

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21704
Docket Number CL-20603

Robert A. Franden, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employes

PARTIES TO DISPUTE:

(Clinchfield Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7468) that:

Carrier shall compensate Mr. J. P. Letterman for eight (8) hours' pay at the rate of the Agency position at Erwin, Tennessee for each work day that he is held off that assignment, beginning September 1, 1972 and continuing until such time as he is allowed to resume duty.

OPINION OF BOARD: This dispute was submitted to the Board on October 23, 1973.

On December 13, 1974, the Board issued the following Award No. 20548:

"The dispute herein arose following a conference agreement of August 18, 1972, to reduce discipline of dismissal of claimant to suspension ending August 31, 1972, the physical examination of claimant and the result of that examination.

"There apparently were numerous 'off-the-record' discussions prior to the conference agreement of August 18, 1972, and the record is conflicting as to just what was said with respect to a physical examination of claimant. However, the conference agreement signed by the claimant and his representative contains nothing concerning such physical examination. It is also significant that no objection was entered to claimant undergoing the physical examination on August 24, 1972, and the objection arose after claimant was advised of the result of that examination.

"It is well settled that a Carrier has the right to determine the physical qualifications of its employes. Such right may be restricted by Agreement, but the record herein does not justify a finding that the Carrier's rights were restricted by Agreement. However,

"such a determination should be based on reasonable medical certainty. (See Third Division Award 16316 and Second Division Award 6539). The Board makes no pretense of being able either to resolve a conflict in technical medical testimony, or to diagnose emotional problems.

"Based on the present record, we find that there is need for additional medical data to determine the physical fitness of claimant to return to work. Therefore, we direct that Carrier and Claimant (or his representative) select a neutral third doctor for the purpose of examining claimant, and that the Carrier's physician, Claimant's personal physician and the neutral doctor present a written report to this Division of the Board, within sixty (60) days of the date of this Award, stating their conclusions regarding the physical qualification of claimant for restoration to service as of August 31, 1972, and at present. The neutral doctor's report need not be concurred in by both of the other doctors. A detailed explanation of the duties of claimant as agent shall also be supplied to the neutral doctor (by Petitioner and Carrier) so that he may properly evaluate the physical fitness of claimant to perform the job.

"Upon receipt and consideration of the medical reports directed above, the Board will make its final disposition of this claim.

"To avoid any confusion, the doctors' reports above requested should be submitted through the Carrier, with copies furnished the petitioner."

The claim was remanded to the property for additional medical data as indicated.

There followed a dispute between the parties as to agreeing upon a neutral doctor and the type of examination that claimant should undergo, resulting in request that the Board interpret the award in the light of the dispute between the parties. On November 26, 1975, the Board issued Interpretation No. 1, Serial No. 279, to Award No. 20548:

"Following Award 20548 the parties to the dispute were unable to agree upon a neutral doctor, as suggested in the Award, or upon the type of examination claimant was to undergo. Hence the request for interpretation of the Award.

"It was not the intent of Award 20548 to restrict in any manner the type of examination to be given claimant by the neutral doctor to determine his ability to satisfactorily perform the work of agent.

"The record shows that claimant's personal doctor suggested that Dr. Ernest Yount of Winston-Salem, North Carolina, serve as the neutral doctor. The Carrier states that in conference on March 20, 1975, it advised claimant's representatives that it would agree to the selection of Dr. Yount as the neutral doctor under the following conditions:

- "1. Dr. Yount would be advised the nature of disqualification of claimant and that his evaluation would be for the purpose of determining whether that disqualification was proper at the time made, and at the present time.
- "2. That claimant would authorize Dr. Yount to perform any examinations, refer him to any other doctors, and to obtain any medical records of prior treatment and/or evaluations that Dr. Yount might deem appropriate for reaching his conclusions.
- "3. That claimant would authorize Dr. Yount and Carrier's Chief Surgeon to release their findings and reports to Carrier for transmission to the Third Division.

"The above procedure is reasonable. The Board directs that it be followed and that the Board be furnished the neutral doctor's report, together with the statements of claimant's physician, and Carrier's Chief Surgeon, within sixty days of this interpretation."

Following the issuance of the above quoted Interpretation, arrangements were made for the examination of claimant by Dr. Yount with a view to obtaining the information requested in Award No. 20548 as clarified by Interpretation No. 1 thereof. However, claimant reported to Dr. Yount for examination as a private patient.

Claimant was not examined for the purposes expressed in Award No. 20548 and Interpretation No. 1 thereof. By his own actions he frustrated the efforts of the Board to obtain the requested medical information, insisting that Dr. Yount examine him not in the function of a third and neutral doctor in the case, but as a private patient. It is stated, without contradiction, that claimant had instructed Dr. Yount's office not to furnish the Carrier with a copy of Dr. Yount's report.

The case was again referred to the Board and on April 15, 1977, the Board issued Interpretation No. 2, Serial No. 288 to Award No. 20548 as follows:

"The Board felt that its Interpretation No. 1 to Award 20548, rendered on November 26, 1975, would result in the Board being furnished sufficient medical information to render a final award. However, such has not been the case, and the Board finds it necessary to seek further information before attempting to render a final award.

"It appears from the record now before the Board that claimant was examined on the basis of a private patient on April 1, 1976, by the neutral doctor previously agreed to. A report of that examination, as well as report of psychiatric examination of May 20, 1976, has been furnished to the Board. However, it is not clear whether the reports were intended to meet the requirements of Award No. 20548 and Interpretation No. 1. The Board, therefore, directs that the General Chairman of the Organization and the Director of Labor Relations of the Carrier join in addressing a letter to the neutral doctor previously agreed to, Dr. Ernest Yount, inquiring whether the doctor can, from the examinations performed, furnish a report that would meet the requirements of Award No. 20548 and Interpretation No. 1 thereof."

The Director of Labor Relations for the Carrier and the General Chairman of the Organization prepared and sent to Dr. Yount a joint letter dated April 26, 1977, in line with Interpretation No. 2. On July 15, 1977, the Carrier advised the Board that it had received no response from Dr. Yount. The Board is also in receipt of information from the General Chairman that he was informed by Dr. Yount's office that he had no intent of answering the joint letter.

Thus the Board has been unable to obtain the medical information requested in Award No. 20548 and Interpretations Nos. 1 and 2 thereof, perhaps because of claimant's actions in being examined on a private patient basis instead of upon the basis set forth in Award No. 20548 and the interpretations thereto.

Under the foregoing set of circumstances there is nothing upon which this Board can properly base a determination that claimant was, at the time the claim originated, medically qualified for reinstatement to the position of Agent at Erwin, Tennessee; nor, is there now information sufficient to make such a determination at the present time. Therefore, we cannot find that the Carrier violated the Agreement beginning September 1, 1972, when it refused to permit claimant J. C. Letterman to work the agency position at Erwin, Tenn.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.