Award No. 4244
Docket No. 4193
2-GN-FO-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Firemen & Oilers)

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Car Department Laborer Harry (Harilaos) Maras, Havre, Montana, is being unjustly withheld from service.

2. That Carrier has unjustly refused to have Harry Maras examined by Carrier's Chief Surgeon, and has unjustly refused to cooperate in establishing a three doctor panel to determine if Harry Maras is capable of performing work as a Car Department Laborer.

3. That accordingly the Carrier be ordered to compensate Harry Maras at the rate of eight hours each day at the applicable rate of pay, five days per week, re-troactive to July 1, 1960.

EMPLOYES' STATEMENT OF FACTS: Harry (Harilaos) Maras, commonly known as Harry Maras, and hereinafter referred to as the claimant, first entered the service of the Great Northern Railway Company, hereinafter referred to as the carrier, as a Laborer in the Car Department at Havre, Montana, August 25, 1955. He continued to work as a laborer in this department until March 13, 1958, when he was injured in an automobile accident. After sufficiently recovering from the effects of this accident, he was approved as fit for work by Great Northern surgeons, and returned to service September 8, 1958 and continued to work thereafter whenever his seniority permitted him to. Early in 1960 the claimant began to have spells of dizziness and momentary blackouts. He then took himself out of service March 13, 1960 to seek medical treatment. Following several months of such treatment, which included a trip to Rochester, Minnesota to consult specialists, the claimant reported to Dr. D. S. MacKenzie, a Great Northern examining physician at Havre, who pronounced him fit to resume work. About July 1,

3. The personal opinions of the claimant's own personal physicians that he should have returned to work immediately after his return from the Mayo Clinic do not indicate that they take into consideration the dangers of his employment, the legal responsibilities of the carrier and the fact that they had prematurely recommended his return to work previously.

4. There is nothing for a three-doctor panel to resolve, for the claimant's own personal physicians admit that he has suffered from post-traumatic seizures due to head injuries suffered in the 1959 automobile accident.

For the foregoing reasons, the carrier respectfully requests that the claims of the employes be denied.

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 were given due notice of hearing thereon.

Among the undisputed facts are that the Claimant Maras sustained injuries in an off-duty automobile accident on March 4, 1959. There is evidence that as a result of his injuries the Claimant suffered from seizures and that he was incapacitated for a time, during which he was treated by private physicians and also at the Mayo Clinic. The issue tendered by the claim is that the claimant was sufficiently recovered to return to work as of July 1, 1960, and that he be compensated at his applicable rate of pay since that date. In support of the claim the employes say that on June 27, 1960, Dr. D. J. Almas, by Dr. D. S. MacKenzie, Jr., of the Havre (Mont.) Clinic certified to the Carrier that the Claimant was able to return to work — said Drs. MacKenzie and Almas being Carrier's examining physicians. The organization further asserts that the Carrier was arbitrarily and unreasonable in refusing to join it in establishing a three-man board of physicians to examine the claimant and report as to ability to return to work.

The Carrier says that the doctors above named were merely its local physicians paid on a fee basis, and that they were not authorized by it to determine claimant's fitness to work, and that, in any event, they were in the instant case acting as claimant's personal physicians. Subsequently, on April 3, 1961 Drs. Almas and MacKenzie, Jr., again reported that, "If the patient (Maras) has not had a seizure for a full year, we would see no reason why he should not return to work". Then, on February 13, 1962, the Carrier's Vice President advised the General Chairman that the Chief Medical Officer would appreciate having a current Medical report of Mr. Maras' personal physician, giving his present condition, including a history of any seizures during the last year, medication being administered, and the prognosis. The record does not disclose any response to this request.

In view of the showing that the claimant was afflicted with seizures following his accident, we would not be warranted in finding that the Carrier acted arbitrarily in refusing to restore him to service. There does not appear to be any contractual obligation on the part of the carrier to set up a three-

man examining board, and there is a lack of preponderance sufficient to establish that it ever agreed to do so. The responsibility that a carrier owes to its employes, to the public, as well as with respect to its own liabilities are all calculated to preclude this Board from substituting its judgment for that of the carrier's with respect to such an involved matter as an employe's physical fitness to work.

We reject the claim on account of a failure of proof sufficient to sustain it.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June, 1963.

DISSENT OF LABOR MEMBERS TO AWARD 4244

The record filed with the Board in dispute demands that we dissent from the findings of the majority.

Under the terms of the applicable collective agreement as applied on this property for many years the carrier cannot withhold an employe from service without good cause. Whether an employe is physically fit is a question of fact to be determined in each case by an evaluation of competent medical findings.

Faced with situations of this type this Board for many years, with and without the aid of neutral referees, has followed the reasonable procedure of ordering an examination by a neutral physician with disposition of the claim to rest upon his findings.

The majority's failure to require the parties to this dispute to select a neutral doctor to determine the instant medical question is an evasion of the primary jurisdiction of the Board and the Railway Labor Act. See Slocum vs. DL&W R.R. Co. 70 S. Ct. 577.

James B. Zink

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger