

Award No. 5673

Docket No. 5494

2-N&W-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Carman R. E. Simmons, Lamberts Point Shop, Norfolk, Virginia is being unjustly withheld from service.

2. That Carrier has unjustly refused to medical arbitration that would determine if R. E. Simmons is capable of performing work as a carman.

3. That accordingly the Carrier be ordered to restore R. E. Simmons to service with vacation rights unimpaired and compensation for all time lost, from June 14, 1965.

(a) That Carrier pay the health and welfare and death benefit premiums for the time held out of service.

EMPLOYEES' STATEMENT OF FACTS: Carman R. E. Simmons, hereinafter referred to as the claimant, has been in the employment of the Norfolk and Western Railway Company, hereinafter referred to as the Carrier, for seventeen (17) years at Lamberts Point Shops, Norfolk, Virginia.

On or about November 12, 1964, claimant became ill and was hospitalized for 13 days and after being discharged was sent home to rest for 30 days; he then undertook gradual increasing physical activity, and at the end of another 30 days he had recovered completely.

On June 8, 1965, claimant's physician, Dr. R. C. Chapman, pronounced him fit to resume work. Attached and shown as Exhibit A.

On June 14, 1965, claimant reported to General Foreman O. H. Jennings, presenting a return to duty slip from Dr. R. C. Chapman; however, General Foreman Jennings refused to return claimant to service.

On August 9, 1965, claim was initiated for claimant, attached and shown as Exhibit B.

involves the use of heavy tools, such as sledge hammers, riveting hammers, air motors, etc., for extended periods.

Clearly, Mr. Simmons must perform work involving **strenuous and prolonged physical exertion**, and must be able to tolerate more than **moderate exertion**. (See Exhibit C.) Thus, Mr. Simmons has been disqualified by his own physicians, as well as the Carrier's Medical Department.

The claim of the Employees is without merit, and Carrier respectfully requests that it be denied.

(Exhibits not reproduced.)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Petitioner contends that claimant has been unjustly withheld from service by Carrier since June 14, 1965, when he reported to work with a statement from his personal physician indicating that he was physically qualified to perform the duties of his position; that Carrier arbitrarily refused to submit the question of the claimant's physical qualification to perform the work of his former position to medical arbitration; and that claimant is entitled to be reinstated with compensation for all time lost, as well as all other rights unimpaired, including vacation rights and payment by Carrier of health, welfare and death benefit premiums for the period that claimant was improperly withheld from service.

Carrier contends that the claim must be dismissed as it was not handled in accordance with Section 3 First (i) of the Railway Labor Act, as amended. Furthermore, Carrier avers that no Rule of the applicable Agreement was violated, as Carrier had sufficient reason to withhold the claimant from service until furnished with unqualified medical evidence that claimant was able to perform all of the duties normally performed by carmen.

The record reveals that the initial claim on the property sought reinstatement of the claimant with pay for time lost from June 14, 1965 until such time as the Carrier accepted claimant for active duty. Alternately, Petitioner requested Carrier to jointly submit the question of claimant's physical qualifications to medical arbitration. The instant claim has been expanded to include additional violations which were not alleged on the property, and further relief is sought on behalf of the claimant. Such additional allegations must be dismissed, but the original claim on the property will be considered as the expanded charges can be excised readily therefrom. (Award 5505.)

The fundamental facts are not in issue. Claimant had approximately seventeen (17) years' service on November 12, 1964, when he suffered a heart

attack (subendocardial myocardial infarction) and was hospitalized for thirteen days. Thereafter, he convalesced at home until January 26, 1965, when he initially sought to return to work. He was examined by Carrier's Medical Examiner, an outside cardiologist, as well as his own physician, prior to June 15, 1965, when his personal physician furnished claimant with a note stating that "patient has sufficiently recovered to permit him to return to work." Later, another cardiologist submitted a report on September 8, 1965, which, in part, stated as follows:

" * * * It is my impression that even with these various conditions (hypertension, systolic heart murmur, and myocardial infarction), he is able to lead an essentially normal life, **avoiding only strenuous and prolonged physical exertion.** From my discussion with him regarding his former work with Norfolk and Western Railway, it would be my opinion that he could return to his position as a car inspector for the railroad without danger to himself and others." (Emphasis ours.)

Despite this affirmative but qualified assurance from a medical expert concerning the claimant's ability to perform the duties of the position he formerly held, Carrier has refused to reinstate the claimant because he would be required to tolerate more than moderate exertion if he were to perform all of the work normally performed by carmen as opposed to his former car inspection duties.

Although we concur in Petitioner's contention that the question of claimant's physical fitness should be determined by impartial medical authorities, the provisions of Rule 37 of the controlling Agreement are inapplicable (Award 4099). There is no evidence that Carrier's refusal to permit the Claimant to return to work was arbitrary or capricious in this case, and, therefore, tantamount to constructive suspension or discharge.

Furthermore, Petitioner has failed to establish that Carrier has violated Rule 22 of the Agreement pertaining to assignments of light work to employees with long and faithful service, and this specific charge was not raised when the claim was considered by the parties on the property.

The remaining question for determination is whether Carrier has unjustly refused to submit the question of claimant's physical qualifications to perform carmen duties to medical arbitration. Analysis of the record reveals conflicting statements concerning the claimant's physical fitness by his personal physician and Carrier's Medical Examiner, as well as a qualified statement supporting the claimant's contention as to physical fitness by an impartial cardiologist. Even though no provision of the Agreement between the parties expressly provides for examination of an employee by impartial medical experts, both parties herein have already sought such advice concerning the physical condition of the Claimant. Moreover, Carrier agreed to consider any request for medical arbitration in this case while it was being considered on the property. In view of the foregoing, the parties should select a neutral physician to examine the claimant for the purpose of determining whether he has sufficiently recovered from his undisputed heart attack on November 12, 1964 to presently assume all of the duties normally performed by carmen, and the cost of such examination shall be borne equally by both parties.

As this Board is not competent to resolve the conflict of medical evidence before us, the findings of such a neutral physician shall constitute conclusive evidence as to the claimant's physical qualification to presently perform the duties of a carman. If claimant is found physically qualified for reinstatement, Carrier shall restore him to duty with seniority rights unimpaired, but without compensation for time lost.

AWARD

Claim is sustained as modified by the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1969.