Award No. 13755
Docket No. SG-12146

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the New York, Susquehanna and Western Railroad Company that:

(a) Gordon W. Burgess' rights under the effective agreement were violated when the Carrier refused to allow him to return to work in the Signal Department.

(b) The Carrier now be required to allow Claimant Burgess to return to work and allow him payment for all working hours actually lost beginning as of June 24, 1959, and continuing until this claim has been corrected.

EMPLOYES' STATEMENT OF FACTS: The instant claim arose as a result of an injury to the claimant, Mr. Gordon W. Burgess, on November 21, 1957. On that date he fell from a signal, a distance of about twenty-five (25) feet, which resulted in four fractured vertebrae, fractured wrist, broken ribs and head injuries. The Carrier continued to pay Mr. Burgess his regular wages and all necessary medical expenses until about September 8, 1958. (It later developed that the Travelers Insurance Company was reimbursing the Carrier for the medical expenses and the amount was about $1,400.00.)

On September 8, 1958, Mr. Burgess' attorney addressed a letter to the Carrier, requesting a conference to discuss the case. Upon receipt of this letter the Carrier stopped all payments to Mr. Burgess.

Following this action, suit was instigated and trial held during a period from April 27 to May 4, 1959. During the course of the trial the Carrier attorney and witness stated to the Court, to the jury, and to Mr. Burgess, that the monies he received were on account of salary, and impressed upon the Court and the jury, that the Carrier had been paying Mr. Burgess a salary for a very substantial period of time following the accident. They also incorporated in the trial record, Rule 48 of the Signalmen's Agreement, and impressed upon the Court that there was a job and work available in the Signal Department for Mr. Burgess that he was able to handle.

(a) That by his own admission and the testimony of his doctors Burgess was not able to resume service on June 24, 1960, although he requested to do so.

(b) That despite his request to return to work he still continued his contention of physical disability until he had both presented and cashed the check awarded him as a result of his suit — this was on July 9th, 1959, and he had allowed the time limit for appeal to expire on August 3rd, 1959.

(c) That considering his own safety and that of his fellow employes he could not have resumed service until he had been physically qualified for such service by a competent surgeon.

(d) That the Carrier did with all due and reasonable promptness cause such examination to be conducted and that this resulted in his return to railroad service.

The various Divisions of your Honorable Board have on various occasions held that the carrier is entitled to a reasonable time in which to make such a determination of fitness, quoting from just one such award (18380, First Division): "As we view this issue, . . . it resolves itself to be one of whether or not the carrier acted in an unreasonable or arbitrary manner in not restoring the claimant to service until the Chief Surgeon had examined claimant's medical history and resolved the question by directing claimant's return to active service. He was returned to active service, and we consider the time taken to make that decision was not unreasonable and that the handling of the case, on the facts of record, was not arbitrary."

For the foregoing reasons, it is respectfully submitted that all claims in this case should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: In its submission to the Board the Petitioner took the position that the claim was payable under Article V of the August 21, 1954 National Agreement. This issue was referred to the National Disputes Committee established by Memorandum Agreement dated May 31, 1963, to decide disputes involving the interpretation or application provisions in specified National Agreements. On March 17, 1965, that Committee rendered the following Findings and Decision (NDC Decision 10):

"FINDINGS: (ART. V) Paragraph 1(a) of Article V of the August 21, 1954 Agreement provides that —

'(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date of same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. * * *"

In their submission before the Third Division, employes contend that the Chief Engineer, who initially disallowed the claim, did not set forth the reasons for his disallowance. The carrier in its rebuttal submission does not dispute or otherwise comment on this contention.

The National Disputes Committee rules that inasmuch as the employes did not raise the contention that Article V of the August 21, 1954 Agreement was not complied with in the handling on the property, they may not raise such contention before the Third Division.

DECISION: The employes waived any contention that Article V was not complied with in the handling on the property by their failure to raise that question on the property. The docket is returned to the Third Division, NRAB, for disposition in accordance with Paragraph 8 of the Memorandum Agreement of May 31, 1963."

On November 1, 1957, the Claimant fell from a signal, sustaining personal injury, for which he later brought civil suit against the Carrier. A jury was had, with verdict in Claimant's favor, the judgment being made final on June 18, 1958. On June 24, 1959, Claimant sought unsuccessfully to return to work. Following physical examination by Company surgeon, Claimant was returned to work on September 28, 1959.

Claim was presented and progressed for wages lost beginning June 24, 1959, on the basis the Carrier violated the Agreement when it did not permit him to return to work on June 24, 1959.

Rule 48 of the Agreement reads as follows:

"RULE 48.

Employes who have given long and faithful service in the employ of the Company who have become unable to handle heavy work to advantage will be given preference of such work as they are able to handle."

Rule 80 provides, among other things, that injured employes "will be permitted to return to work just as soon as they are able to do so. . . ."

The sole question here then is whether the Carrier violated these rules by delaying Claimant's return to work for the three-months period.

There can be no question that in the absence of contrary provisions in the applicable agreement a carrier retains the right and responsibility of determining the qualifications and physical fitness of its employes (Awards 8175, 8394, 8535, 10920). And, so long as a carrier exercises that right in good faith, and on the basis of fair and uniform standards of physical fitness, its determinations may not successfully be attacked (Award 11909).

The effective Agreement here contains no provisions inhibiting the right of this Carrier to determine the physical qualifications and fitness of employes covered thereby. Therefore, the Carrier has the right to do so, provided it exercises that right in good faith without bias or discrimination.

A preponderance of the evidence present in this case, however, raises the presumption that the long delay in reinstating the Claimant was unreasonable and arbitrary. Carrier's argument that the delay was caused by its unwillingness to act until Claimant's right of appeal in the civil suit for damages had expired and the subsequent unavailability of Carrier's doctors to examine him before he could be permitted to return to work is neither persuasive nor of sufficient weight to rebut the aforesaid presumption.

The schedule rules cited herein contemplate the prompt return to work of those employes who have been injured on the job. It is the Carrier's contractual responsibility thereunder to act with reasonable speed. A three-months delay under the circumstances present here cannot be condoned in the face of the clear requirements of the Agreement.

Accordingly, the claim will be sustained.

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 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1965.