



Award No. 18868

Docket No. SG-19171

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE-LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie-Lackawanna Railroad Company:

On behalf of Mr. Robert J. Giet, Leading Signalman, Signal Gang No. 50, Marion Kent Sub-Division, for pay for all time and benefits lost after September 4, 1969, account being improperly held out of service.

(General Chairman's File: 343; Carrier's File: 174-Signalmen)

EMPLOYEES' STATEMENT OF FACTS: There is an agreement in effect between the parties to the dispute, bearing an effective date of March 1, 1953, as amended, which is by reference thereto made a part of the record in this dispute. Particularly pertinent and controlling rules of that agreement are Rules 3 and 63, and the Understanding on Physical Reexamination.

"Rule 3. An employe assigned to work with and direct the work of other employes specified herein shall be classified as a leading signalman or leading signal maintainer. However, the number of employes so directed shall not exceed four (4) at any time.

Rule 63. 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 over other employes for such work as is available and they are able to handle."

"UNDERSTANDING ON PHYSICAL REEXAMINATIONS

July 24, 1948

Erie Railroad requires certain physical reexaminations. Effective September 1, 1948, when an employe is directed by the company to report to the Chief Surgeon at Cleveland, Ohio, for reexamination, he will be reimbursed by the railroad company for any reasonable traveling expenses incurred in the trip. When an employe loses pay in

CARRIER'S STATEMENT OF FACTS: On October 24, 1968, R. J. Giet, hereinafter referred to as claimant, suffered a myocardial infarction, and was hospitalized. Under date of February 12, 1969, Carrier was advised by claimant's personal Doctor, John R. Von Bergen, D. O., that claimant was to undergo a thorough evaluation of his cardiac status by David J. Fergusson, M. D., of Cleveland Clinic. On March 5, 1969, claimant underwent a cardiac catheterization and on March 6, 1969, Dr. Fergusson advised Dr. Von Bergen that claimant's diagnosis was "Severe Atherosclerotic Heart Disease." Dr. Fergusson's letter and pertinent portion of report are attached as Carrier Exhibits A and B.

Some five (5) months after claimant had suffered the myocardial infarction, he requested to return to work and consistent with Carrier's policy was physically examined by Carrier's Local Doctor on March 17, 1969. This report was then furnished Carrier's Chief Surgeon who after examining all the records advised that claimant was not qualified for the regular work required, but, if there was a position available requiring only light work he could be qualified to perform same. The Chief Surgeon was advised that there was no such position available and, therefore, claimant was disqualified for all service effective April 17, 1969.

The Organization's Local Chairman instituted claim with Carrier's Signal Supervisor on behalf of claimant under date of May 26, 1969, (Carrier's Exhibit C). The claim was for all time lost as well as all benefits account claimant allegedly improperly held out of service.

On June 25, 1969, when the General Chairman was in Cleveland he discussed claimant's case with the Chief Surgeon and it was understood that claimant would be called in for another examination. The Chief Surgeon examined claimant on July 7, 1969, and thereafter referred claimant to noted cardiologist Dr. H. A. Zimmerman. Dr. Zimmerman recommended, in letter dated July 22, 1969 (Carrier's Exhibit D) as follows:

"Certainly it is at age 42, this man deals with a chronic and progressive, fatal disease and I certainly feel it would not be advisable to allow him to return to work as a Signal Maintainer as he could at any time have another myocardial infarction."

The claim instituted on May 26, 1969, was denied on July 1, 1969 (Carrier's Exhibit E). This claim was abandoned or allowed to outlaw as it was not thereafter handled or progressed consistent with the applicable time limit on claims rule. On November 4, 1969 (Carrier's Exhibit F) the Local Chairman instituted another claim with Carrier's Signal Supervisor which was again denied on November 10, 1969 (Carrier's Exhibit G). This untimely submitted claim was thereafter handled on appeal up to and including Carrier's highest officer. Copies of pertinent correspondence attached as Carrier's Exhibits H through Q.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant suffered an acute myocardial infarction (heart disease) on October 25, 1968. He was attended to by his own physician, John R. Von Bergen, D. O., who referred him to David J. Fergusson, M. D. for examination and diagnosis. Dr. Fergusson concluded that if his exercise tolerance proves adequate, he felt Claimant could return to his present occupation provided that Claimant was prepared to delegate the more strenuous tasks.

Claimant was thereafter examined by Carrier's Chief Surgeon, W. E. Mishler, M. D., and by Drs. Joel S. Webster, M. D. and Henry A. Zimmerman, M. D. Drs. Von Bergen and Webster stated that they felt that Claimant could return to work on a trial basis to see if he can tolerate complete rehabilitation. Drs. Mishler and Zimmerman recommended that it was not advisable for Claimant to return to work as a Signal Maintainer as he could at any time have another myocardial infarction.

