**Award No. 4728**

**Docket No. 4634**

**2-NYC-BK-'65**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C.. I. O. (Blacksmiths)**

**NEW YORK CENTRAL RAILROAD (Western District)**

DISPUTE: CLAIM OF EMPLOYES: 1. That the Carrier violated the Physical Examination Agreement of November 19, 1942, when Blacksmith Welder Philip G. Marlin was unjustly held out of service from June 1st, 1961, to December 7th, 1961.

2. That the Carrier compensate Mr. Marlin for all the time he was unjustly held out of service.

EMPLOYES' STATEMENT OF FACTS: Philip G. Marlin, hereafter referred to as the claimant, entered the service of the New York Central Rail road Company at Ashtabula, Ohio, scrap and reclamation plant as a blacksmith welder on January 6, 1954, at which time he was required to take a physical examination by the Doctor. Claimant worked steadily except for a period he was furloughed due to a reduction in force. Claimant, prior to this accident, has never had an accident or lost any time due to sickness for the entire period of his employment.

The Claimant was injured on September 1, 1960, and was brought to the Ashtabula General Hospital.

The following day, September 2nd, 1960, he was released from the hospital about 2:00 P. M. and was required to go to the plant and fill out a time card in order to be paid for that day. The claimant, who was in severe pain from this injury, worked intermittently from this time until the time of his operation.

The claimant reported for work on June 1st, 1961. The carrier requested that he take a physical re-examination. The claimant was told to report to Dr. O. J. Lighthizer, railroad doctor, for this examination. Under the agreement, the claimant has a right to see his own doctor, so on June 2nd, 1961, the day after he reported for work, he was examined by Dr. Rosenberg and found physically fit to return to work.

Claimant reported to Dr. O. J. Lighthizer on June 3rd, 1961, and Dr.

to consist of the difference between the net amount Machinist C. A. Welch actually earned during the time he was laid off and the amount he would have earned during this period if he had not been wrongfully dismissed."

Award No. 1185, Referee George A. Cook:

"That Machinist Arthur G. Stephens' service rights were unjustly terminated at Albany, Oregon, and that accordingly the carrier is ordered to reinstate him in the service with pay for all time lost since April 11, 1946, less any amount that Mr. Stephens may have earned in other employment during the period mentioned."

Award No. 1215, Referee George A. Cook:

"Claim sustained with pay for time lost, less any amount earned in other employment during the period in question."

Award No. 1302, Referee Harold M. Gilden:

"It is concluded, therefore, that Machinist J. W. Robertson was unjustly deprived of reinstatement beginning January 7, 1948, and he should be reinstated with seniority rights unimpaired, and remunerated for all time lost as a result of the Carrier's action, with deductions for wages, if any, earned in any other employment during the period for which he is awarded back pay."

Award No. 4102, Referee Charles W. Anrod:

" * * * Moreover, from the compensation due to him there shall be deducted any remuneration which he may have earned in other gainful employment from and after July 6, 1960, until his re-instatement."

CONCLUSION: The carrier has shown it did not act arbitrarily or unjustly in not allowing claimant to return to work until the neutral doctor reported he was physically fit to return.

The claim is without merit or rule support and carrier respectfully requests that it 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 claim is that the Carrier violated the Physical Examination Agreement by unjustly holding Claimant out of service from June 1 to December 7, 1961, and should compensate him for the time lost.

The agreement provides (Sec. 3) that an employe presenting himself for

duty after an illness or injury may be required to pass a physical examination before resuming work. The procedure (Sec. 2) is for the employe's examination at his own expense by a doctor of his choice, and his prompt presentation to the Carrier of the doctor's detailed written report of his findings; if the Carrier considers the report satisfactory it shall return the employe to service; but if not, it shall have him examined by its own doctor, who shall make a like report. If the doctors do not agree, there shall be an examination and a similar report by a third doctor, and the majority opinion shall be binding on all parties.

The two doctors shall select the third if possible; if they agree upon a third, there is no provision for his rejection by either of the parties; but if they cannot agree upon a third doctor, he is to be selected by the parties' representatives.

