Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38379
Docket No. CL-39319
08-3-NRAB-00003-06186
(06-3-186)

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

PARTIES TO DISPUTE: (Transportation Communications International Union
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the TCU (GL-13124) that:

1) The Carrier violated the TCU/CXT-North Rules Agreement, effective June 1, 1999, particularly Rules 36, 40, CSX's Medical Policy requiring an individual who performs no service for the Carrier for a period of 90 days or more obtain a return to duty physical exam, and other rules when on June 23, 2004, it failed to notify Claimant John Nardacci that he completed and passed his return to work exam and drug test. And in fact, the Carrier did not notify Claimant John Nardacci of this change in his work status until afternoon of Friday, August 20th, 2004.

2) That Claimant John Nardacci now be allowed 8 hours pay at the pro rata rate of $109.40 for each of the following dates: June 24 25, 26, 27, 28, 29 and 30. July 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31; August 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, 2004. In addition, Claimant John Nardacci also be made whole in every other way e.g., Claimant is to receive 58 days vacation credit for the calendar 2004, on account of this violation.

3) This claim has been presented in accordance with Rule 45 and should be allowed."

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.

The Claimant sustained an on-duty personal injury while working as a Stevedore on September 29, 2001. The extent of injury reportedly necessitated the Claimant to undergo extensive surgery. Following a period of recovery, the Manager of Vocational Rehabilitation worked with the Claimant, his personal physician, and an attorney who was then representing the Claimant in litigation against the Carrier, in an effort to return the Claimant to work under the Carrier's voluntary vocational rehabilitation program on alternative positions for which he would be physically qualified. In this respect, after being off work for about 33 months, the Claimant reported for a Carrier-scheduled medical screening examination by Occupational Medical Services, P.C., (OMS) of Albany, New York, on June 23, 2004. The examination report was forwarded to the Chief Medical Officer in Jacksonville, Florida, for review and determination on the Claimant's ability to return to work. A drug test administered during the medical screening examination was incomplete, and the Claimant submitted to a further drug test on June 29, 2004. The results of the medical screening examination were thereafter provided to local Carrier officials and the Claimant by the Medical Department on July 6, 2004 for what appeared to be a return to service with restrictions.

On that same date, July 6, 2004, the Medical Department received a report from the Claimant's personal physician that was dated May 25, 2004, a date prior to the date of the above mentioned OMS examination of June 23, 2004. Although this report from the Claimant's personal physician is not a matter of record, it is undisputed that it stated the Claimant could not work through June 28, 2004. This

report, the Carrier contends, gave reason for its Medical Department to request further information concerning the Claimant being physically qualified to return to work. The Chief Medical Officer therefore requested the Claimant's personal physician to provide up-to-date information regarding the Claimant's physical condition. A response to the Medical Director's request was not provided by the Claimant's physician until August 19, 2004. The latter response, although not a part of the record, reportedly stated that the Claimant could return to work with restrictions on August 23, 2004.

Following receipt of the August 19, 2004 response from the Claimant's personal physician, the Chief Medical Officer qualified the Claimant to return to work effective August 23, 2004, with restrictions. Upon being notified of this determination, the Claimant exercised his seniority on August 25, 2004, displacing onto a Driver/Messenger position at Selkirk, New York.

The claim at issue was filed by the Organization on behalf of the Claimant under date of September 27, 2004. Basically, it is the position of the Organization that the Claimant completed and passed a return-to-work medical examination on June 23, 2004, and he should not have been held out of service for some 58 days before he was permitted an exercise of seniority in a return to active service. The Organization thus alleges that the Carrier violated Rules 36 and 40 and "other rules," as well as its own Medical Policy, in a failure to timely return the Claimant to work.

It is the position of the Carrier that it acted properly and promptly to ensure that the Claimant was qualified and back to work in accordance with the timeline and restrictions set forth by his personal physician, and that the Agreement Rules cited by the Organization have no application to the dispute. The Carrier also says that even if it was to be assumed, arguendo, a determination on the physical qualifications of the Claimant should have been made prior to August 23, 2004, he would not have worked seven days per week, much less 58 consecutive days, as claimed.

In study of the record, the Board finds reason to question the Carrier's argument that any delay in returning the Claimant to work was the failure of the Claimant's personal physician to have responded in a timely manner to its Medical Department's request for "up-to-date information" on the Claimant's physical condition. On the one hand, the Board is unable to determine who was responsible for such delay because the date that the Carrier's Medical Department dispatched its

request to the Claimant's personal physician is not a matter of record. Conversely, or on the other hand, even if the Claimant's personal physician did not make a timely response, it remains questionable as to why the Medical Department was seeking so-called "up-to-date information" because the most recent examination of the Claimant at that time was already in the hands of the Medical Department. That is, the report of examination performed for the Carrier by OMS on June 23 or one month after the May 25, 2004 examination by the Claimant's personal physician. It would also seem to the Board that OMS as a part of its examination and evaluation of the Claimant on June 23, 2004, if not the Carrier, in view of litigation involving the on-the-job injury, would have then had on file reports of examinations performed by the five doctors OMS listed in its report to the Medical Department as having treated the Claimant for the on-duty injury, or have inquired of the Claimant when he was last examined by those doctors.

The Board also finds it significant that nothing of record shows what additional information concerning the Claimant's physical condition was subsequently provided by his personal physician, or to what extent, if any, that information differed concerning the physical condition of the Claimant from that which the Medical Department had in giving consideration to the report of examination by OMS on July 6, 2004.

In regard to Rules cited in support of the claim, the Board concurs with the Carrier's argument that the Organization failed to demonstrate the manner in which Rules 36 and 40 have application to the dispute. As the Carrier submits, Rule 36 - Basis for Pay, outlines how an employee is paid for the first 36 months of employment, and covers miscellaneous wage issues handled under the Conrail Implementing Agreement. While the Organization asserts this Rule is "germane to this dispute," it does not document the manner in which the Rule is applicable.

Rule 40 - Extra Lists, governs the assignment of work to employees on extra lists. As with Rule 36, the Organization does not offer argument sufficient for the Board to consider its application to the dispute. Furthermore, if citation of the Rule was to show in some manner that an employee could be required to work as much as 16 hours per day, seven days per week, as the Organization alleges, its contentions remain undocumented and unsubstantiated that the Driver/Messenger position to which the Claimant displaced is required to work extended periods of time, much less 58 consecutive days.

In the circumstances, although the Board concludes there were no Agreement Rule violations, we do find that the Carrier failed to notify the Claimant in a timely manner that he was physically qualified to return to work. Although the Carrier may well have had reason to inquire of the Claimant's personal physician as to the basis for his having said the Claimant could not work through June 28, 2004, the Carrier should have expedited any such need, as above stated by the Board. Had it done so, the Board believes that the Medical Department should have been able to complete its evaluation of medical reports on or about July 14 instead of August 20, 2004. This would have provided the Claimant an exercise of seniority for a return to work on Monday, July 19 as opposed to August 25, 2004. Accordingly, the Board will direct that the Claimant be awarded a regular day's pay at the straight time rate for the Messenger/Driver position to which he subsequently displaced for a total of 27 days covering the period July 19 through August 24, 2004. The balance of the claim is denied.

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 21st day of December 2007.