Claimant's position is that Carrier has arbitrarily held Claimant out of service since September 4, 1969 even though three doctors had approved Claimant's return to duty as a Leading Signaller, and Carrier's refusal to so permit Claimant to return to work is in violation of the Signalmen's Agreement, and in particular the Understanding of Physical Examination.

Carrier raises a procedural question alleging that this claim is barred under the provisions of Article V, Section 1(a) of the August 21, 1954 Agreement, the pertinent part thereof providing as follows:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the offices of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which claim or grievance is based."

The Organization by letter dated December 23, 1969 from its General Chairman, W. D. Wilson, to Carrier's Chief Signal Engineer, W. E. Bell, stated:

"A claim was originally submitted to Signal Supervisor E. J. Gaughan on May 26, 1969. Mr. Gaughan denied this claim on July 1, 1969. Due to correspondence being lost in the mail or otherwise, Mr. Gaughan's denial was not received by the General Chairman for appeal under the time limit rule. Therefore, on November 4, 1969 a claim was resubmitted in Mr. Giet's behalf. Mr. Gaughan denied this claim on November 10, 1969, reiterating what he said in his original denial July 1, 1969."

Carrier, by letter dated August 6, 1970 from its General Manager, Labor Relations to General Chairman W. D. Wilson, pointed out:

"* * *, it is Carrier's position that this claim is outlawed as it was originally instituted on May 26, 1969, and denied by the Signal Supervisor August 18, 1969. There was no rejection of the Signal Supervisor's decision of August 18, and no timely appeal thereof. Instead, the claim was again submitted on November 4, 1969, which is not proper under the provisions of the time-limit-on claims rule, this for the reason that this case involves the single incident of claimant not being restored to service. As it was not a bona fide continuing claim, it cannot be again submitted as was done by the Organization. The Second Division, in Award 5682, so ruled on this property, copy of the pertinent decision attached. Furthermore, as the case was not handled consistent with the July 24, 1968 Physical Re-Examination Agreement but as a time claim, it is not properly before Carrier for consideration."

This Board in Award No. 12851, involving Article V, Section 1(c) of the August 21, 1954 National Agreement procedural issue, stated:

" * * * Here the substance of the claims before the Board is the same as was contained in the original claim. That claim became barred for failure to appeal it within the 9 months' time limit of the rule. These claims represent a re-filing or resubmission of the original claim. The Board has ruled that claims once barred under a time limit rule cannot be resubmitted for adjudication. (See Award 10453; also Award 943 of the Fourth Division.) We have also found that continuing claims are not open to refiling under Article V of the National Agreement (supra). (Awards 9447 and 10251, cited and relied on in Award 10453.)"

In this dispute, the Organization filed a claim with Carrier on behalf of Claimant dated May 26, 1969 and alleging that Claimant is able to return to his normal duties as of April 1, 1969, which claim was denied by Carrier's Signal Supervisor E. J. Gaughan on July 1, 1969. The Organization failed to appeal Carrier's decision in said regard, and thus is in violation of the provisions of said Article V, Section 1(c) of the August 21, 1954 Agreement.

The Organization's attempt to refile the claim now pending before this Board as of November 4, 1969 in which it asks for damages from September 4, 1969, comes too late. The Organization did not file a timely claim alleging a difference of opinion concerning the medical findings and requesting a neutral physician.

The Second Division was faced with an analogous situation in Award No. 5682, and the Board found as follows:

"The record discloses that the first monetary claim was based on the allegation that Claimant was 'unjustly suspended or dismissed' and was commenced by the Organization on July 7, 1964. This claim was denied, and was properly progressed on appeal up to and including the Master Mechanic, who denied the same on December 12, 1964. The claim was abandoned on that date. No further action was taken by the petitioner until July 7, 1965, a period of almost 7 months later, when the request was made to appoint a neutral physician.

On August 9, 1966, more than two years after the original claim was instituted, and more than one year after petitioner demanded re-examination by a neutral physician. This claim was filed on behalf of Claimant that he 'be returned to service of the Carrier with full seniority, vacation privileges, health and welfare and life insurance rights unimpaired, and that he be compensated for all wages lost since July 14, 1966'

In view of the above facts included in the record, this Board finds that the petitioner abandoned the July 7, 1964 claim on December 12, 1964, and did not institute a timely claim alleging a difference of opinion concerning the medical findings and requesting a neutral physician. Therefore, this case is procedurally defective in that it was not properly filed under Article V of the August 21, 1954 National Agreement.

This Board further finds that under Second Division Awards No. 3777, 4848, 2177 and 4924; and Third Division Awards No. 9447,

10251, 10329 and 12851, the original claim of July 7, 1964 cannot be resubmitted as has been attempted in the instant claim. Since this Board finds that it lacks jurisdiction because of violation of the time limit rule, the merits will not be considered, and this claim will be dismissed."

In view of the aforesaid, we must dismiss the claim for failure to conform to the procedural requirements of said Article V, Section 1(c) of the August 21, 1954 Agreement.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Claim will be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1971.