Award No. 15399
Docket No. CL-16046

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE BELT RAILWAY COMPANY OF CHICAGO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5932) that:

(a) The Carrier violated the Clerks' Agreement when it arbitrarily withheld employe G. Weidner from service beginning February 16, 1965.

(b) Mr. G. Weidner, Clerical Machine Operator, shall be compensated for monetary loss from February 16, 1965 to October 31, 1965, inclusive, the period which he was improperly held out of service.

EMPLOYES' STATEMENT OF FACTS: Claimant G. Weidner, is a regularly assigned Clerical Machine Operator, at Carrier's Clearing, Illinois facility, with a seniority date of June 29, 1955. He is a World War II Veteran, who was medically retired in 1946 with an 80% disability pension. Whatever physical disability he is suffering from are the results of his war efforts and have been with his since his first date of employment with the Carrier. He has from time to time been confined to the Veterans Administration Hospital, Hines, Illinois, last of which was on September 25, 1964 and was released for work on or about January 25, 1965, based on the opinion of his attending physician, Dr. Vokel. Employes' Exhibit No. 1.

On January 27, 1965, he appeared for a physical examination by the Carrier's Chief Medical Officer and was rejected.

Claimant Weidner then returned to the Veterans Administration Hospital, was re-examined on February 11, 1965, by Dr. A. Nagib, Sr. Resident in Neurosurgery and was released with a statement indicating that Claimant Weidner may return to work on February 15, 1965. Employes' Exhibit No. 2.

Dr. Nagib's statement was furnished to the Carrier's Management on February 15, 1965, with a request that Claimant be permitted to return to work, in view of the fact that competent medical authority of the Veterans Administration Hospital has authorized his return, with the understanding, that if he was not premitted to return to work, claims will be instituted and formal filing of same would follow. Employes' Exhibit No. 3.

OPINION OF BOARD: Claimant, an IBM key punch operator, was sick in a Veteran's Hospital from September 25, 1964, until January 25, 1965. He had previously been out sick for extended periods in 1957, in 1959, twice in 1961, twice in 1962, in 1963 and once before in 1964. On each such occasion he had, on being released from the VA Hospital to return to work, been examined by Carrier's then Chief Surgeon, and returned to work on the same day. That Chief Surgeon retired before Claimant's release by the the VA Hospital to return to work on January 25, 1965, Claimant presented to Dr. Reilly, Carrier's new Chief Surgeon, a written statement signed by VA Dr. Vokel that Claimant could return to work. According to a statement in Carrier's Ex Parte Submission Claimant " was examined by the Company's Chief Surgeon on January 27, 1965 and rejected from service because of his right to exercise seniority to positions requiring outside service among moving cars and locomotives." The text of Dr. Reilly's report of this examination is not in the record.

On February 11, 1965 Claimant was examined by VA Dr. Nagib who wrote that "based on available clinical records" Claimant could return to work. On February 15 Employes wrote Carrier, enclosing a copy of Dr. Nagib's report and referring to the prior similar statement of Dr. Vokel which had been given Dr. Reilly, and requesting that Carrier return Claimant to his job on February 16. Carrier did not then return Claimant to work; Carrier responded to Employes letter on February 16:

> ". . . Our records indicate that G. Weidner was rejected by the Company's Chief Surgeon and that G. Weidner has since applied for a disability pension."

On April 5 Employes filed the claim we are here dealing with, pointing out that since two VA doctors had authorized Claimant's return to work "it is only reasonable to conclude that his request for a disability pension will be rejected." On April 6 Carrier denied the claim, taking note of the assumption that Claimant's disability pension application would probably be rejected and saying:

> "The fact remains that G. Weidner has been disqualified for further service by the Company's Chief Surgeon; therefore, your claim as presented is hereby denied."

Claimant's request for disability annuity was denied on April 23, and Employes so notified Carrier.

On May 10 Carrier's Manager of Labor Relations wrote Employes sustaining the denial of the claim saying:

> ". . . Mr. Weidner's condition was such that upon examination by the Company's Chief Medical Officer he was found to be unacceptable for employment as long as that condition existed, in the degree indicated by the Doctor's examination.
>
> As stated to you in our discussion there is provided a procedure to be followed in cases of this nature and if it is Mr. Weidner's desire, necessary arrangements can be made to follow through with that procedure."

