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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6434
Docket No. 6292
2-C&NW-CM-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 12 Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Chicago and North Western Railway Company

Dispute: Claim of Employes:

1. The Carrier unjustly removed Car Inspector Arthur Scheschi from service January 22, 1971, account of overweight.

2. That Carrier be ordered to compensate Arthur Scheschi eight (8) hours each day, January 23rd through April 11, 1971 - 56 working days - plus Holiday Pay, account George Washington's Birthday February 15, 1971, and his Birthday Holiday Pay, which was January 28, 1971, plus 6% interest on all wages lost.

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.

Claimant was hired in 1952 when he was 36 years old and weighed 216 pounds; he is 6 feet, 1 inch tall. In 1969, the carrier required claimant to be examined because he weighed over 250 pounds and Carrier claimed that the excess weight affected his ability to work. Claimant was examined periodically during 1969 and 1970 for his weight condition and each time told to lose weight. Although the exact dates do not appear in the parties' submissions, claimant had several accidents during 1969 or 1970 which carrier attributed to his overweight. Claimant was informed a number of times, orally and in writing that:, "you will be removed from service until you get your weight down to a safer level.", letter dated January 9, 1970, from the Division General Car Foremen. A letter dated September 23, 1970 from the Assistant Division Mechanical Officer to the claimant stated that the Medical Department advised that claimant was very much over

Company standards. Claimant was notified by letter to report for examination on January 11, 1971, and was warned: "You should make every effort to loose some weight by that time. If not, you will be removed from service until your weight is down to normal." At this examination, it was found that claimant was still overweight. A letter dated January 20, 1971 from Division Mechanical Officer to the Local Chairman, confirmed a conversation had with Assistant Foreman regarding this situation and stated: It is the findings of our Medical Department that Mr. Scheschi is overweight and will be removed from service until such time as his weight is down to acceptable limits." Claimant was removed from service on January 22, 1971. He was returned to service after re-examination in April 1971, subject to another examination in June. He had taken off 17 pounds.

By letter dated February 11, 1971, the General Chairman wrote to the Director of Labor Relations, referring to a discussion between them regarding the weight problem, after claimant had been removed from service on January 22. The Chairman conceded that claimant's weight was over 250 pounds but argued that he was always, "on the heavy side". The letter ended as a claim for reinstatement, with pay for time lost plus 6% interest. The Chairman's letter also referred to a, "letter of instructions of August 27, 1934," which states the following: "The employes under the Shop Craft Organizations Agreement will not be required to submit to physical examination unless it is apparent their health is such an examination should be made for the purpose of informing them of their disability, if any exists, in order that they may take treatment to improve their condition. An employe will not be removed from the service unless it is definitely determined after conference, under Rule 35, that he is unfit to perform his usual duties and in case a dispute arises the General Chairman and an Officer of the Company will agree on some competent doctor not in the employ of the Company to conduct an examination and the case will be disposed of on their findings." This was answered by letter from the Director to the Chairman, dated March 24, 1971, disagreeing on the merits and rejecting the claim because it," was not handled in the required manner in that it was not submitted to or ruled on by the appropriate Mechanical Department officers."

Apparently crossing in the mail, was a letter dated March 20, 1971 from the local chairman to A.D.M.O., setting forth a continuing claim based on the same circumstances. The March 20, letter referred to claimant's examination by two of his doctors in which they reported that, "---Art Scheschi is in good health except a little overweight and okay to go back to work." These examinations were made on 2-3-1971 and 3-1-1971, after he was removed from service.

The Organization's claim is argued on three points: First, the letter of March 20, 1971 started the claim properly. Therefore, appeal to this Board was within 9 months and timely, after all steps to appropriate officers of carrier had been complied with; Second, the carrier violated Rule 35 of the Agreement and "letter of instructions of August 27, 1934"; Third, the carrier failed to conduct an investigation pursuant to a March 9, 1967 letter of understanding, prior to taking disciplinary actions.

The Carrier has opposed the claim on the grounds that: First, the claim dated February 11, 1971 to the Director of Labor Relations was denied by him at the final step on March 24, 1971 so that appeal to this Board was not timely

(in excess of 9 months); Second, the letter of claim dated March 20, 1971 may not be considered because it is the second claim for the same matter, a procedure which has been disapproved in prior Awards of this Division; Third, its action was justified on the merits; Fourth, there was discussion with the Local Chairman before removal from service, and that after following a weight reduction program, the claimant did reduce to the required weight and was restored to service; Fifth, this was not disciplinary action so that a preliminary investigation was not required.

We can dispose of the argument regarding lack of investigation. We find that this case does not involve disciplinary action.