Under the Physical Examination Agreement the employe is not entitled to resume work until he thus passes the examination, and there is no provision for establishing his fitness in any other way, or for the doctors' findings to relate back to any prior time.

After an eight months' absence due to a hip injury requiring surgery, Claimant reported for work on June 1, 1961, was required to pass a physical examination, and was given an authorization for examination by the Carrier's doctor. On June 2nd he was examined by his surgeon, Dr. Rosenberg, who gave him a note which did not detail his findings but merely stated his belief that he could safely attempt to return to work. This did not comply with the agreement and apparently was not given to the Carrier or its doctor. On June 3rd Claimant reported to the latter's office, learned that the doctor was absent from town, and was told to return on the 9th. Claimant injured his elbow in a skating accident on June 4th which required treatment by Dr. Shelby, and did not call at Dr. Lighthizer's office until June 20th. The only report shown from Dr. Shelby is one dated February 15, 1963, stating that Claimant was under his care and totally incapacitated from June 4th to June 21st, 1961, inclusive. He did not state that Claimant then became fit for work. Dr. Lighthizer examined Claimant on June 20th, 1961, and also decided that he then was not physically fit to resume work. On August 1st Claimant was examined by his heart specialist, Dr. Frankel, who submitted a detailed written report stating that in his opinion Claimant was fit to resume work. As their opinions did not agree, Drs. Lighthizer and Frankel attempted to name a third doctor, but could not find one satisfactory to Claimant and his representative, who under the agreement were not authorized to veto the doctors' appointment or refuse examination by him. However, the parties' representatives were authorized to appoint a third doctor if the first two doctors were unable to agree upon one, and finally did so on November 1st.

During the interval Claimant was examined at his own expense at the Mayo Clinic by two doctors, one of whom, Dr. Hargraves, made a detailed report of his examination, also detailed what he reported as Dr. Sullivan's findings upon the spine and hip examination, and stated that he and Dr. Sullivan believed there was no reason why Claimant could not resume work. It is alleged that Dr. Lighthizer agreed with Claimant's representative upon the appointment of the Mayo Clinic as the third doctor; Dr. Lighthizer denies this; the agreement does not provide for appointment by a doctor and a representative, or for the appointment of a clinic instead of a doctor; and the parties later agreed upon Dr. Wolkin.

Claimant was also twice examined for employment by other employers;

first, on August 24th by a registered nurse, who merely certified "findings were negative;" and again on October 30th by Dr. Blackman, who certified him physically fit for the position of "Burner, Class 2," the nature of which is not shown. He also performed welding from September 18th to October 16th for another employer, who certified that his services were entirely satisfactory. This evidence, which does not comply with the requirements of the agreement, indicates that Claimant was fit for at least some employment on certain dates between June 2nd and October 30th; but this Board is not authorized to ignore the agreement's provisions in considering whether the Carrier violated it.

Finally, after the two doctors abandoned their attempt to name a third, the parties' representatives on November 1st named Dr. Wolkin, who examined Claimant on November 10th and on November 29th certified him fit to resume work, which he did on December 7th, 1961.

Thus it was not until November 29th that under the procedure prescribed by the Physical Examination Agreement Claimant was shown qualified to resume work, and it is not contended that the Carrier unduly delayed his recall after that date. Consequently this Division cannot conclude that the Carrier violated that agreement by holding Claimant out of service between June 1st and December 7th, 1961.

The contract does not limit the time for the prescribed procedure nor provide penalties for delays. The Carrier cannot be blamed for Claimant's elbow disability, which totally disabled him for service from June 4th to June 21st, according to Dr. Shelby's statement which confirms Dr. Lighthizer's findings on June 20th. The record does not show the Carrier is at fault for the doctors' failure to name a third doctor satisfactory to Claimant and his representative, or for the delay of Dr. Wolkin's report. Consequently, even if the agreement prescribed penalties for delays, of if this Board were empowered to consider the equities instead of deciding claims according to the agreement, the Board could not find the Claimant entitled to pay for the period from June 1st to December 7th, 1961, nor find that the Carrier violated the agreement by holding him out of service during any part of that period.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May, 1965.