NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20124
THIRD DIVISION Docket Number SG-19810

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railroad Signalmen on the Chicago and North Western Railway Company that:

(a) The Carrier violated and continues to violate the current Signalmen's Agreement on the Twin Cities District (former Omaha Railroad) when it will not allow Mr. J. S. Harmer to return to work and/or his former assigned position as Signal Maintainer at Superior, Wisconsin, on March 5, 1971.

(b) Signal Maintainer J. S. Harmer be returned to his regular assigned position as Signal Maintainer at Superior, Wisconsin, and compensated for all time lost starting 60 days prior to the date of this claim (May 13, 1971) and continuing until Mr. Harmer is placed back to work. (Carrier's File: 79-19-6)

OPINION OF BOARD: The Claimant had a heart attack on September 8, 1970, while on vacation. On March 5, 1971, his personal physician considered him fit to return to work. Also on March 5, 1971, the Claimant had an examination by Carrier's local company doctor, but this examination did not result in Claimant receiving medical clearance to return to work. Instead the local doctor sent forms to Carrier's Medical Director. On or about March 17, 1971, the Claimant was advised to have a chest x-ray and an electrocardiogram. This was done on March 25, 1971, and the results were sent to the Medical Director. In a letter to the Director of Labor Relations, dated April 29, 1971, the General Chairman stated, inter alia, that:

> "Mr. Harmer, wanting to return to work was examined by Dr. Stack, on March 5, 1971, and he sent the report to Dr. Speers in Chicago, Dr. Speers requested a chest x-ray and an electrocardiogram, after 6 weeks the report came back that Mr. Harmer could report back to work, but could not work alone or drive a Company vehicle. Mr. Harmer's duties require him to work alone and to drive.
>
> In view of diverse opinions by the Doctors, we ask, please, that you investigate this situation with the intention of returning Mr. Harmer to his regular duties as District Signal Maintainer at Superior, Wisconsin."

The Director of Labor Relations did not reply to this letter, but the matter was discussed in conference on May 6, 1971. On May 18, 1971 the Medical Department cleared Claimant's return to service and he resumed service on May 25, 1971.

On these facts, the Petitioner contends that the Carrier violated Rule 64, paragraphs (a) and (c) (3), by unjustifiably delaying medical clearance for Claimant's return to work following his illness. The Petitioner states that Carrier delayed Claimant's return to work over two and one-half (2½) months, whereas Rule 64 allows only 15 days to examine an employee and make a report. For its part the Carrier, among other defenses, raises a jurisdictional objection to the Board's consideration of the dispute on the ground that the claim has not been handled in the usual manner on the property as required by Section 3 First (i) of the Railway Labor Act. More specifically, the Carrier says that the issue of Claimant's physical condition should have been submitted to a medical panel as provided by Rule 64 (c), and that Claimant's failure to use this remedy results in a jurisdictional bar to consideration of the claim. The Petitioner says this objection cannot be considered, because it was not raised on the property; however, numerous Board Awards hold that jurisdiction can be raised at any stage of the proceedings, Awards 8886 (McMahon), 12223 (Dolnick), and 19704 (Blackwell), etc. We must therefore consider the jurisdictional objection before we may properly consider the merits of the dispute.

Rule 64, in its entirety, reads as follows:

"64(a). The Railway Company may require all employes in the service to take a visual and physical examination or when returning to the service of the company after having been out of service ninety (90) days or more for any reason. If, as a result of the examinations referred to, a physical condition is discovered which necessitates additional examinations, or if employes in the judgment of the Railway Company should at any time require an examination, such additional examinations will be taken by the employe in order to determine the fitness of such employe to safely perform the duties in which he is engaged.

64(b). It is also understood and agreed that any medical fee in connection with such examinations by Company Doctors as are requested by the Company, will be borne by the Railway Company.

64(c). If an employe is not satisfied with the examination of the Railway Company's doctor, he is privileged to have the case handled as follows:

"(1) The employe involved, or his representative, will select a physician to represent him, and he will act with Carrier's Chief Surgeon, in conducting a further physical examination. If the two physicians thus selected shall agree, the conclusion reached by them will be final.

