

The Second Division consisted of the regular members and in addition Referee Edmund W. Schedler, Jr., when award was rendered.

Parties to Dispute: (System Federation No. 100, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Consolidated Rail Corporation
((formerly Lehigh Valley Railroad Company)

Dispute: Claim of Employees:

That the Carrier violated the controlling agreement when they arbitrarily removed Carman Raymond Kindt from service effective September 30, 1971. Buffalo, New York Car Department.

That the Carrier be ordered to return Carman Raymond Kindt to service with seniority unimpaired, compensate him at his applicable rate of pay for all work days lost, payments be made on premiums for hospital, surgical and medical benefits, and Group Life Insurance.

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.

This clarification of Award No. 6561 of the Second Division of the National Railroad Adjustment Board was order by the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 74 - 1456 on May 18, 1976. The facts leading up to the MEMORANDUM AND ORDER were not disputed. On July 23, 1973 the National Railroad Adjustment Board by Order of the Second Division awarded Carman Raymond Kindt:

- (1) Restore the Claimant to service with seniority rights unimpaired.
- (2) Make the Claimant whole for all vacation rights.
- (3) Pay premiums for hospital, surgical, medical benefits and group life insurance.

- (4) Restore all pay lost from September 29, 1971 until restored to service less any other wages made on any other job during this period.

and the Board issued an order to make Award No. 6561 effective on or before August 23, 1973. On August 6, 1973 the Carriers filed a dissent to Award No. 6561.

The Carrier made arrangements for Carman Kindt to take a physical examination on October 23, 1973 and on December 4, 1973. Carman Kindt has refused to take a physical examination. On June 11, 1974 the Carrier filed with the United States District Court for the Eastern District of Pennsylvania a petition for a review of Award 6561 and the order of the National Railroad Adjustment Board. On May 18, 1976 the Court, on cross motions of the parties for summary judgment, issued a MEMORANDUM AND ORDER and the pertinent language for the Board to consider is found on page 6 of the ORDER, to wit:

"The order of the Board as to a reinstatement physical and as to the consequences of a refusal to submit to such a physical is too vague to be considered a final award capable of judicial enforcement. Order of Railroad Con. & Brake. v. Erie Lackawanna R. Co., 302 F. Supp. 1196 (N.D. Ohio 1969); Brotherhood of Railroad Signal. v. Chicago, M.St. P. & P.R. Co., 284 F. Supp. 401 (N.D. Ill. 1968); 45 U.S.C. 153 (m), (p), (q). The award before this court is not final and is incapable of enforcement, because it is inappropriate for this court to determine what effect the respondent's refusal to submit to a physical would have on the award. Courts have held that Board is the proper forum for such clarifications of awards. Brotherhood of Railroad Signalmen v. Southern Ry. Co., 380 F. 2d 59 (4th Cir. 1967); Order of Railroad Con. & Brake. v. Erie Lackawanna R. Co., supra. Therefore, under the fact situation present in this case, the court will order the enforcement of the award up to the time of the reinstatement physical refusal and will remand to the Board for a clarification of the effect of respondent's refusal to submit to a physical examination on the remainder of the award."

A panel discussion was held in Chicago on May 19, 1977 and the question at issue before the Board was whether or not the Carrier has the right to require Kindt to take a physical examination before returning to work under an Order from this Board. If the answer to the question at issue is "yes", what will be the remedy where the claimant refused to take a physical examination. Those questions are in accordance with the MEMORANDUM AND ORDER.

The Carrier's position was that they did have the right to require a physical examination before Kindt returned to work. The Carrier submitted numerous awards to support their position and we will discuss those awards.

