

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25417
Docket Number MW-25475

Paul C. Carter, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Claimant M. B. Wiggins shall be reimbursed for all compensation loss suffered by **him** as a result of being improperly withheld from service beginning **November 2, 1982** (System File **MW-83-16**).

(2) The claim* as presented by General Chairman W. E. Allen on December 21, 1982 to Assistant Regional Engineer R. E. **Cox** shall be allowed as presented because the claim was not disallowed by Assistant Regional Engineer R. E. **Cox** in accordance with Section **1(a)** of Article 15.

*The letter of claim will be reproduced within our initial submission.

OPINION OF BOARD: The dispute herein began on the issue of the physical fitness of Claimant to return to work for the Carrier as an Assistant Bridge and Building Foreman. In the handling of the dispute on the property, a time limit issue also **became** involved.

The record shows that on July 7, 1982, following consultation with Claimant's personal physician, the Carrier removed Claimant from service based upon a diagnosis of Claimant's personal physician that Claimant was suffering from syncope. **Syncope** is defined as:

"...a fainting, or loss of consciousness, caused by a temporary deficiency of blood supply to the **brain**."
(Webster's New World Dictionary, Second College Edition).

On October 11, 1982, Dr. C. C. Meyers, Jr., whom the Organization describes as a specialist in Neurology, Beaumont, Texas, wrote the Carrier's Chief Medical Officer, stating in part:

"**Mr.** Wiggins states that he has had recurrent episodes of syncope since 1970. These episodes usually begin with leg cramps, then he becomes somewhat lightheaded and then has brief loss of consciousness. No seizure activity has ever been witnessed. With the last **two** episodes, he has been incontinent, but this is not typical of his other attacks. **He** is somewhat cold and clammy following these, and is diaphoretic. When he begins to arouse from the attacks, he can hear but cannot move, transiently. His last attack was in July of 1982. **He** has had possibly four attacks in the last ten years. **Most** of the ones in the last ten years have occurred **at night** when he was in bed and then when he gets up the syncope **ensues**. He had an outpatient CAT scan at St. Elizabeth and an EEG, **both** of which **were** normal.

Impression: I feel that these **syncopal** attacks may represent either transient arthostatis **hypotension** or hyperventilation. I did not feel that he has seizures and see no reason why he cannot be released to return to **work** and normal activities. I have recommended that he discontinue the Dilantin completely, and will be happy to see him again should other problems arise..

The record also contains a letter dated **October 18, 1982**, addressed to Carrier's Chief Medical Officer by **Dale C. Eager, M.D., P.A.**, Beaumont, Texas:

"It is my medical opinion that Michael Wiggins should be able to return to his normal work duties and activities based on all the tests performed by me and based on tests performed by Dr. Clyde C. Meyers, Jr., M.D. neurologist."

and a letter dated May 19, 1983, addressed to Carrier's Chief Medical Officer, by **Donald R. Webb, M.D., P.A.**, of Beaumont, Texas:

"Enclosed is a letter that I recently wrote for **Mr. Michael Wiggins**. If you need further information please let me know. Mrs. Wiggins expressed considerable disappointment in **what** I had to say. I do feel, however, **that** this was as far as I could go in recommending that Michael return to **work**. I tried to explain to Mrs. Wiggins that I am concerned about possible injury to this young man. As I told her, it is very difficult to quantitate the increased danger that this man has. Unfortunately, I think I have lost this family as patients. I do hope that your company and Mr. Wiggins are able to **work** out something to help this young **man**."

According to the Carrier, the above-quoted letter of **May 19, 1983**, contained the following penned in P.S. **"I talked with Dr. Myers today and he of course agreed that Michael is an increased risk for climbing=.**

Following the report of Dr. Meyers, dated October 11, 1982, Claimant requested that he be allowed to return to work, which request was denied. On November 2, 1982, the General Chairman of the Organization requested that Claimant's case he placed **"on** a three **panel** medical board and be **be** allowed to see a neutral doctor in order to resolve his **case"**. The request was denied, with advice to the General Chairman that the medical facts were not in dispute, and the Agreement contained no provision for a three-doctor board.

On December 21, 1982, the General Chairmen wrote **the** Carrier's Assistant Regional Engineer in part:

"We are presenting to **you** a claim in behalf of Assistant **B&B** Foreman **M. B.** Wiggins **for reinstatement** to his former position with pay for all time lost commencing **November 2, 1982,** and to run concurrently until such time that Mr. **M.B.** Wiggins is restored to service and his personal record cleared account him being unjustly removed from service account of medical reasons..

