer responsible for doing so. Additionally, the Organization was not prejudiced by the denials being issued by other officers.

The weight of arbitral authority by this Board supports the Organization's position with respect to the time limit issue. The Organization has cited numerous Awards interpreting either the 1954 National Agreement or rules derived therefrom, as is the rule in this case. In Third Division Award 23943, the Board held:

> "All the authorities cited by the parties have been reviewed and it is clear that the great weight of authority in closely related circumstances supports the Organization's position. Those awards hold that the officer of the Carrier who had been previously designated as the individual to receive claims or appeals must be the officer who responds to such claims or appeals."

Without regard to the merits, therefore, the claim must be sustained for the period of time concluding with the February 4, 1988, denial by the Carrier in accordance with National Disputes Committee Decision No. 16.

The rule establishing the medical arbitration procedure goes beyond disputes over diagnosis. To commence the procedure, the employee must submit a statement from his or her personal physician "setting forth that doctor's opinion of the employee's condition and his ability to resume service in his railroad occupation..." The neutral doctor "will decide whether or not the employee has the capacity to resume duty without hazard to himself and/or others." Finally, the neutral doctor will render a report which "shall be confined to the question of whether or not the employee is physically or mentally capable of resuming duty without hazard to himself and/or others." (Emphasis added)

This case presents a dispute between two doctors over whether or not Claimant's condition precludes her safe performance of the job to which she was assigned. This Board is not qualified to make such a decision. (See Third Division Award 26700). Rather, this is the type of dispute which should have been resolved through the medical arbitration procedure established by the parties. Accordingly, we will direct that the procedures set forth in Rule 65(a) be followed.

The Board notes that Rule 65(a) is silent with respect to compensation for time lost should the neutral doctor find Claimant qualified. The issue in this case, however, is not whether or not Claimant was improperly disqualified, but whether or not the Carrier improperly refused to follow the medical arbitration procedure. As stated above, we hold that the Carrier's refusal was improper. Had this procedure been followed, Claimant would have been returned to service if found qualified. Accordingly, if Claimant is found by the neutral doctor to be medically qualified, she is to be made whole as provided in Rule 42(a)(4) for wages lost due to the disqualification subsequent to February 4, 1988, i.e., after the Carrier properly denied the claim. It is reasonable to presume that a decision would have been rendered by that date had the medical arbitration procedure been followed.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of August 1989.

Serial No. 339

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 28064

DOCKET NO. CL-28555

NAME OF ORGANIZATION: Transportation Communications International Union

NAME OF CARRIER: Norfolk and Western Railway Company

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following Interpretation is made:

This Board, in Award 28064, directed that "the claim...be sustained for the period of time concluding with the February 4, 1988 denial by the Carrier...." It further directed that the medical arbitration procedures set forth in Rule 65(a) be followed and, if Claimant is found by the neutral doctor to be medically qualified, she is to be compensated for time lost subsequent to February 4, 1988.

According to the Organization, this Award required the Carrier to:

> "(a) Pay $14,944.88 for the Rule 38 Rule violation from July 16, 1987 until February 4, 1988.
>
> (b) Return Clerk Boissoneault to full service status by subscribing to the expert medical opinion of neutral physician Patrick M. McGookey, M.D. as outlined in his report dated December 11, 1989 which held in part, 'No significant neurological disability was found, and I have found no reason that should prevent her from working. * * * At this time, to my knowledge, she is only on intermittent medications for her migraine, and I see no reason for her not to resume her duties.'

(c) Pay $422.50 which is half of the medical examination expenses Clerk Boissoneault incurred pursuant to Rule 65.

(d) Return $150.00 which was presented to Carrier by Clerk Boissoneault pursuant to Rule 65 for medical arbitration.

(e) Compensate Clerk Boissoneault for wages lost subsequent to February 4, 1988 until December 1989 in the amount of $50,779.30."

According to the Organization's response of August 3, 1990, the Carrier has complied with paragraphs (a), (c) and (d) above. Accordingly, our decision will be limited to discussion of paragraphs (b) and (e).

Under the terms of the Award, the Carrier is obligated to return Claimant to service (paragraph (b) above) and to compensate her for lost wages (paragraph (e) above) only if she had been found by the neutral doctor to be medically qualified. According to an undated letter from Dr. McGookey (apparently received by the Carrier on November 17, 1989), Claimant was examined on November 6, 1989. As a result of that examination, the neutral doctor advised:

"Regarding the employment, it would be recommended that the patient should return to work in a limited capacity, and of course not operate equipment while she is under medication. At this time the patient seems to be improving with having only two to three headaches a month, although she associates them directly with stress and there may be an increase when she returns to work. It is my personal policy that I never make someone totally disabled from a pain syndrome, and I think that she can perform some type of duties with the company willing to work with her."

