

Special Board of Adjustment No. 910

PARTIES
TO
DISPUTE:

United Transportation Union
and
Consolidated Rail Corporation

STATEMENT
OF
CLAIM:

Request that Trainman Steven Koslov be restored to service or alternatively that a neutral physician be appointed under the provisions of Rule 96.

FINDINGS:

Claimant, a trainman with 13-3/4 years of service, was disqualified from work on November 26, 1986 after he had been examined by D. H. Price, PA-C, a physician assistant in Carrier's Health Services Department. In his letter of that date notifying claimant of his disqualification, Mr. Price stated that disqualification was due to

"The diagnosis of multiple sclerosis and the progressive nature of that disease."

Petitioner contests that action and in support of its position, cites letters by Dr. Richard Tenser and Dr. Richard Brown. Dr. Tenser's letter, dated December 12, 1986, reads as follows:

"Mr. Steven Koslov has been under my care because of Multiple Sclerosis. I most recently saw him on November 20, 1986. His Multiple Sclerosis continues to be in remission at the present time. His neurological examination was within normal limits. For this reason he may return to his employment.

Future exacerbations may occur but cannot be predicted. I have encouraged him to continue his employment since exacerbations may not occur."

Dr. Tenser is Professor of Medicine and Chief, Division of Neurology at the Hershey Medical Center at Pennsylvania State University. He is claimant's personal physician.

The Company objects to any consideration of Dr. Brown's letter. Its ground is that Petitioner failed to show that letter to Carrier representatives before this claim was progressed to our Board. We will sustain the Company's objection in this case. That is not to say that we are in complete accord with Carrier's position. We might find it appropriate in some situations to consider evidence bearing upon a sensitive issue, even though such evidence was not presented to the adverse party during discussions on the property. Such a situation might exist where no opportunity had been afforded for a more timely presentation of the evidence and it did not concern an issue that had not been duly raised on the property. However, before any such ruling would be made, both parties would have full opportunity to explore the point and it would have to be demonstrated that the evidence was essential to the case.

At any rate, a sharp difference of opinion exists between Carrier's Medical Department and claimant's doctor as to

whether claimant is physically qualified to return to work.

Petitioner requests that claimant be examined by a neutral physician pursuant to the provisions of Rule 96(b) of the applicable agreement. Rule 96(b) reads as follows:

"When a trainman has been physically disqualified and a physician of his choice disputes the medical diagnosis of the Corporation which resulted in the trainman's disqualification, such disqualification may be appealed and a request made for an examination by a neutral physician. The request for a neutral physician must be made by the General Chairman to the highest appeals officer of the Corporation. A copy of the findings of the trainman's personal physician must accompany such request. The neutral physician shall be a specialist in the field involved in the disqualification, and shall be selected by a physician designated by the trainman through his General Chairman and a physician designated by the Corporation. To the extent practical the neutral physician and the examination shall be at a location convenient to the trainman."

It is urged by Carrier that Rule 96(b) may be activated only when there is a dispute relative to the diagnosis of the employee's physical condition. In this case, Carrier contends, no such controversy exists since claimant has been diagnosed by both claimant and Carrier medical advisors as having Multiple Sclerosis. It is Carrier's view that because of his illness, claimant cannot safely and efficiently perform such trainman duties as walking on ballast, kneeling, stooping, climbing on and off the locomotive and carrying objects of up to 83 pounds.

We agree with Carrier's general theory that Rule 96(b) does not come into play if no dispute exists as to diagnosis of the employee's physical condition. We reaffirm the well

established principle that no panel of physicians is empowered to overrule physical and medical standards that are required by Carrier of employees and are not arbitrary or capricious. Carrier clearly has the right to prescribe reasonable standards of physical fitness for its employees.

There is no dispute in the present case that claimant has multiple sclerosis. Each of the physicians involved has arrived at that diagnosis. However, the fact is not controlling here since the record shows that employees who have multiple sclerosis have been found by Carrier qualified for full duty. According to Carrier's own standards, therefore, the illness at some state does not bar service as a trainman.

The critical question is whether that illness has progressed to a point where qualification for such duty is inappropriate. Understandably, Carrier's standards in that connection are not clearly set forth. They are more complex and quite unlike the easily applied standards of visual acuity (as in PLB 1312 Award 937), height, weight and blood pressure (PLB 2035 Award 14), or presence of a seizure disorder (S.B.A. 910 Award 4).

We are aware that PLB 2143 in a well reasoned award, No. 285, declined a request for a three-doctor panel in a multiple sclerosis case. However, significant factual distinctions exist between that case and the situation now before us. In Award 285, Board 2143 was careful to point out that

"There is no evidence before us that Carrier unreasonably delayed claimant's return to duty after the illness went into remission."

In the instant case, claimant's physician found that claimant's multiple sclerosis was in remission and that his neurological examination was within normal limits. His findings relate to medical conditions and diagnosis that are relevant and very much in issue in this case. A substantial question exists as to claimant's neurological condition and as to whether his multiple sclerosis condition is in remission. This is a medical question for experienced physicians to determine and the situation for Rule 96(b) to come into play. It is accordingly appropriate that a neutral specialist be appointed to serve in accordance with that Rule. This Board of course lacks authority to alter its terms.

Our holding does not affect, and we reaffirm the well settled principle that no board of doctors or referee is in a valid position to overrule reasonable physical standards promulgated by Carrier for the employment of trainmen. When supported by persuasive medical proof, Carrier may prescribe standards as to the stage at which an employee suffering from multiple sclerosis may no longer be fit to perform certain specific work functions.

AWARD:

Claimant's request for appointment of a neutral physician in accordance with the provisions of Rule 96 is granted. To be effective within 30 days.

Adopted at

December 9, , 1987



Harold M. Weston, Chairman


Carrier Member
Employee Member