

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34988
Docket No. CL-34093
00-3-97-3-628**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11829) that:

- (1) Carrier acted in an arbitrary and unprecedented manner when, upon Ms. K. Robinson's request to return to work from a medical leave of absence, she was required to undergo a "physical capacity test," allegedly to ensure she was medically and physically fit to safely perform her duties as a GREB Clerk in the Vancouver Terminal.**
- (2) In view of that action, Ms. Robinson suffered the loss of five (5) days pay and should be made whole for that amount of wages."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

In 1994, the Claimant was a clerical employee assigned to a Guaranteed Rotating Extra Board (GREB) position at Vancouver, Washington. On or about April 16, 1994, the Claimant experienced a neurological disorder that rendered her unable to work. As a result, she was given a Leave of Absence.

On July 12, 1994, Dr. Edward E. Conrad, Jr., the Claimant's personal physician, advised the Carrier that she was still unable to work due to her neurological disorder. Therefore, the Carrier extended the Claimant's Leave of Absence to October 16, 1994, because Dr. Conrad opined that she would not be able to work for at least 90 days.

On August 23, 1994, Dr. Conrad wrote to the Carrier and said that he anticipated that the Claimant would be able to return to work on a modified basis on August 30, 1994. He stated that she could work no more than four hours a day for two weeks and then six hours a day. Dr. Conrad further declared that the Claimant was going to be intolerant of loud noises and would need a calm work environment. She would also be unable to lift more than eight pounds at a time. Dr. Conrad advised the Carrier that the length of these restrictions was undetermined and that the Claimant would be re-evaluated after a month.

Because of these restrictions, the Claimant was not allowed to return to work under the Carrier's Early Return to Work Program.

On September 21, 1994, Dr. Conrad informed the Carrier that he believed the Claimant would be able to return to full duty within 30 days. On October 5, 1994, Dr. Conrad advised the Carrier that the Claimant could return to her job on October 16 without any restrictions.

On October 13, 1994, the Claimant was given a return-to-work physical by Dr. Elizabeth Steiner, a Carrier designated physician. Dr. Steiner concluded that there were no physical or psychological reasons for the Claimant not to return to full duties as a Clerk and she released the Claimant to return to work on October 16, 1994.

Despite the releases from Dr. Conrad and Dr. Steiner, the Carrier's Medical Department was concerned about the Claimant's ability to perform her clerical duties because her rigorous restrictions had been lifted so quickly. It, therefore, instructed her to undergo a functional capacity test.

The Claimant completed the functional capacity test on October 24, 1994. On October 25, the Carrier advised the Claimant that the functional capacity test indicated that she could safely return to full duty. On October 26 she returned to work.

On October 20, 1994, the Claimant requested an Unjust Treatment Hearing under Rule 58 of the applicable TCU Agreement. The Hearing was held on December 14, 1994. On December 27, the Claimant was advised that no substantial evidence was presented at the December 14 Hearing to support her allegation that she was unjustly treated by the restriction placed on her return to work by the Carrier's Medical Department.

The Board agrees with the Organization that the Claimant was unfairly and unreasonably withheld from service from October 16 through October 25, 1994. There was simply no justification for the Carrier to require her to undergo a functional capacity test, in our view.

Dr. Elizabeth Steiner, the Carrier designated physician who examined the Claimant on October 13, 1994 did not see any reason for further functional evaluation. Her unequivocal medical opinion was that there were no physical or psychological reasons not to return the Claimant to her full duties as a Clerk effective October 16, 1994. Evidently, the Carrier representatives who ordered the Claimant to undergo a functional capacity test were unaware of Dr. Steiner's unequivocal medical opinion until December 1994, two months after the Claimant successfully completed the functional capacity test.

Because the Claimant was unfairly and unreasonably withheld from service between October 16 when Dr. Steiner released her to return to her full duties as a Clerk without any restrictions, and October 25, when the Carrier finally allowed her to resume her clerical position, the Claimant is entitled to the earnings and benefits she lost during this period. The claim is therefore sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of September, 2000.