

Award No. 19192

Docket No. SG-19238

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, 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 Retarder Technician L. H. Tegler for pay for all time lost, and other benefits, between July 28, 1969, and March 16, 1970, account being improperly held out of service. (General Chairman's File: 354. Carrier's File: 172-SIG)

EMPLOYEES' STATEMENT OF FACTS: This dispute is based on our contention Carrier improperly held Claimant L. H. Tegler out of service between July 28, 1969, and March 16, 1970, when it failed and/or refused to permit him to return to service promptly after illness absence even though he was examined by two doctors who gave him a release for normal duty. He was prevented from returning to service at that time by the Carrier's Chief Surgeon who made that decision without examining him.

There is an agreement in effect between the parties to this dispute bearing an effective date of March 1, 1953 which, as amended, is by reference made a part of the record herein.

Mr. Tegler was the incumbent of a Retarder Technician position at Bison Yard, East Buffalo, New York. On June 1, 1969, he was admitted to a hospital with a back problem, put in traction, treated, then released June 16, 1969. During this absence, he was considered on leave of absence under the second sentence of Rule 47 which is quoted here for ready reference:

"Leave of Absence

Rule 47. Upon request, employees may be given leave of absence by proper authority for six (6) months or less and will retain their seniority rights. Employees absent from duty on account of sickness or disability will be considered on leave of absence until they are able to return to duty. Employees failing to return before their leave of absence expires will lose their seniority, unless proper extension has been obtained. An employee absent on leave who engages in outside employment will lose his seniority. Notice of leaves of absence will be furnished local chairmen.'

was waived in lieu of a personal examination of claimant by the Chief Surgeon.

Exhibit "P" — Letter dated December 30, 1969 from General Chairman to General Manager-Labor Relations appealing decision of Chief Engineer.

Exhibit "Q" — Letter dated January 6, 1970 from Chief Surgeon to General Chairman confirming physical examination on December 4, 1969 at which time claimant advised he had also been hospitalized for coronary artery disease, therefore, further reports were required.

Exhibit "R" — Letter dated February 27, 1970 from General Manager-Labor Relations to General Chairman denying claim.

Exhibit "S" — Letter dated April 16, 1970 from General Manager-Labor Relations to General Chairman confirming conference denial of March 18, 1970.

Exhibit "T" — Letter dated May 11, 1970 from General Chairman to General Manager-Labor Relations.

Exhibit "U" — Letter dated June 26, 1970 from General Manager-Labor Relations to General Chairman.

As shown in Carrier's Exhibit "Q," claimant was examined by the Chief Surgeon on December 4, 1969. Also, at Carrier's request, claimant was examined on December 4, 1969 by Orthopedic Surgeon Dr. K. S. Alfred and Cardiologist Dr. G. F. Feil. Upon receipt of reports from the foregoing Doctors and an examination of records furnished concerning claimant's coronary artery disease history, claimant was qualified for service on February 16, 1970.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is based on contention that Carrier held Claimant out of service between July 28, 1969 and March 16, 1970 when it refused to allow him to return to service promptly following an illness. Claimant alleges that two Doctors had given him a release to return to duty, but he was prevented from returning by Carrier's Chief Surgeon who made the decision, though he did not personally examine him until December 4, 1969, approximately six months after his illness.

Carrier contends that the claim should be dismissed as the Organization failed to follow the applicable "Understanding on Physical Re-examinations," but, in any event, Carrier had the sole right to determine the physical qualifications of its employees and such determination should not be overturned by this Board.

We do not agree with Carrier's contention that the Organization failed to follow the "Understanding on Physical Re-examinations." The General Chairman's letter of November 12, 1969, to Carrier Chief Surgeon Mishler requesting Claimant to be examined by a neutral doctor, as well as the General Chairman's letter to Mishler on October 18, 1969, together with the written authorization by Claimant to release all information that Dr. Mishler had relative to Claimant's physical condition, amounted to substantial compliance, in our opinion, with the requirements of the "Understanding on Physical Re-examinations."

However, since Carrier's Chief Surgeon did not "summarily refuse to follow this procedure," the claim is distinguishable from Award 16926, and that case is not dispositive of the claim herein. Thus, we must determine whether the Chief Surgeon acted in an arbitrary or capricious manner in refusing to allow Claimant to return to service earlier.

It is uncontroverted that on August 6, 1969, the Chief Surgeon qualified Claimant for sedentary work. Furthermore, on October 21, 1969, Dr. Baker, Claimant's personal physician advised the Chief Surgeon that Claimant's lifting should be limited to 35 to 40 pounds. However, there were no light duty positions available to Claimant, nor was Carrier required to establish such a position. Thus, it was the medical judgment of the Chief Surgeon as well as Claimant's personal physician that dictated the decision to hold Claimant out of service until he had fully recovered from his condition. If Dr. Baker's medical opinion had been different, the result herein might also be different, but since that is not so, we are compelled to deny the claim.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 12th day of May 1972.