

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36779
Docket No. CL-37256
03-3-02-3-278

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

PARTIES TO DISPUTE: (*Transportation Communications International Union*
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12816)
that:

1. The Carrier acted arbitrary and in an unfair manner violating rule 7, 24, Article XIV of the September 06, 1991 Mediation Agreement, Section 10 of the September 02, 1994 Agreement and other related rules of the agreement. As of October 05, 1998 the Carrier has failed or refused to allow Claimant (Nina Lee) to return to service off a medical leave of absence (MOLA), despite her release from her doctor.
2. The Carrier shall be required to immediately compensate Claimant eight (8) hours at the pro-rata rate of Janitor, the last position Claimant worked before going on a MOLA, for each workday Claimant is held from service starting with the above mentioned date. This will be ongoing claim until this dispute is settled or this claim is honored.”

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.

Claimant Nina Lee was employed as an unassigned Station Cleaner in Chicago, Illinois. On July 20, 1996, the Claimant alleged that she had suffered an on-duty injury and left work early that day. From that date forward, the Claimant worked occasionally until August 30, 1996. On September 27, 1996, a certified letter was sent to the Claimant indicating that she had been unavailable for work since August 30, 1996, and stating that she had not had any contact with the Crew Assignment Office. She was directed to contact the office and submit documentation to support her absence from duty by October 4, 1996. Between October 1 and December 9, 1996, the Carrier requested medical justification for the Claimant's absence. Two doctors the Claimant was seeing placed her on disability for that period. After placing the Claimant on disability from October 7 through December 2 on December 9, 1996, Dr. Balan placed restrictions on the Claimant's return to duty. She was limited by Dr. Balan's examination not to lift, push, or pull over 15 pounds. While the Claimant was in disability status from October 7 to December 2, 1996, she filed a claim (on October 9, 1996) with Amtrak's Claim Department. Based on Dr. Balan's December 9, 1996 report, the Claims Department requested a second opinion. The Claimant was examined and evaluated by Dr. McNeill on February 4, 1997. His diagnosis is reproduced below:

"Thomas W. McNeill, M.D.
February 4, 1997
Ms. Helen Jovanovich
Amtrak
210 South Canal Street
Room 228
Chicago, Illinois 60606

RE: Lee, Nina
DOB: 9-8-65

Dear Ms. Jovanovich and Dr. Joyce:

Than you so much for allowing us to see Ms. Nina Lee. She was seen in our office at 1725 West Harrison Street, Chicago, Illinois, 60612, on February 4, 1997. She was unaccompanied. Studies were not available for review. However, your letter and reports were available for review and have been appended to the chart.

The patient states that she now is 31 years old. A history was obtained with much effort, and there was much equivocation. It wasn't until I presented dates and times of previous accidents and back and neck complaints that she reluctantly admitted to a prior history.

In her initial history, the patient states that she was injured for the first time on July 29, 1996, while attempting to open a stuck sliding glass door in order to clean it in her job at Amtrak. She followed up with her family doctor, who diagnosed lumbar strain. However, he moved his office. Before treatment was completed, she transferred her care to a chiropractor, Dr. Balan, who took x-rays and reported them to the patient as being negative. Dr. Balan has continued with manipulation and other modalities to this date. In December 1996, he attempted to return the patient to work. However, she says that she reinjured herself just doing normal activities at home. At this point in her mind, she is unable to continue to work. She states that she also has neck pain with radiation into the right arm. She was very vague as to whether this occurred at the time of the original accident. When first iterating her history, it wasn't mentioned.

Currently, she states that she has no trouble with sphincter control. She has sitting tolerance of less than an hour, standing tolerance of

more than an hour, and walking tolerance someplace between two and six blocks.

Past surgical history reveals two previous C-sections and a tubal ligation.

Past medical history reveals no significant intercurrent illness.

Physical examination: Reveals a 5'4" and 196 lb woman, who walks with a normal reciprocal gait. She did this hesitantly with short steps during the examination but left the office with a normal gait. She has a normal posture. She claims tenderness on palpation of her back, but this was poorly localized, diffuse and superficial. Cervical range of motion was normal. Lumbar range of motion was about normal in all planes, but it was done hesitantly and only after encouragement. Straight leg raising was normal lying down with marked resistance to straight leg raising, which is voluntary with complaint of back pain at 10 degrees on the right and 20 degrees on the left. This is inappropriate. Reflexes are normal. Motor power is normal throughout but only with encouragement. On initial testing of every muscle group, she demonstrated inappropriate giving-way weakness. Sensory exam is normal in the upper and lower extremities. On measurement, thighs and calves were normal throughout. Grasp and muscle strength in the upper extremities are normal.

Diagnosis: The patient has no recognizable objective findings to substantiate her subjective complaints. If she did in fact sustain a lumbar strain, it was an aggravation of a preexisting condition. The aggravation is now long since past.

She is fully capable of working full-time at a heavy job without restrictions. She surely does not need any more treatment, does not need any more chiropractic treatment, and does not need any more studies. She should not be disabled in any way from this preexisting condition and/or superimposed lumbar strain.

Thank you very much.

Yours respectfully,
Thomas W. McNeill, M.D.

cc: Patrick Joyce, M.D.
Amtrak
210 South Canal Street
Chicago, Illinois, 60606

TWM/jr"

Faced with the detailed report from Dr. McNeill, the Carrier instructed the Claimant to contact the medical office for a return-to-duty physical by March 10, 1997. According to the record, there was no response from the Claimant for five months.

On August 6, 1997, a letter was sent instructing the Claimant to present documentation to justify her absence by August 18, 1997. The Claimant did not respond. By letter dated August 19, 1997, she was considered to have resigned for abandoning her position.

More than one year later, the Organization filed the instant claim alleging that the Carrier violated Rules 7 and 24, Article XIV of the September 6, 1991, Mediation Agreement, and Section 10 of the September 2, 1994 Agreement. The Organization takes the position that the Claimant was on an indefinite Leave of Absence and that all required medical information to justify the Claimant's absence over the period was in the possession of Amtrak's Claims Department. It argues that when the Claimant settled her claim with Amtrak in October 1998, the Carrier refused to allow her to return to work. At that point, the instant claim was filed.

The Board reviewed the record in detail. As a result of that review, the Board has concluded that the Claimant did not meet the minimum requirements to satisfy the need to justify her medical condition to support a Medical Leave of Absence. Once Dr. McNeill submitted the results of his examination of the

Claimant, the Carrier instructed the Claimant to report for a return-to-duty physical. The Claimant did not respond to that request. Five months later, the Carrier informed the Claimant about the danger of her being removed from the seniority roster if she did not produce medical evidence to support her continued absence. Because she did not supply the material, she was removed from the list.

The Board can find nothing in the record that justifies the Claimant's lack of cooperation or that allows the Claimant to remain silent about her condition for such long periods of time. There is a long list of Awards from every Division of the Board that support the Carrier's right to request and receive meaningful medical information concerning an injured or ill employee's absence from work. When such information is refused or is not forthcoming in a reasonable time, many of those Awards grant the Carrier the right to take action against the employee. That is what happened in this case. The Board can find no basis in this record to support the Organization's claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of December 2003.