It is evident from this statement that the neutral doctor did not find Claimant medically qualified for the job from which she had been removed. There was, therefore, no obligation on the part of the Carrier to return her to her former position or pay her for wages lost subsequent to February 4, 1988.

We conclude that the Carrier has fully complied with the Award.

Referee Barry E. Simon, who sat with the Division, as a Neutral Member, when Award 28064 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 17th day of December 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD NO. 28064, DOCKET CL-28555
(Referee Simon)

The Majority has erred in sustaining this claim. Rule 65 - Physical Examinations is intended to permit an employee to challenge available medical opinions on his physical condition, not Carrier's medical standards.

Claimant was medically disqualified on July 10, 1984, from her job operating a company vehicle because her personal physician stated that Claimant suffered from classical migraine cephalgia which could come without warning. He further stated that Claimant does not trust herself to make decisions or operate machinery including an automobile while suffering from a migraine headache. In order for Claimant to work within her own doctor's restrictions, it would therefore have been essential for her to be able to literally drop whatever task she was performing when she suffered a migraine attack and go home. This would cause delays in accomplishing the work, and could cost the Carrier another employee's full day's pay to complete the job. If claimant were transporting crews to their trains, must the Carrier permit her to stop and no trains be run until such time as a replacement could be found? If Claimant were checking tracks and handling waybills, must Carrier stop switching, incurring the dissatisfaction of its customers and delay of the train until a replacement could be found? Clearly, Claimant's doctor did not release her to perform all of the tasks of her regular assignment of relief clerk. At this time, no dispute existed ripe for adjudication by a neutral doctor.

The Majority has refused to recognize that there is no dispute as to the ". . .doctor's opinion of the employee's condition and his ability to resume service in his railroad occupation." Claimant's physician acknowledged her

affliction with migraine headaches and the necessity to mark off while taking medication. His opinion "I feel she can do her job as she had done so in the past nineteen years of employment" is exactly the same as Carrier's physician. Claimant, however, was disqualified from the position of an outside relief clerk which required driving vehicles and crossing tracks. Had she stood for an inside desk job, "her job as she has done so in the past nineteen years. . ." Claimant would never have been disqualified. The Majority, being ignorant of the issue in dispute, has rendered a palpably erroneous Award which will not be considered as having any precedential value.

In support of this statement, the Carrier quoted from a number of Awards from distinguished and knowledgeable Neutrals who have upheld the principle that there is no contractual basis to invoke the services of a neutral physician when there is no dispute about the illness in question. In denying the very same issue as presented in Docket CL-28555, PLB No. 206 with Referee Seidenberg held:

> The Board finds no basis for sustaining the claim. The medical evidence submitted by the Organization merely confirms and buttresses the findings of the Carrier's physicians that the claimant was a victim of epilepsy. While there may have been some dispute as to the effectiveness of the control of this illness as a result of medication, there was no dispute that the claimant was subject to this illness. Consequently, there was no contractual basis for invoking the services of a neutral physician to determine whether the claimant was a victim of grand mal epilepsy.
> PLB 206, Awd. 18, UTU (E) v. PC (Seidenberg)

Also, the Majority's finding that Rule 38 - Time Limits on Claims specifies the officer designated to deny claims runs counter to the better reasoned awards rendered by this Board. Rule 38 reads, in part, as follows:

> Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his

> representative) in writing of the reasons for such disallowance. (Emphasis added)

The foregoing provisions of Rule 38 were not violated in any manner and were, quite frankly, complied with in their entirety. The fact that Assistant to Superintendent W. K. Fultz denied the claim did not and does not prejudice the rights of the Claimant in any manner whatsoever. On this point Third Division Award No. 20790 held in part as follows:

> The instant claim is based on the premise that Carrier was precluded from disallowing the Claim by any representative other than the officer who was authorized to receive the claim. The controlling agreement does not so restrict Carriers. Therefore the claim will be denied.

For the reasons set forth above, we dissent to Third Division Award 28064.

James E. Yost
J. E. Yost

Martin W. Fingerhut
M. W. Fingerhut

Robert L Hicks
R. L. Hicks

Michael C. Lesnik
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