

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) Chicago and Western Indiana Railroad Company
TO THE) -and-
DISPUTE) Brotherhood of Maintenance of Way Employees

- QUESTIONS AT ISSUE:
1. Is Crossing Watchman Charles R. Geringer a protected employee and thereby entitled to forty (40) hours of pay each week at the straight time rate of a crossing watchman?
 2. If the answer to the above is in the affirmative, is Mr. Geringer entitled to payment since April 21, 1967, or is he entitled to payment only for the period beginning sixty (60) days prior to December 29, 1967 (date of claim presentation.)

OPINION OF BOARD: From early December, 1966, until early April, 1967, Claimant, a protected employee, did not work due to an infected leg, which was the result of flu and a diabetic condition. His doctor then advised him that he could return to his Crossing Watchman's duties, so long as it was not heavy work and he was not on his feet too long. According to Claimant, he was examined by Carrier's doctor who did not think that the leg had healed enough, but who said he should "try it anyway."

Claimant returned to work, apparently without incident, until he was laid off three weeks later for lack of work. Carrier offered Claimant work as a laborer, which he declined on the ground of physical incapacity. Laborers and Crossing Watchmen have separate contracts with Carrier. On May 4, Claimant was examined by Carrier's doctor for "entrance to service as Leverman from Crossingman." He was disqualified for that position "on account of hypertension, overweight and chronic varicose ulcers (active)."

Carrier declined to continue Claimant's compensation, because of his physical incapacity to do such work. However, pursuant to Article IV, Section 5, of the February 7 Agreement, physical incapacity to perform the work of another

*See 3rd Dec
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for these past time and
expenses*

position, under a different contract, is not grounds for loss either of protected status or of compensation due protected employees. Article II, Section 1, provides that protected status terminates if an employee fails to obtain a position available to him in the exercise of his seniority. But Carrier acknowledges that Claimant continues to be a protected employee, according to Carrier's letter of February 7, 1969.

Claimant's failure to work as a watchman certainly was not due to his physical condition, but to a reduction in force. Despite Carrier's contention on the point, Captain of Police Rauchenberger, in a letter to the general chairman on February 13, 1968, said that Claimant "was furloughed on account of force reduction...and he would be called back to crossingman's position in seniority order should the need arise."

More than a year after the physical examination, Carrier's doctor wrote "that Mr. Geringer would not have been physically able to perform the duties of a Leverman or a Crossingman." The latter finding is far too belated, based as it was upon a medical examination addressed to the physical requirements of a different position, to merit credence or to be relevant. For when compensation was denied it was because Claimant was unable to perform a leverman's job, and not because of inability to work as a watchman. Carrier's intervening statement that Claimant would be recalled as a Crossing Watchman if the need arose proves this. Claimant not having been disqualified for the duties of his regular position, he was not obliged to invoke the provisions of Rule 21 of the 1949 Agreement concerning physical examination by a neutral physician.

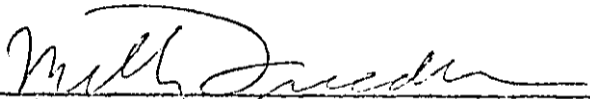
Since Claimant failed to work solely due to a layoff, he cannot be denied compensation under Article IV, Section 5, by a retrospective determination that he had been physically unable to work as a Crossing Watchman.

A W A R D

1. The answer to Question No. 1 is Yes.
2. The answer to Question No. 2 is that Mr. Geringer is entitled to payment

AWARD NO. 136
Case No. MW-43-W

for the period beginning sixty
(60) days prior to December 29,
1967.


Milton Friedman, Neutral Member

Dated: Washington, D. C.
September 10, 1969