(The procedure referred to is that practiced by the parties to resolve differences between an employes' doctor and Carrier's doctor about and em-

ployе's physical fitness to work; the two doctors would select a third as neutral and the three would examine the employe and decide the question.) On July 23 Employes wrote Carrier enclosing a copy of a report dated July 22 by Dr. Gasteyer saying that "After examining and conferring with Gordon Weidner it is my opinion that he is physically fit to return to work as a key punch operator . . ."; in that letter Employes requested that Dr. Reilly arrange for a neutral doctor with Dr. Gasteyer. In the beginning of September Dr. Gasteyer declined to further participate in the matter.

On September 15 Dr. Reilly again examined Claimant, and, in the first report by him which is quoted in the record, reported that Claimant "is unfit to resume his regular employment as Railway Clerk." Following this the parties agreed to have Claimant examined by a Dr. Byla and to be governed by his findings. That examination took place on October 15; Dr. Byla reported on October 18 that Claimant should be able to perform his regular work but recommended against his employment on a job involving frequent bending or which involved running or lifting. Claimant was returned to work on his position as an IBM key punch operator with the understanding between the parties that his services would be limited to work as a key punch operator.

Carrier argues that there is nothing in the record to show that either Dr. Reilly or Carrier acted arbitrarily, capriciously or maliciously (as suggested by Employes) in holding Claimant out of service, and that, in the absence of such a showing in the record Carrier had "every reason and right to rely on the judgment of its Chief Surgeon." Carrier also argues that any delay in getting the matter determined by the "established procedure" cannot be attributed to any failure on the part of Carrier.

Employes argue that the delay, if any, in moving the case to a determination by a neutral doctor was the responsibility of the management. Employe's also contend that Dr. Reilly's disqualification of Claimant originally and Carrier's continued reliance on it to keep Claimant out of service were arbitrary.

Thus we have here two issues in dispute: first, whether Carrier acted arbitrarily in refusing to restore Claimant to work on February 16; and second, whether Carrier was responsible for the time it took to resolve the issue of Claimant's ability to return to work.

We do not agree with Carrier's statement that there is nothing in the record to show that it acted arbitrarily in this matter. The only basis shown in the record for Carrier's holding Claimant out of service in the face of the two VA doctors' reports is Chief Surgeon Reilly's January examination which led him to conclude that Claimant should not be permitted to work on a position "requiring outside service among moving cars and locomotives."

Rule 63 of the Agreement reads:

"RULE 63.

PHYSICAL EXAMINATIONS

(a) Employes coming within the scope of this agreement will submit themselves to physical examination by the company doctor

only when it is apparent their health or vision is such that examination should be made. Being disqualified by Chief Surgeon, the right of appeal for further handling between the officers of the Company and General Chairman is agreed upon.

(b) Efforts will be made to furnish employment (suited to their capacity) to employes who have become physically unable to continue in service in their present position."

To say that Carrier has the right, as it has, to rely on the medical judgments of its Chief Surgeon, is not to relieve Carrier of its responsibility for proper use of those judgments in applying the Agreement. (See Award No. 10598.) In this case, if Carrier wanted to use its Chief Surgeon's expertise under Rule 63 it was up to Carrier to get the Chief Surgeon's opinion as to Claimant's physical fitness to perform the duties, inside an office, of a key punch operator; to get a medical judgment on Claimant's physical fitness to perform the more physically strenuous duties of some other position which he might never be called on to perform, and into which Claimant could not simply move at his option, was an unreasonable exercise of discretion by Carrier; the repeated application of that judgment to deny Claimant his right to return to work on his old position was so decisively unreasonable as to be arbitrary; and in light of the consistent contrary actions by its previous Chief Surgeon, Carrier's action this time may well be called capricious.

Faced with the opinions of two VA doctors on February 15 that Claimant could return to work, even if (as we cannot find with certainty from this record) the Chief Surgeon's contrary opinion were based on his evaluation of Claimant's physical fitness to perform the duties of key punch operator, it would then have been Carrier's responsibility in ordinary prudence to seek resolution of the dispute through the agreed procedure. As we said in another case in which conflicting medical opinions faced a Carrier:

". . . it is the responsibility of the Carrier to have an employe examined by an impartial physician in order to resolve the matter rather than to permit the situation to 'drift'." (Award No. 12184)

To paraphrase what we said in Award 10598 where on a certain date Claimant being held out of service for medical reasons presented evidence to Carrier that he was in a good state of health in conflict with evidence Carrier had that he was not: What took place after Claimant here presented the Chief Surgeon evidence from the VA doctors that he was physically fit to return to his job was at Carrier's risk.

We find that the delay in determining the dispute about Claimant's physical fitness was, under the circumstances in this case, Carrier's responsibility. Carrier did not properly apply Rule 63 of the Agreement until November 1, 1965.

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 allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1967.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.

15399