NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22285
THIRD DIVISION Docket Number SG-22166

Abraham Weiss, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Louisville & Nashville Railroad Company

STATEMENT OF CLAIM: "Claims of the General Committee of the Brotherhood of Railroad Signalmen on the Louisville and Nashville Railroad Company:

Claim No. 1

Carrier files: G-364-2, G-226-2, G-306-2

On behalf of Mr. Gerald Dunaway, Signal Maintainer, for signalman's rate of pay from September 22, 1975 through January 18, 1976, plus holiday and overtime pay during this period.

Claim No. 2

Carrier files: G-303-2, G-226-2, G-306-2, G-364-2

On behalf of Mr. Gerald Dunaway, Signal Maintainer, for vacation pay earned in 1974, and for reimbursement of certain medical expenses incurred by him in behalf of his wife in November 1975."

OPINION OF BOARD: Claimant was an excepted employe who was removed from service on August 1, 1974 for failure to perform work in a satisfactory manner. Within a week or two thereafter, Claimant entered a hospital for, in his own words, "a nervous condition that has been diagnosed variously as chronic anxiety reaction or acute depression and has existed for 1-1/2 years."

Claimant's bid to return to work under the Signalmen's agreement as a signal maintainer was rejected, following an examination by Carrier's doctor on November 8, 1974, on the basis of his physical condition.

On August 25, 1975, Claimant's personal physician advised him that based on his examination on July 2, 1975,

> "I see no objective evidence of organic disease or objective evidence of emotional disease to prevent you from working at this time."

However, based on an examination on July 25, 1975, Carrier's doctor again disqualified Claimant on August 6, stating that:

> "I am somewhat perplexed that an individual disqualified approximately 8 months ago for a chronic condition, and to my knowledge, a progressive condition such as cirrhosis, is returned for physical evaluation relative to the responsible position of signal maintainer..."

The Carrier doctor added, however, that "this employee could possibly qualify for another position with the Company" and that Claimant should be able to return to work "at something, but not in a Department with the responsibility of the Signal Department."

On September 8, 1975, the Organization, through its General Chairman, again protested Claimant's disqualification and requested "that some further consideration be given in /Claimant's/ case" based on Claimant's personal physician's opinion of August 25 quoted above. Noting the difference in opinion between the two doctors, the Organization stated:

> "There are provisions in cases such as this whereby both parties agree to a third party (neutral physican) and accept that person's findings as binding by both parties."

On September 19, in response to Carrier's request, the Organization furnished Carrier a copy of the August 25 medical report of Claimant's personal physician and requested a reply. (Carrier's Exhibit A-6d would appear to indicate that Claimant's physician wrote Carrier's doctor on July 8 that Claimant, who was last seen on July 2, "was quite emotionally stable at that time and at present I do feel that he should be able to return to work.")

Thus, Carrier was on notice that there was a disagreement between the two doctors and that its own doctor's disqualification was not absolute, but related to Claimant's return to work in the Signal Department.

On November 21, 1975, Petitioner filed a claim (Claim No. 1), stating that it had received no reply to its letters of September 8 and 19, respectively, and referring to its September 8 letter in which it "requested the Carrier consider the possibility of a neutral physician examining [Claimant]."

On December 31, 1975, Claimant was notified of an appointment with a third doctor for January 5, 1976. Claimant was qualified and returned to work on January 16, 1976.

Carrier treated the General Chairman's September 8 letter as a suggestion to consider the possibility of designating a neutral physician, not an obligation to do so, since parties' Agreement does not so require.

The Organization, on the other hand, maintains that the September 8 letter must be viewed as a request for the appointment of a neutral doctor, a view, it argues, which is supported by the language in its November 21 letter; namely, that it "requested the Carrier consider the possibility of a neutral physician examining [Claimant]."

Carrier was aware that its doctor and Claimant's personal physician disagreed as to whether Claimant could return to work. Carrier's doctor, especially, expressed concern over what he consdered to be a chronic and progressive condition.

Carrier, faced with the Organization's request and its own doctor's opinions, wrote its doctor on October 10, 1975 indicating that the National Railroad Adjustment Board "has held in many cases that where the personal physician and the company doctor fail to agree upon the physical capability of an employee, a neutral doctor, acceptable to both doctors, will be appointed and his decision will be binding on both the company and the organization."

On October 20, Carrier's doctor replied: "It is, as a rule, the thing to do to seek an independent medical opinion in any instance where there appears to be a conflict in thinking and the conclusion of those in attendance."

Accordingly, he submitted the name of a third physician. He also suggested, as an alternative for Carrier consideration, that he personnally discuss Claimant's case with the latter's personal physician regarding Claimant's job responsibilities with the Signal Department.

On November 19, 1975, Carrier wrote its doctor requesting him to confer at his earliest convenience with Claimant's personal physician and notify Carrier of the results of his discussion. Apparently, Carrier's doctor became ill at about this time and there is no record that such a discussion took place.

It was not until December 31, 1975--almost 2-1/2 months after hearing from its own doctor--that Carrier notified Claimant that an examination with a third doctor had been scheduled for January 5, 1976.

In all, about 4 months elapsed between September--when Petitioner's general chairman requested reconsideration and designation of a neutral doctor to resolve the conflicting medical opinions--and the date Claimant was examined by a third physician and found qualified to return to service.

In our judgment, this represents an undue period of time by Carrier to take steps to resolve the opposing medical diagnoses.

It is true that Carrier, both for its own protection as well as the safety of the general public and its own employes, has the right to insist that its employes be physically qualified to perform the duties of their assignments. But the principle is well established that a Carrier may not arrogate to itself such a decision in the face of conflicting diagnosis by a qualified physician. This is the situation involved in the case before us.

When the medical opinion of a Carrier's own medical staff or of doctors retained by it is challenged by the contrary findings of an employe's personal physician, a prompt resolution of such differences is called for, if the Carrier is not to be judged arbitrary and capricious to its actions. Carrier, in brief, does not have the exclusive right to make such determinations of physical fitness when the findings of its own doctors are challenged by competent authority. Carrier in this case recognized this principle by citing NRAB rulings to this effect in its October 10 letter to its own doctor, quoted above.

Whether a Carrier's action to resolve differences in medical diagnoses is "prompt" or "resonable" must be judged by the circumstances in each case. In the instant case, Carrier was put on notice, on September 8, that Claimant's personal physician judged him qualified to be restored to duty. Carrier had a contrary opinion from its own doctor.

Whether it viewed the General Chairman's language concerning use of a third physician as a suggestion or as a request, it was incumbent upon Carrier to take the necessary steps to resolve the issue within a reasonable time so as not to impose an unfair hardship on Claimant.

We must, however, take cognizance of two events in reaching a decision on the merits of this case. Carrier's labor relations official, who is Carrier's highest officer designated to handle claims or grievances on the property, and who was involved in the consideration of the claim before us, retired effective November 1, 1975. A new labor relations official was appointed to succeed him. Correspondence in the record before us indicates that the newly appointed officer was trying to familiarize himself with the details of the instant dispute. This transition undoubtedly accounts for part of the delay in settling his dispute.

We must also give some weight to a situation over which Carrier had no control; namely, the illness of its local doctor who was handling the medical aspects of the case for Carrier. Carrier was unaware of its doctor's illness for some period of time. Because of his illness, the local doctor never met with Claimant's personal physician as requested in Carrier's October 20 letter.

Carrier's October 10 and November 19 letters to its local doctor, previously mentioned, may be viewed as a good faith effort by Carrier to find a solution to the conflicting medical opinions.

The fact remains that Carrier's scheduling of a medical examination by a neutral doctor on December 31, 1975 represented a lapse of well over 3 months after the Organization furnished Carrier with a copy of the medical opinion of Claimant's personal physician and requested Carrier reconsideration. Over 2 months elapsed between October 20, when Carrier's local doctor notified it of the rule "to seek an independent medical opinion...where there appears to be a conflict," and the examination by a neutral physician on December 31.

As our Findings above indicate, there are unique and special circumstances present in this case. Accordingly, and in consideration of these circumstances, with respect to Claim No. 1 we direct that Claimant is to be recompensed for time lost only for the period between December 1, 1975 and the date he returned to active service with Carrier.

In Claim No. 2, Claimant made claim for vacation pay earned in 1974 and for reimbursement of certain medical expenses incurred by him on behalf of his wife in November 1975. There is no proper basis for the second claim and it is denied. Claimant was an excepted employe in 1974, not covered by the Collective Bargaining Agreement between Carrier and the Organization. Hence, the grant of vacation pay was a matter of Company discretion. Claimant was denied vacation pay because of "extremely unsatisfactory conduct" and we have no authority to overrule Carrier's decision in this regard.

Based on our ruling in Claim No. 1, Claimant was ineligible for reimbursement for medical expenses incurred in November 1975 and we must, therefore, 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 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 to the extent shown in Opinion.

A W A R D

Claim No. 1 sustained to the extent indicated in the Opinion.

Claim No. 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panbra
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January 1979.