The carrier's claim that the appeal to this Board was untimely is not correct. The carrier considers its letter of March 24, 1971 from the Director of Labor Relations rejecting the claim, as the final step, thereby starting the 9 months running for appeal to this Board. The reason given for rejecting the claim is that the Organization did not follow the steps required before reaching the Director. However, the Organization, before receiving the March 24, letter, initiated the claim properly by letter of March 20. This is different from the facts stated in prior Awards submitted as precedent. The appeal was not taken to this Board on the ground that the carrier was in error in refusing to consider a claim improperly before the Director of Labor Relations.

The appeal was taken to this Board from the final step of a continuing claim presented by the Organization in its letter dated March 20. It is true that the Organization's February 11, letter requested reinstatement with pay and interest. We do not believe that the March 20, letter setting forth the claim in detail was an expansion of the claim in the letter dated February 11.

It appears that the February 11, letter, although stating a claim, was more of a confirmation of the result of informal discussion engaged in between the parties. The carrier appears to acknowledge this by answering in its letter dated March 24, that the claim had not been processed through the appropriate officers to the Director of Labor Relations.

The Organization is not correct in asking this Board to disregard references to high blood pressure and the medical reports of the series of examinations held during 1969 and 1970. These reports were incidental to the examinations, known to the claimant and a matter of record available on the property. In addition, it is common knowledge that high blood pressure may exist when a mature individual gains 40 pounds.

Under the circumstances of this case, we believe that to decide it on the technical grounds claimed by the carrier could disturb stability in labor relations between the parties. It could tend to eliminate informal discussions of grievances which is often the way to settle matters amicably on the property. Before receiving the March 24, reply letter, the Organization had acted to present the claim according to the required procedure.

The main issue in this case is: When should the claimant have acted to present a grievance? The employe's weight as a factor in doing his work was in issue as early as March, 1969. Several accidents occurred which carrier believed

to be the result of his excess weight. Properly and for sufficient reasons, carrier's doctors examined claimant in March 1969. Tests were made in April 1969. Claimant was permitted to remain in service but was warned that unless his weight and blood pressure came down, he might be removed from service. Claimant was reexamined in June, September and December of 1969. He was taking medication for high blood pressure and his weight came down at first but went up again in December 1969 to 251 pounds. He was advised in writing on January 9, 1970 that because of his failure to lose weight, the medical department was concerned and that if claimant did not lose a few pounds prior to the next examination, "---you will be removed from service until you get your weight down to a safer level." He was examined again in March 1970. His weight was down, his blood pressure was normal. Examined again in June, he had lost more weight, down to 236 pounds.

However, when examined in September, he had gained 4 pounds and was again warned, "You should make every effort to lose some weight---. If not, you will be removed from service---." When examined again on January 11, 1971, claimant's weight was not down to acceptable limits so that in a letter dated January 20, 1971, he was notified that he would be removed from service.

Discussion of the examinations, and letters from the carrier to claimant have been repeated to make the point upon which the ultimate disposition of this case should be made. In April 1969, claimant was warned that he "might" be removed from service. In December 1969 and thereafter, the letters from the carrier stated that claimant "will" be removed from service. After each examination and in each letter, overweight was stressed.

The grievance should have been filed no later than the date when the first notice that claimant "will" be removed from service was given to him. There was ample time to invoke the rule set forth in the "August 27, 1934 letter of instructions". Claimant through his Organization should have sought the findings of a neutral doctor no later than September 1970. Claimant gave the carrier reason to believe that he was agreeable to the course of conduct being followed; that he was cooperating; that he knew he would be removed from service if he did not get his weight down. Under such conditions, claimant may not be permitted to cry "Foul" when the warnings were carried out. It is interesting to note that within 3 months, claimant did lose enough weight to be reinstated, after he had nearly 2 years to do so.

The reports of claimant's doctors could be accepted as those of neutral doctors to satisfy the Organization's claim as to the requirements of the 1934 agreement. The claimant's doctors agreed that claimant was overweight. The carrier has discretion to determine whether or not to continue in service an employe whose excess weight it deems to be a hazard to himself and others. The ultimate result would be the same. Carrier would be justified in removing claimant from service until his weight was reduced to a level which would reduce the element of risk to himself and others on the job.

Awards discussing elements of this situation but not sufficiently in point have been reviewed. They are: Second Division, Nos. 4510, 4924, 5739, 6278 and Third Division 13126, 15327.

We find that the claimant did not avail himself of his remedy under the grievance procedure of Rule 32 of the Agreement within the time set forth.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January, 1973.