

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 28720  
Docket No. SG-29059  
91-3-89-3-555

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen  
(  
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (CONRAIL):

On behalf of J. W. Ferneding, for reinstatement to service and paid for all time and benefits lost, beginning October 27, 1988 and continuing until he is restored to service, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 2-C-1, when it refused to allow him to return to service." Carrier file SG-38.

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant seeks payment for all time and benefits lost from October 27, 1988, to April 11, 1989, a period during which he alleges that Carrier failed to allow him to exercise his seniority, in violation of Rule 2-C-1 of the Signalmen's Agreement.

Claimant had been terminated in 1981 and was later reinstated in a decision by the Adjustment Board. In undergoing a return-to-work physical on June 7, 1984, it was determined that he could not qualify medically for service. In 1988, Claimant once again sought to resume his employment with the Company. According to Carrier, he was scheduled for an examination by a Company physician on May 16, 1988, given a Form MD-40 (Request for Medical Service), and told that he should acquire a medical release from his personal physician before the examination. He did not appear for the physical.

On June 10, 1988, Claimant was given another Form MD-40 and was examined by Carrier's doctor on July 18, 1988. He was adjudged to be qualified for service as of July 25, 1988. The Organization maintains that Claimant was barred from returning to service at that time, while Carrier contends that he made no effort to exercise his seniority until September.

On October 20, 1988, Claimant wrote Carrier indicating his intent to exercise his seniority and objecting to the delay in allowing him to resume his position. On October 26, Carrier's Regional Medical Director issued an amended MD-40 that stated that Claimant was not qualified to return to work. Carrier contended that the doctor who had previously certified Claimant as qualified had done so erroneously, since Claimant was not simply being reinstated, but was returning to work from a non-occupational disability (as established in his June 7, 1984, physical).

Claimant filed his Claim on October 27, 1988. Carrier responded on November 9, denying the Claim, and citing as the reason the invalidity of the first MD-40 Form in July. On January 17, 1989, in response to a further appeal, Carrier spoke of the fact that Claimant had been told to provide a medical release in May, 1988, and had not yet done so to date.

A report from Claimant's physician was forwarded to Carrier on January 19, 1989. Claimant was sent a note on January 27, 1989, directing him to obtain an MD-40 Form and submit himself for another return-to-work exam. Carrier stated in its Submission that Claimant was approved for return to work following the physical on February 24, 1989, but did not return until April 11, 1989.

The Organization disputes the fact that Claimant was told in May, 1988, that a report from Claimant's personal physician was required and argues that mention of the need for a personal doctor's report appeared for the first time in Carrier's letter of January 17, 1989. A letter from a Psychologist and a Psychology Assistant was then sent to Carrier on January 19, 1989.

A review of that letter reveals that Claimant had "referred himself for evaluation and therapy" in December, 1988, and he "informed me that it was very important that he be psychologically evaluated in an effort to determine if he was mentally ready to work at Conrail." The fact that Claimant sought out a psychologist in December, 1988, for evaluation suggests to this Board, that Claimant, if not the Organization, was aware of the need for a personal physician's report in 1988, prior to the January 17, 1989, letter.

While there was a delay in returning Claimant to work, it appears from the record that Claimant's own actions may have contributed to it. It undoubtedly was costly, in terms of both time and money, for Claimant to obtain the type of psychological evaluation required here and it would no doubt have been easier for him had he been able to rely on the decision to qualify him that had been made erroneously in July. The fact remains, however, that Carrier has the indisputable right to request such a release from a personal physician or psychologist after an employee has been medically disqualified. At the same time, the suspicion has been raised that Claimant was in fact aware of this requirement before the time it was memorialized in writing.


Were Claimant awarded compensation here, it clearly would have to be reduced to omit the time when he had been approved for service, but elected not to return, as well as reduced by the earnings he received from the U. S. Postal Service, where he was employed during this period. Given all of the circumstances present in this case, however, we cannot conclude that payment for time lost or benefits is warranted.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.