1. In Award No. 8535 (Third Division) this Board held that where the Agreement is silent on the matter of physical examinations and the Claimant had been absent due to illness for extended periods of time, the Carrier's decision to require a physical examination before the Claimant returned to work was entirely reasonable. This award is distinguishable from Award No. 6561 because Kindt was examined by the Carrier's physician on August 16, 1971 before he was withheld from service on September 29, 1971.
2. In Award No. 7033 (Second Division) Carman D. R. Bazzell was out of service from January 24, 1972 to June 7, 1972 for herniated lumbar disc surgery. He was examined by the Carrier's physician and disqualified from returning to work on June 26, 1972 by the Carrier's Chief Medical Officer. Award No. 7033 is similar to Award No. 6561 in that this Board made a determination in a medical controversy. The back pay damages were awarded from the date June 26, 1972 which was immediately after the Carrier's Medical Officer received a report of the Claimant's physical examination and there was no unreasonable delay in the Carrier's review of the Claimant's medical record.
3. Award No. 6880 (Second Division) has a striking similarity to Award No. 6561. In Award No. 6880 the medical controversy was resolved by a panel using the Claimant's physician, the Carrier's Medical Director, and a neutral physician. In sustaining the claim this Board ordered the Carrier to pay the Claimant from the date he was removed from service to the date he returned to service (August 22, 1972 to April 19, 1973) less any outside earnings. The material difference between Award No. 6880 and Award No. 6561 was that the Board did not have the benefit of the medical opinion of a neutral doctor in 6561.
4. Award No. 6851 was a disciplinary grievance for use of abusive language and unauthorized leaving of work. No medical controversy was involved and this award is clearly distinguishable from No. 6561.
5. In Award No. 6850 (Second Division) Carman Gourdin was off work from August 1 to August 7 due to high blood pressure and not feeling well. Carrier required 3 days of medical examinations before returning Claimant to work. The claim was that 3 days of medical testing was arbitrary and unreasonable. This award is clearly distinguishable from Award No. 6561.
6. In Award No. 6758 Carman Mullins was held out of service from April 25, 1972 to September 18, 1972 for medical reasons. On July 21, 1972 the Carrier's Chief Surgeon received a certificate from a qualified physician giving the Claimant a "clean bill of

- health." The essence of Award No. 6758 was the delay in returning the Claimant to work between July 21 and September 18. In Award No. 6758 it was unnecessary for this Board to resolve a controversy over fitness - the award was simply a matter of determining damages due to a delay in returning to work. Award No. 6758 is distinguishable from Award No. 6561.
7. In Award No. 6842 Electrician K. R. Osborn was absent from work due to illness from November 20, 1972 to January 2, 1973. His return to work was delayed an additional 16 days for the Carrier to verify his fitness for service. This award is similar to Award No. 6758.
 8. In Award No. 6704 (Second Division) Electrician E. H. Eaton was out of service from January 8, 1972 to March 11, 1972. He returned to work on March 13 with a medical release from his physician but his start to work date was delayed until March 22 to allow the Carrier's Chief Medical Officer to review the Claimant's record. In Award No. 6704 there was no medical controversy over the Claimant's fitness to return to work and this award is distinguishable from Award No. 6561.
 9. In Award No. 6039 (Second Division) the Claimant was withheld from service in the wrecking crew because he stuttered. This Board ruled that the Claimant had an impairment that could be detrimental to the safety of the wrecking crew and Award No. 6039 is distinguishable from Award No. 6561 on the merits.
 10. In Award No. 4099 the Claimant was held out of service for his failure to pass the Company's physical examination. Claimant had a "disc back injury" operation in November 1956; and, after a physical examination September 15, 1958 the Carrier's medical officer deemed the Claimant was unfit to return to work. The record was devoid of any contrary medical opinion, hence Award No. 4099 is distinguishable from Award No. 6561.
 11. In Award No. 6363 Carman Olsen was off work for medical reasons from July 23, 1970 to August 5, 1970 and he returned to work with a medical release on August 5. Carrier withheld Olsen from service until he was examined by the Carrier's Chief Surgeon and the Chief Surgeon authorized the Claimant to return to work on August 19, 1970. Award No. 6363 was a controversy over the delay in returning the Claimant to work and this award was similar to Award No. 6561.
 12. In Award No. 6700 (Second Division) Carman Pettet was held out of service after he returned to work in April 1971 from a knee operation. He did not get an unconditional release from his physician until July 13, 1971 and he returned to work on July 27, 1971 after the Carrier's physician found him qualified. Award

No. 6700 is similar to Award No. 6363 and is distinguishable from Award No. 6561.