(2) The physicians selected by the Company and the employe shall be graduates of reputable Class A medical schools of regular medicine and of good standing in their communities.

(3) If the two physicians selected in accordance with paragraph (1) should disagree as to the physical condition of such employe, they will select a third physician to be agreed upon by them, who shall be a well known consultant of recognized standing in the medical profession, and a specialist in the disease, or diseases, from which the employe is alleged to to be suffering. The board of medical examiners thus selected will examine the employe and render a report within a reasonable time, not exceeding fifteen (15) days after selection, setting forth his physical condition and the opinion of the majority of the board as to his fitness to continue service in his regular employment will be accepted as final.

(4) The Management and the employe involved will each defray the expenses of their respective appointees. The fee of the third member of the Board shall not exceed $50, and will be borne equally by the involved employe and the Company. Fees for hospital expenses, laboratory, and X-Ray examinations, etc., will be borne equally by the employe involved and the Railroad Company.

64(d) Examinations or re-examinations as the employe may be required to take, will, if possible, be conducted during regular working hours without deduction in pay therefor."

We believe the Carrier's jurisdictional objection is well taken and we shall dismiss the claim. We believe the provisions of Rule 64(c) above can only be read as establishing a procedure for a medical panel to resolve a dispute of this nature on the property, and that such a dispute would not be ripe for submission to this Board until after compliance with such procedure. In Award No. 112 of PL Board No. 364 (Coburn), a conductor's claim for time lost from service for physical reasons was dismissed pursuant to the following ruling:

"The essential facts here are that the claimant was removed from service on February 19, 1965, having been found by competent medical authority to be physically disqualified. As the result of another physical examination conducted by the Carrier's Chief Surgeon on June 17, 1965, claimant was returned to service on June 21, 1965.

"The claim was progressed to this Board on the theory that the claimant was dismissed from service in violation of his contractual right to the due-process protection of Rule 45 - Investigation Rule, of the basic agreement. The Board finds this was procedural error. As has been noted, the claimant was withheld from service not as a result of any disciplinary action but for medical reasons. His remedy, therefore, was to proceed under the Physical Re-Examination Rule of the Agreement, the purpose of which is to provide a fair and impartial method of deciding by competent medical authority disputes involving an employee's physical and mental abilities to perform his duties.

"In view of the foregoing, the Board holds that claimant has no standing to petition for damages on the basis of an alleged violation of Rule 45 of the Agreement. Claim, therefore, will be dismissed."

See also Award 8886 (McMahon). The above ruling in Award No. 112 has direct application here, for the Carrier's position that the medical panel is the usual manner for handling a dispute of this nature has not been disputed by the Petitioner. Claimant knew that a difference of medical opinion existed. This knowledge arose from the fact that the local company doctor did not clear him for duty following the March 5, 1971 examination. At this point the Claimant could have invoked Rule 64(c) which provides for the selection of a two-doctor panel, and ultimately a three-doctor panel, if an employee "is not satisfied with the examination" conducted under Rule 64(a). The Claimant did not do so. Instead, he presented the matter to the General Chairman who wrote the Director of Labor Relations a letter dated April 29, 1971, and thereafter conferred with the Director on May 6, 1971. These initiatives by the General Chairman, though probably a practical approach to working out the matter, did not alter the fact that Rule 64(c) set out the agreed procedure for situations involving diverse medical opinions on an employee's physical condition. Finally, we note that we find no merit in Petitioner's argument that Rule 64 evidences recognition by the parties that 15 days is sufficient time for evaluation of an employee's physical condition. It is true that 15 days is the maximum period allowed under Rule 64 for a three-doctor panel to reach a decision. However, Rule 64 was not invoked by Claimant and, accordingly, the 15-day period mentioned therein has no relevance to this dispute.

In view of the foregoing, and on the whole record, we conclude that the dispute is jurisdictionally barred because it was not handled in the usual manner on the property. We shall dismiss 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 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

The claim is dismissed on jurisdictional grounds as per the Opinion.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1974.