

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union  
(  
(Elgin, Joliet & Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
(GL-10498) that:

1. Carrier violated the effective Telegrapher's Agreement when it refused to return Operator Frederick Schofield to service following his recovery from a previous disabling injury and further failed to provide any medical reason for such action.

2. Carrier shall now compensated Mr. Schofield eight (8) hours' pay at the rate of the positions he selects, for November 27, 1989, and for each and every day thereafter that he is improperly withheld from service."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

The Organization bases its Claim on the following contract language:

"ARTICLE 15 PHYSICAL DISABILITY

An employe leaving active service under the disability provisions of the Railroad Retirement Act shall retain his seniority and his position, which shall be filled as a temporary vacancy. Should such employe return to active service prior to the time he reaches sixty-five (65) years of age, he shall resume his position if it has not been abolished, or if a senior employe has

exercised displacement rights, he may displace in accordance with the provisions of this agreement.

#### ARTICLE 43 - DISCIPLINE

(a) An employee shall not be disciplined or dismissed without first being given a hearing, but may be suspended from service pending such hearing and shall not be paid for time suspended if at fault, except, hearing in advance of discipline shall not be required in cases which are investigated by correspondence or otherwise, and in which the discipline does not exceed twenty (20) demerit marks, unless the employee requests hearing. If the employee has been suspended, such hearing shall be held within ten (10) days from the date of suspension except when otherwise agreed.

#### ARTICLE 45 - MEDICAL DISQUALIFICATION APPEAL PROCEDURE

Employees coming within the scope of this agreement may be required by the Carrier to take physical examination. Such examination will not be more frequent than once each year, except when more frequent physical examinations are required by law, and unless it is apparent to the Carrier that the employee's health or physical condition is such that more frequent examinations should be made. In the event an employee should be disqualified as a result of a physical and/or mental examination, he will be notified in writing of the reason for such disqualification. If he feels that such disqualification is not warranted, the following rules will apply:

(a) The employee involved or his representative shall, within fifteen (15) days of receipt of notice of disqualification, submit to this Sub-department head and the proper Company physician a statement from a physician of the employee's choosing setting out his complete medical findings and the history of treatment of the disqualifying condition. If the medical findings of the employee's physician agree with those of the Company physician, they will be accepted as final.

(b) if the medical findings of the two physicians referred to in paragraph (a) disagree, said two physicians shall promptly select a competent and qualified neutral physician. These three

physicians will constitute a Board of Medical Examiners and will meet as a Board as promptly as possible to examine the employe and they will render a report of their findings within fifteen (15) calendar days after completion of their examination, setting forth the employe's condition and the conclusion as to whether he meets the requirements of the Carrier's physical and/or mental standards. The decision of the majority of the Board of Medical Examiners shall be final and binding. Should the Board's decision be adverse to the employe and, after reasonable interval, it later appears from the presentation of an adequate medical statement or report that his physical condition has improved, reexamination will be arranged upon request of the employe."

The Claimant has a seniority date of December 6, 1965. On June 3, 1981, he presented a statement from his personal physician indicating he was medically restricted from "stair climbing, prolonged standing or walking." Based on these restrictions, the Carrier Chief Surgeon disqualified Claimant from service. The Claimant was given a permanent disability pension.

On November 15, 1989, the Claimant, through the Organization, once again presented to the Carrier statements from his personal physician which indicated he had no disability which would prevent him from doing "any type of employment." Accompanying the report were X-rays and a request that the Claimant be returned to service.

In a response dated November 20, 1989, the Carrier requested additional information prior to taking any further action. The Claimant was not asked to submit to an examination by the Carrier's physician.

On December 30, 1989, the Chief Train Dispatcher for the Carrier, not having received any of the additional information requested, advised the Claimant that, as far as his medical condition was concerned, there was no disagreement between the findings of the Claimant's personal physician and those of the Carrier physician. The Claimant's request to be reinstated was denied. The Carrier determined the findings to be final.

The Organization filed a Claim objecting to the Carrier's decision. It argues that the Carrier is withholding the Claimant from service without cause. There is ample evidence to prove the Claimant has recovered from his previous disability. On the other hand, there is nothing to show he should not be returned to work. If nothing else, it believes a neutral physician should examine the Claimant. The Carrier has violated sections of Article 15, Article 43 and Article 45.

The Carrier believes it has the prerogative to establish and enforce the minimum medical standards of the Carrier. In the instant case, the Claimant was removed from service because he failed to meet those medical standards. There was no disagreement between the Claimant's personal physician and the Carrier's physician relative to the Claimant's medical condition. There was nothing submitted to the Carrier which showed the Claimant's medical condition had changed.

There is no question that the Carrier does have the right to establish the minimum medical standards for its employees. In the instant case, the medical report submitted by the Claimant in 1989 appeared to indicate that he still had discernible impairment in his lower back. As a result, the Carrier requested further explanation for the personal physician's diagnosis. The Claimant ignored the request, choosing instead to file a Claim. Absent marked improvement in his medical condition, the Claimant had a responsibility to provide sufficient evidence to the Carrier to demonstrate a distinction between the Claimant's condition eight years earlier when it was determined he was permanently disabled and his most recent physical examination, after which his personal physician reported he was capable of "any type of employment." The Carrier was justified in asking the physician to explain his rationale in view of the fact the Claimant's medical condition had not seemed to change.

On the other hand, if Claimant can submit medical verification that his condition has improved to the point he is able to return to work, the Carrier would be required to return Claimant to work or have Claimant examined by its own physician. If Carrier's physician disagreed with Claimant's physician, the next step would be the implementation of Article 45 in connection with the appointment of a neutral physician.

With respect to Claimant's current attempt to return to work, Claimant shall have 45 days from the date of this Award to furnish Carrier with the medical verification discussed above.

A W A R D

Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

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