13. In Award No. 6269 Carman Lord injured his ankle while hunting and was absent from work one or two days to recover. He was required to furnish a medical release before returning to work and this cost Lord an additional day off work. Award No. 6269 is obviously distinguishable from Award No. 6561 where Carman Kindt was withdrawn from the work force while at work.
14. In Award No. 2077⁴ (Third Division) the Claimant was removed from service for medical reasons. In denying the claim this Board ruled that the Organization failed to prove the Claimant's medical fitness.
15. In Award No. 203⁴ (Third Division) the Claimant was withheld from service from December 6, 1971 to February 18, 1972 to allow the Carrier to review the Claimant's medical record. This claim was that the Claimant had been withheld from service too long. On the merits, the Board held that where the Claimant had taken severe, potentially self destructive steps and been subjected to lengthy hospitalization the Carrier did not violate the Agreement in delaying the Claimant's return to work. Award No. 203⁴ is distinguishable from Award No. 6561.
16. In Award No. 14389 (Third Division) the Claimant refused to sign the medical forms. The Carrier's right to require a physical examination was not at issue. The Claimant's signature was necessary to properly identify the individual taking the physical examination. Award No. 14389 is distinguishable from Award No. 6561.
17. In Award No. 10920 (Third Division) the Claimant requested 30 days of sick leave which was extended to August 20, 1960. Claimant was on vacation from August 22 to September 2, 1960. An investigation into charges made by employees against the Claimant was held on August 24, 1960. Claimant was not present at the investigation, but the District Chairman and the Claimant's spouse were present. From the investigation the employer concluded that Claimant must take a physical examination before returning to work. Claimant was advised of this requirement on September 2, 1960. Claimant asked for a 90 day sick leave to end December 5, 1960. She furnished a medical statement from her physician to resume work on that date and she refused to take an examination by the employer's physician. The Organization contended the employer could not require the Claimant to submit to a physical. The record was devoid of any information the Claimant was examined by the employer's physician subsequent to illness. Clearly, Award 10920 is distinguishable from Award 6561 in that in Award 6561

Kindt was examined by the Carrier's physician on August 16, 1971 prior to being withheld from service.

18. In Award No. 14249 (Third Division) Claimant sued the Carrier for back injuries; suit was settled for \$3500 on November 29, 1962; and Claimant had been withheld from service. On December 27, 1962 the Claimant initiated a complaint to return to work. In denying the claim, the Board found that the Claimant had already had his day in court and there must be an end to disputes. The merits of Award No. 14249 are distinguishable from Award No. 6561.
19. In Award 11909 (Third Division) the Claimant's vision did not meet the Carrier's minimum requirements. This award is distinguishable from Award No. 6561.
20. In Award 20845 (Third Division) the Claimant did not avail himself to a board of physicians to rule on his fitness. This award is distinguishable from Award No. 6561.

This Board also reviewed Award No. 19806 (Third Division), Award No. 19905 (Third Division), Award 19328 (Third Division), Award No. 18710 (Third Division), Award No. 18236 (Third Division), Award No. 15367 (Third Division), Award No. 11646 (Third Division) and in the opinion of a majority of this Board those awards were submitted to encourage this Board to reconsider the merits of Award No. 6561. We refuse to reconsider the merits.

Award No. 6561 resolved the controversy over the medical fitness of Carman Raymond Kindt to return to service and that award found that Kindt was physically fit to return to service. Award No. 6561 neither intended for Kindt to take a physical nor did the award require Kindt to take return to work physical. Kindt had a physical examination by the Carrier's physician 44 days before he was withheld from service on September 29, 1971 and there was no evidence that his condition had changed by October 23, 1973 when the Carrier ordered him to report for a return to work physical. The answer to the question at issue is "no, the Carrier did not have the right to require Carmen Raymond Kindt to take a physical examination before returning to work under an Order from this Board" and the Carrier will abide by the Order of the Board dated July 23, 1973, to wit:

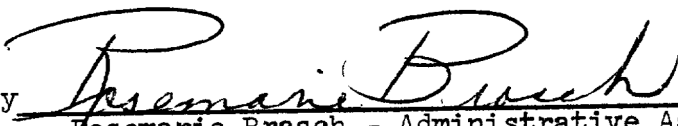
- (1) Restore the Claimant to service with seniority rights unimpaired.
- (2) Make the Claimant whole for all vacation rights.
- (3) Pay premiums for hospital, surgical, medical benefits, and group life insurance.
- (4) Restore all pay lost from September 29, 1971 until restored to service less any other wages made on any other job during this period.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of July, 1977.