The Organization contended on **the property** and contends before the **Board** that the **Carrier** failed to render a decision on the claim within sixty days. The General Chairman so advised the Assistant Regional Wgineer on February 25, 1983. **The** Assistant Regional **Engineer** wrote the General Chairman on March 4, 1983, enclosing what be termed **"a copy of my reply dated February 7, 1983"**, in which the claim was denied. The Carrier's highest designated officer of appeals took the position on the property:

"You have also alleged Mr. **Cox** failed to decline claim within the time limit. As you **were** advised, Mr. Wiggins' case does not involve an **agreement or rule** violation, but is a medical condition being evaluated by both Carrier **and** Wiggins' personal physician, As such, even if claim was not denied within time limit, this would have no effect on the outcome of **Mr. Wiggins release** to return to work.'

The Board does not agree with the Carrier's contention **in this respect.** **The** letter of **December 21, 1982,** did constitute a claim as contemplated by Article 15 of the applicable Agreement. **The** issue before the **Board** in this respect is whether the claim was timely denied. In Fourth Division Award No. 3760, with this Referee participating, it was held:

'Many awards have been issued by the different Divisions of the Board involving the time limit rule of the 1954 National Agreement. **Numerous** awards have held that where the addressee denies receipt of **a** claim or a denial within sixty days, it is then the responsibility of the addressor to ensure receipt by the addressee within the **time** limit. See Third Division Awards Nos. 21088, 20763, 18661, 18004. 17999, 16357, 16000, 14354. See also Fourth Division Awards **Nos.** 3615, 3234 and **3097.**'

In addition to the Awards cited in Fourth Division Award No. 3760, see Third Division Awards 16163, 16537, 15070, 17227, 17291. We realize that there have been some Awards to the contrary, holding in effect that mail properly addressed **and** placed in the usual location for pickup and delivery, is constructive delivery of the letter. However, such Awards seam to be in the minority. We **are** forced to the conclusion that the Carrier was in violation of Article 15 of the Agreement. The question then **arises** as to the proper remedy for **such** violation. In our **Award** No. 24298, we held:

"Many awards have been rendered by **this** Division involving late denial of claims by Carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision **No.** 15 of the **same** Disputes Committee. **Decision** No. 16 of the National Disputes Committee, and awards following the issuance of that **Decision, have** generally held that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of late denial, disputes **are** considered on their merits if the merits are properly before the **Board.**"

There is no denial that the General Chairman received Assistant Regional **Engineer Cox's** letter of March 4, 1983, on March 7, 1983. Receipt of that letter was sufficient to toll Carrier's liability. We find that the proper measure of damage for Carrier's violation of Article 15, is compensation **for** Claimant Wiggins at his straight time rate from November 2, 1982, to and including March 7, 1983. Again **we** refer to Award **No.** 24298. Allowance **of** this portion of the claim on the **time** limit issue has no effect on the merits of the dispute.

As to the merits of the dispute, we adhere to the principle enunciated in our Awards Nos. 15357, 18512 and 22553 **that** the Carrier alone has the duty and the right to set and enforce medical standards for its **employees**, and the right to accept the recommendations of its Chief Medical Officer in such matters. In connection with the request for a neutral doctor determination, we stated in Award No. 22553, with this Referee participating:

"**The** governing collective bargaining Agreement does not diminish the Carrier's right to determine medical qualifications of clerks. **There** has, however, been an understanding between the Organization and the Carrier over many years that adjudication of a medical dispute by a neutral doctor will **be** provided when 'the findings of the employee's doctor conflict with those of the **Carrier's** doctor.' This understanding only subjects the disputed **medical** condition of a disqualified **employee** to neutral determination. It does not require **the** adjudication of the validity of the standards which the Carrier has the right to determine.

"**The** record **before** the Board does not contain evidence of a conflict in findings between claimant's physician and Carrier **'s** physician. There is, therefore, no proper basis for the Organization's contention that the Carrier violated the Agreement when it refused to agree to a neutral doctor to resolve the issue of claimant's disqualification."

The above findings are applicable in the present dispute. There is no dispute that **Claimant** has had recurrent episodes of syncope since 1970. **The** statement of Dr. Meyers, dated October **11**, 1982, is clear on this, and Dr. Webb's statement of May 19, 1983, expressed concern as to the *increased danger* that Claimant may present. With this **information**, the action of the Carrier's Chief Medical Officer in declining to approve the return of Claimant to service as a Bridge and Building **employee** was not arbitrary, capricious or in bad faith, and the Board is in no position to overturn his decision. We will not award that Claimant be restored to service or that he be compensated, except for the period November 2, 1982, to and including March 7, 1983.

FINDINGS: The Third Division of the Adjustment **Board**, after giving the parties to this dispute due notice of bearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated to the extent shown in Opinion.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1985.