Award No. 4705
Docket No. 4533
2-PULL-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, Car Cleaner Ada Honeycutt has been unjustly held out of service for alleged physical reasons since January 16, 1963.

2. That accordingly, the Carrier be ordered to return the aforesaid employe to active service in accordance with her seniority.

EMPLOYES STATEMENT OF FACTS: Car Cleaner Ada Honeycutt, hereinafter referred to as the claimant, had been employed by the Pullman Company, hereinafter referred to as the carrier, for approximately thirty (30) years, and was working as a car cleaner, five (5) days a week, eight (8) hours per day, when she was arbitrarily withheld from service and told to report to the carrier's physician, Dr. Walter Spoeneman on January 14, 1963, for physical examination.

Claimant reported as directed and following examination she was advised that she had been found unfit for further service and placed on sick leave effective January 16, 1963. Neither claimant or her representative have been furnished with copy of Dr. Walter Spoeneman's diagnostic findings. Neither have either been told why she was placed on sick leave except that she was found unfit for further service.

On January 19, 1963, after being advised that she had been placed on sick leave, claimant went to the Washington University Clinic in St. Louis, Mo., and submitted to physical examination by Dr. Arthur L. Mook, who after examination issued a statement that claimant was able to return to work.

On January 25, 1963, claimant submitted to and was given a complete physical examination by Dr. Jerome Williams, M.D., F.C.C.P., of St. Louis, Mo. Following his examination of Claimant, Dr. Williams addressed a letter to Attorney Charles R. Oldham of St. Louis, Mo. setting forth his diagnostic findings and opinion. In the last paragraph of his letter Dr. Williams stated:

> "There was no disabling condition found on this examination and there is no contraindication to the patient's working."

"Once the requirement of a physical examination is recognized to have been reasonable under the circumstances of this case, the fact that the complainant submitted certificates of fitness from his personal physicians the findings of which were later confirmed by the company's physician does not alter the conclusion as to the propriety of the carrier's action. * * * The fact that the complainant submitted medical certificates from his personal physicians was in itself an acknowledgment that the requirement of a physical examination was reasonable, and there appears to be no ground for accepting the findings of these physicians in place of those of the company physician as required by the carrier."

Further, in Third Division Award 2096 (Tipton), the Board held:

"The record fails to show the advice given by the physician was given in bad faith. The Carrier is entitled to hold an employe out of service on the bona fide advice of a physician that he considers the employe unsafe for service. (See Award No. 728.)"

Third Division Award 8394 (Bailer), holds as follows:

"The Carrier is charged with the responsibility of maintaining safe and efficient operation of its facilities. It has a heavy obligation to provided for the safety of its employes and of other persons entrusted to its care. In a matter such as the instant case, this Board should not set aside Management's judgment unless there is a showing of action that is arbitrary, capricious or evidentiary of bad faith. No such showing is made by the record before us. Thus the claim must be denied."

(See also Third Division Awards 11143 (Moore), 10920 (Boyd) and 11029 (Hall).)

CONCLUSION: In this ex parte submission the company has shown that the claim in behalf of Cleaner Honeycutt improperly is before the board because the organization failed to comply with the provisions of **Rule 37. Appeals,** which requires the organization to put management on notice within a specified number of days that its decision is not satisfactory. Also the company has shown that Cleaner Honeycutt's physical condition has been established by the evidence of record as rendering her unqualified for work as a cleaner. Finally, the company has shown that the action taken with Cleaner Honeycutt is consistent with numerous awards of the National Railroad Adjustment Board.

The organization's claim in behalf of Cleaner Honeycutt is improperly before the board, it is without merit, and it should 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.

The facts in the instant case are not in dispute. Claimant Honeycutt, was employed by the Carrier as a cleaner of cars for forty-four years. Some time ago the Carrier's physician, Dr. Spoeneman, after a physical examination, concluded that Claimant's health would not permit her to continue on her job. The Claimant's doctor disagreed with this decision and upon Claimant Honeycutt's request the Carrier agreed that another examination should be made by a neutral doctor who concurred in the conclusion of Claimant's own doctor that her condition was not such as to interfere with the proper performance of her duties.

Once again, in the instant case, Dr. Spoeneman, the Carrier's physician, examined the Claimant and found that she was physically unable to do her job. This time the Claimant was examined by the clinic at Washington University and three private doctors and all four medical reports concluded that no disabling condition was found which would prevent the proper performance of Claimant Honeycutt's duties. On the present state of the record the preponderance of the evidence is in favor of the Claimant.

Based on the findings and recommendations of her four doctors Claimant again requested the Carrier to establish an impartial medical board of three physicians and agreed to be bound by the decision of this neutral board.

The Carrier this time took the position that it had the sole responsibility of determining Claimant's fitness for work; it's Doctor, who is very familiar with the requirements of Claimant Honeycutt's job, made physical findings which resulted in her separation from service. Furthermore the Carrier points out that there is no provision in the current agreement which requires that a neutral medical board be established and this Board has no authority to add this provision to the said contract. In support of its position the Carrier cites a case decided by the Ninth Circuit Court of Appeals (**Gunther vs. San Diego & Arizona Eastern Railway Company,** 336 F 2d 543) which held that in the absence of a contractual obligation requiring examination by a neutral board of doctors where the Company's doctor and the Claimant's doctor disagree as to physical ability to continue on the job, the Carrier did not have to submit the issue in controversy to a neutral medical board.

The Organization for its part cites the case of **Hodges v. Atlantic Coast Line R. R. Company,** 310 F 2d 438 wherein the Fifth Circuit Court of Appeals held that the Adjustment Board could properly consider that its determination of a question of physical fitness would be aided by the use of a medical arbitration panel.

From the above it is clear that the Fifth Circuit and the Ninth Circuit are in disagreement. It is significant to point out however, that in the instant case while there is no contractual requirement compelling the establishment of a neutral medical panel there is a clear past practice, concurred in by the instant Carrier, wherein the same Claimant having been found to be physically unfit to perform her job by the same Carrier doctor, requested to said Carrier to establish a neutral medical board to finally determine this issue and the Carrier agreed so to do. In view of the past practice explained supra this Board sustains the requirement of the establishment of a neutral medical panel to determine the question of physical fitness.

AWARD

Claim disposed of in accordance with the above decision.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.

DISSENT OF CARRIER MEMBERS TO AWARD 4705, DOCKET 4533

The fact that the Carrier had once previously agreed to a neutral doctor to determine claimant's physical fitness to perform her job does not make a "clear past practice" for this or any other employe coming within the scope of the controlling agreement. In the absence of an agreed upon rule, one instance cannot be considered as "past practice."

As pointed out in the Findings of this Award "* * * there is no contractual requirement compelling the establishment of a neutral medical panel * * *" and on this basis the claim should have been denied.

On the same date this award was adopted, in disputes involving other Carriers but covering the matter of the establishment of a neutral doctor to determine the physical fitness of the claimant (Awards 4692 and 4693) the majority disposed of those disputes by dismissing them.

We believe like action was required in the instant dispute or in the alternative as stated above, the claim denied.

For these reasons we dissent.

H. K. Hagerman

F. P. Butler

H. F. M. Braidwood

P. R. Humphreys

W. B. Jones