NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22441
THIRD DIVISION Docket Number CL-22046

James F. Scearce, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8379) that:

1. The Carrier violated the effective Clerks' Agreement when on or about March 31, 1976, it removed Clerk Octavia Jackson from its service based upon her alleged physical condition;

2. The Carrier shall now compensate Ms. Jackson for eight (8) hours' pay at the pro rata rate of Position GT-572 commencing on April 9, 1976 and continuing for each and every day thereafter that the Carrier withheld her from service.

OPINION OF BOARD: Apparently shortly after being awarded a position of Assistant Chief Yard Clerk in November of 1975, the Claimant requested and received medical leave to March 1, 1976. Prior to that date, she requested and received a 30-day extension to such leave March 31, 1976.

With a document dated March 30, 1976 and executed by her personal physician (Nesbitt) in hand, the grievant apparently presented herself to the Carrier for return to work. The return-to-work approval contained restrictions:

> "Pt. /Patient/ advised to be off feet as much as possible; avoid extreme temp/erature/ changes & situations of emotional stress; avoid climbing; continued observation."

By letter dated April 8, 1976, the Carrier's Chief Surgeon (Rudman) advised the Claimant:

> "I have reviewed the results of the examination by Dr. Murphy and the Medical Report by L. C. Nesbitt, M. D., your personal physician.

"In the light of the foregoing, and with particular reference to the medication prescribed for you and the restrictions as to climbing, exertion, stress, etc., indicated by Dr. Nesbitt, you fail to meet the minimum medical standards of this Carrier and are, therefore, disqualified.

When your personal physician concludes that you are able to return to work environment that includes climbing and descending railroad car ladders, prolonged walking periods, free from the necessity of sedative or stimulant prescriptive medications, please arrange to have him submit another 'Verification of Private Medical Care Form' documenting that conclusion. You may then re-present yourself for a physical examination by the Railway Company Physician to determine whether you meet the minimum physical standards of this Carrier."

Thereafter, a further examination and report by the Claimant's personal physician somewhat limited the restrictions on her return to work, but again Chief Surgeon Rudman rejected her request to return to work, in a letter dated May 11, 1976:

"I have received your 'Verification of Private Medical Care' form from Dr. Nesbitt and he still is restricting you from climbing, etc., and has prescribed medication.

When your private medical doctor reports by means of another 'Verification of Private Medical Care' form that your Return to Work is not contingent on restrictions as to climbing, extremes of temperatures etc., and prescribed medication, your physical condition will be re-evaluated by this Carrier."

By letter dated May 21, 1976 the Organization submitted a claim on behalf of the Claimant under Section (c) of Rule 62 (hereafter displayed) for all time off work by the Claimant on and after April 9, 1976.

As set forth in Rule 62, Section (c), a "neutral physician" was selected who examined the Claimant and adjudged her fit to "return to her previous position" -- the one she was awarded in November, 1975. On July 15, 1976 the Claimant was notified to return to service; for reasons apparently not germane here, the Claimant delayed her return until July 29, 1976.

A "time claim" was initiated on July 27, 1976 under Rule 28½ by the Organization for the identical period claimed under Rule 62, as set forth in the aforementioned Organization letter dated May 21, 1976.

Rule 62 sets forth a procedure by which employes may return to work from illness or accident:

RULE 62

PHYSICAL EXAMINATIONS - INCAPACITATED EMPLOYES -

(a) Employes coming within the scope of this Agreement will not be required to submit to physical examination unless it is apparent their health or physical condition is such that an examination should be made.

(b) An employe will not be withheld from service or removed from service account physical condition unless it is definitely determined by an examination by a Company physician that the employe is unfit to perform his usual duties. If the employe is removed or withheld from service, prompt written notice will be given by the Carrier to the employe setting forth the physical condition of the employe and the reason why the Company physician determined the employe is unfit to perform his usual duties.

(c) In the event an employe so withheld or removed from service considers himself fit to perform his usual duties and this is substantiated by his personal physician's recorded opinion in this regard which differs from that of the Company physician's report and opinion, an examination will be made by a mutually agreed to physician, not an employe of the Carrier, who shall render a written report to the parties as to the physical condition of the employe and his

opinion as to whether or not the employe is unfit to perform his usual duties, and his decision shall be final. If his decision is in favor of the employe he shall be immediately returned to service and compensated for all monetary loss suffered during the time he was improperly withheld from service.

(d) Should the neutral doctor's decision be adverse to the employe and it later is apparent that his health or physical condition has improved, a re-examination will be arranged after a reasonable interval upon written request of the employe. In such a case should the decision be in favor of the employe he shall be immediately returned to service and compensated for all monetary loss suffered from the time he presented himself for this re-examination.

(e) All doctor fees incurred in applying the provisions of this rule shall be borne by the Carrier, including those of any neutral doctor but excluding any fees incurred by the employe in seeking examination by his personal physician.

(f) Efforts will be made to furnish employment (suited to their capacity) to employes who have become physically unable to continue in their present positions.

We need not look beyond the language of this Rule and relate it to a single event to determine the validity, or lack of it, for this claim: On March 31, 1976 the Claimant presented herself and the medical release from her personal Physician to Carrier doctor (Murphy). Rule 62 (b) is unambiguous in its requirement that such an employe's condition be "definitely determined by an examination by a Company physician" in order that such employe can be withheld from service. While Chief Surgeon Rudman's letter of April 8, 1976 asserts that Dr. Murphy performed such an examination, nothing has been adduced that such an event occurred; to the contrary, the Organization contends that Dr. Murphy merely advised the Claimant an examination by Dr. Rudman would be required. We are not unmindful that the burden issues to the initiator of such a claim to establish facts on the record. Here, it is not reasonable to expect the Claimant to produce proof that such examination did <u>not</u> occur; it is equally reasonable to assume that, had such examination

by Dr. Murphy been made, it would have been documented. It is noteworthy that the Organization, in handling this matter on the property, cited this provision and requirement to the Carrier by a letter dated April 23, 1976; the Carrier, in response on April 29, 1976, references "medical findings ... of (Dr. Murphy)" as part of its basis for denying the Claimant the opportunity to return to work. At no point in the record are the results of such findings of Dr. Murphy adduced. The Carrier was in error from that point on, notwithstanding the parties' eventual selection of a neutral physician, etc.

As to the matter of Rule 28½, it is well-settled by this Board that duplicative claims are improper. Rule 62 at Section (c) is operative in this Claim, and the Organization's efforts relative to Rule 28½ is dismissed.

As to the Award, the grievant shall be compensated for loss of wages at the rate applicable to position GT-192 from April 9 to July 15, 1976 at which time she made herself unavailable for work, for other reasons, until her actual start date of July 24, 1976.

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.

A W A R D

Claim sustained as set out in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1979.