

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36742
Docket No. CL-37253
03-3-02-3-275**

The Third Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

**“Claim of the System Committee of the Organization (GL-12813)
that:**

- 1. Carrier violated Rules 22 and 23 and others as may apply as well as past policy and practice when on November 25, 1998 the Seattle On Board Services crew base failed to allow the Claimant Jennifer Cummings to return from a medical leave of absence after she had provided a medical release to return to her regular job duties, signed by her physician.**
- 2. Carrier has violated the provisions of Rule 18(a) by not responding to this claim within the applicable time limits. Rule 18(a) was further violated as the highest ranking crew base officer, to whom the claim was addressed, has never responded in writing to District Chairman Crowley of his reasons for disallowing this claim.**
- 3. Carrier shall now be required to reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what she would have earned, including but not limited to daily wages, holiday pay and overtime, had she not been withheld from service.**
- 4. Carrier shall now reimburse Claimant for any amounts paid by her for medical, surgical or dental expenses to the extent that**

such payments would be payable by the current insurance provided by the Carrier.”

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 employee 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 were given due notice of hearing thereon.

At the time of the incident that gave rise to this dispute, the Claimant was employed by the Carrier as a Lead Service Attendant working out of Seattle, Washington. On February 6, 1996, the train the Claimant was working on derailed. She sustained an on-duty injury. She has been on an extended Medical Leave of Absence since that time.

Soon after the accident, the Claimant brought a suit against the Carrier under the Federal Employees Liability Act (FELA) contending that she was unable to return to work at Amtrak due to disability. The Claimant presented two of her numerous physicians as witnesses in the court proceedings to support her assertion of disability and inability to work for Amtrak. On February 27, 1998 (two years after the accident), the United States District Court rendered a decision finding no negligence on the part of defendants (Amtrak & Burlington Northern) and awarded the Claimant no monetary award. The Claimant thereupon appealed the Circuit Court's decision to the Ninth Circuit Court of Appeals.

Prior to the decision on the appeal being rendered, the Claimant reported to the Carrier on November 25, 1998 (more than two and one-half years after the injury) that her personal doctor, Dr. Dan A. Welch, had released her to return to

work on her regular job. The Carrier refused to accept the doctor's note and did not allow the Claimant to take a return-to-work examination.

On January 11, 1999, the instant claim was filed contending that the Carrier had denied the Claimant her right to return to work from a Medical Leave of Absence. The claim was not answered by the Carrier within 60 days, as is required by Agreement, so the Organization pursued the claim at the next step as a violation of the Time Limit Rule, Rule 18(a), as well as on the merits.

On April 6, 1999, the Carrier responded to the Organization's claim. It contended that since the Claimant was continuing her suit against the Carrier, having appealed the lower court decision, she could not on the one hand claim she was fit to return to work while maintaining in an active court action that she was disabled and seeking compensation through the courts. The Carrier claims that under these conditions, the Organization had no basis on which to file a claim and consequently any procedural arguments put forth by the Organization have no standing as well.

On October 28, 1999, the Court of Appeals upheld the lower court's verdict and reaffirmed that the Carrier was not negligent and the Claimant was awarded nothing. The Organization continued to press its case and the Carrier continued to maintain its position.

The latest piece of correspondence in the record is the February 8, 2001, letter from L. D. Miller to Mr. Daniel Biggs. That letter briefly states the Carrier's current position:

**"February 8, 2001
ASWC 3018 TC
(390-059-001)**

**Mr. Daniel Biggs
General Chairman
Transportation Communications Union
3 Research Place
Rockville, MD 20850**

Dear Mr. Biggs:

This refers to your January 12, 2001 letter regarding your claim on behalf of Seattle, WA Lead Service Attendant Jennifer Cummings.

Our position as outlined in our November 30, 2000 letter stands. The company's first contact with claimant since the Court of Appeals "defense verdict" on October 28, 1999, was her letter of January 8, 2001 (attached to your letter).

As stated in our previous correspondence, it is incumbent upon her to substantiate her ability to return to service by means of proper explanatory reports and records from those doctors who supported her disability. Upon receipt of those documents, claimant's medical status will be reviewed.

Very truly yours,

**L.D. Miller
Director
Labor Relations"**

The Board reviewed the extensive record of this case. While the portion of the record of the court proceedings contained in the record is most interesting and the position put forth by both parties are pertinent to a discussion of the Claimant's level of disability at the time of the trial, what is pertinent at this point is whether the Claimant is physically fit to return to her job at Amtrak and perform it with no restrictions or limitations placed on her by her doctors. Before the Claimant can be returned to work, she must be cleared by the Carrier's medical service, as is required when any employee returns from a long leave of absence.

The Claimant in this instance spent two and one-half years attempting to establish that she was disabled and could not perform her job as a Lead Service Attendant on Amtrak trains. On November 25, she appeared at a Carrier's office with a handwritten note from a doctor who was not involved in the FELA case, stating she could return to her regular position at Amtrak. No medical documentation of any sort accompanied the note. Carrier Officials refused to let the Claimant return to work for two reasons. One, she was actively pursuing her case against the Carrier, wherein she claimed some level of disability, through the

appeals process. Two, the Carrier concluded it needed some detailed medical comments concerning the Claimant's ability to perform her job at this time from the two doctors who testified at the court proceeding about the Claimant's disability, an inability to fulfill the responsibilities of a Lead Attendant.

The Board reviewed the issue of the Claimant's ability and right to return to work in detail. The Board has concluded that after two and one-half years of advocating the Claimant's disability, the Carrier has a right to demand the Claimant's detailed medical documentation from her medical doctors indicating that she is fit to return to duty. It is the Claimant's burden after advocating she was disabled for so long to present the information requested by the Carrier to now support her contention that she no longer is disabled.

The Board finds it startling that the Organization would support a claim that the Claimant is fit for duty while simultaneously supporting a court action to establish that she is not. The Board concludes that the Carrier has the right to put any action on hold concerning the Claimant's return to work until the court proceedings are completed. We also conclude that the initial claim in this instance was inappropriate. The Claimant had no contract right to return to work while she was advocating that she could not perform her duties. There was no Contract violation on the part of the Carrier and any claim filed in this situation has no meritorious standing. To argue that because the Carrier did not indicate that the claim had no standing and that it should not have been filed, it all of a sudden becomes a valid claim and the Carrier is obligated to honor the claim as filed defies reason and practical labor relations concepts. The cases submitted to support the Organization's position on this point were not on all fours with this case and were not otherwise persuasive.

The Board, however, has concluded that based on the whole record, the Claimant should be allowed to present herself for a medical review to ascertain if she is fit to return to work. She will be required to produce medical statements in some detail from the doctors who testified in the court proceedings, as well as from Dr. Welch, that, at this point, she is capable of returning to service and fulfilling her work responsibilities. As is expected, she will be subject to the Carrier's fitness-for-duty examination. The Claimant will receive her seniority and all other rights unimpaired if she is able to return to work, but no pay for lost work opportunities. The Claimant shall make herself available with the required medical documentation requested by Carrier Officials.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of October 2003.