

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(System Council No. 7
(Consolidated Rail Corporation (Conrail)

Dispute: Claim of Employees:

1. That under the current Agreement the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician G. S. Provenzano from service effective February 24, 1982.

2. That accordingly the Consolidated Rail Corporation be ordered to restore Electrician G. R. Provenzano to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

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 employes 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, Electrician Gary S. Provenzano, entered the Carrier's service on June 25, 1974. On February 5, 1982, Claimant was charged as follows:

"Under date of January 22, 1982, you were directed to report to Conrail Medical Department, Room 474, 30th Street Station, Philadelphia, Pennsylvania, on February 1, 1982, at 1:30 p.m. for a physical examination. The letter stated that you were also to have Form MD 12-B filled out by your personal physician and brought with you on February 1, 1982. You failed to keep this appointment.

In connection with this matter you are charged with the alleged violation of insubordination.

At the time of the incident involved in this case, the Claimant had been continuously out of service as a result of injuries sustained on the job on October 1, 1981.

Following an investigation held in absentia on February 19, 1982, at which Claimant was found guilty as charged, Claimant was dismissed from service effective February 24, 1982.

The Organization's argument rests upon Rule 8-J-1 of the Rules of Agreement Governing Physical Examinations on the Carrier's Property. Rule 8-J-1 states:

- (a) Employees in service covered by this Agreement shall not be required to submit to periodical physical examinations unless required by State or Federal Law. Such examination shall be given during employee's tour of duty when practicable to do so, without loss of compensation to the employee.
- (b) Examinations required of an employee returning from furlough, sickness, disability or from a leave of absence, need not be given during the employee's regular tour of duty.

8-K-1 When an employee has been disqualified from his position on account of his physical condition and the employee desires the question of his physical fitness to be finally decided before he is permanently removed from his position, the case shall be handled in the following manner:

The General Chairman shall bring the case to the attention of the Senior Director-Labor Relations. The Senior Director-Labor Relations and the employee shall each select a doctor to represent them, each notifying the other of the name and address of the doctor selected. The two (2) doctors thus selected shall confer and appoint a third doctor.

Such Board of Doctors shall fix a time and place for the employee to meet them. After completion of the examination they shall make a full report in triplicate, one (1) copy to be sent to the Senior Director-Labor Relations, one (1) copy to be sent to the Medical Director, and one (1) copy to be sent to the employee.

The decision of the Board of Doctors setting forth the employee's physical fitness and their conclusions as to whether he meets the requirements of the Company's physical examination policy shall be final, and shall be placed into effect within ten (10) days after the date on which the report is received by the Senior Director-Labor Relations. In the event of a future physical change in the condition of the employee, either the Senior Director-Labor Relations or the employee may at a later time begin proceedings for further examination by another Board of Doctors.

"The doctors selected for a Board shall be experts in the disease or injury from which the employee is alleged to be suffering, and they shall be located at a convenient point so that it will be necessary for the employee to travel a minimum distance, and if possible not be away from home longer than one (1) day.

The Company and the employee shall each defray the expenses of their respective appointees. At the time their report is made, a bill for the fee and traveling expenses, if there are any, of the third appointee should be made in duplicate one (1) copy to be sent to the Company Medical Director and one (1) copy to the employee. The Company and the employee shall each pay one-half of the fee and traveling expenses of the third appointee."

The Organization argues that Claimant was not required to take a physical examination under the provisions of Rule 8-J-1 which relate to physical examinations. Under Rule 8-J-1(a), the Organization submits that the Carrier has failed to show that the examination was required by a state or federal law. And, as far as Rule 8-J-1(b) is concerned, the Organization contends that Claimant did not fit into the category of an employee returning from furlough, sickness, disability, or from a leave of absence.

Consequently, the Organization argues that there was no rule violation or insubordination as no Company written policy or state or federal law required the Claimant to appear at the examination when he was off on furlough.

The Organization argues further that the Claimant was not in service at the time of the Company's "order" and was not being paid. He was not on the property; not seeking return to work; there was no emergency; and the physical examination had no immediate effect on the Carrier's operation. Moreover, the Organization contends that the physical examination, which the Carrier order the Claimant to attend, would have been a long trip which, in the Claimant's physical condition, the Claimant would have been unable to make.

The Organization objects that the trial of this matter was held in absentia. The Organization contends that the Claimant was not given an opportunity to defend himself against the charges.

The Carrier contends that the Claimant was notified to attend both the appointment for the physical examination and his trial, and he failed to attend either and, consequently, was thereby dismissed from all service.

The Carrier contends the Claimant's action in failing to report for the physical examination and to have his personal physician complete a medical report all constituted insubordination. The Carrier contends such a wilful disregard of the Carrier's instructions is a major offense requiring severe discipline.

The Carrier points to several cases involving insubordination where an employee refuses to perform work and where an employee does not report for a medical evaluation. However, the Carrier makes no reference to any rule or written requirement that an employee, on a disability leave, working for this Carrier must report for a physical exam.

In the panel discussion, Carrier's representative referred to some "innate right" of the Carrier, if an employee is on disability, to require an employee to come in for a physical exam.

This Board is not aware of any "innate right" of Carrier and must review only the evidence and written rules and guidelines before it. This Board is also aware that many Carriers have rules which specifically require employees to appear for physical examinations when they are on disability leave. No such rule was presented here and, in fact, the Organization argued that no such rule existed.

There was insufficient evidence presented at the hearing to support Carrier's position that the Claimant was insubordinate. Carrier may have "believed" that the Claimant was able to return to work but has presented no evidence to support that proposition. Under Carrier Rule 8-J-1, the Carrier is not permitted to require an employee off on disability leave to report for a physical examination nor to treat his failure to report for said examination as insubordination.

On the other hand, an employee off on disability does have the responsibility of keeping his employer informed of his condition.

This Board has thoroughly reviewed the evidence in this case and hereby finds that the Carrier acted arbitrarily when it dismissed the Claimant for insubordination when he failed to appear for his physical examination. There was no evidence in the record that demonstrated that the Claimant was physically able or economically in a position to comply with the Carrier's instructions. Claimant was not in the service at that time and was not receiving pay.

This Board thereby orders that the Claimant is to be reinstated to service with seniority unimpaired, but without any back pay since there was no evidence that he was capable of performing any work since the date of his dismissal. If Claimant believes that he is capable of returning to work, Claimant is ordered to report immediately to the Carrier for an examination and for assignment. If Claimant is still disabled, he should present evidence of that disability to the Carrier. If he is unable to do so, he should make a full explanation.

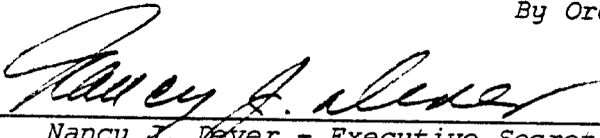
Although Claimant is not without fault in the set of facts presented in this case, there was no insubordination as this Board sees it and, thus, the action taken by the Carrier was excessive. Claimant deserves one final chance at retaining his job.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of July, 1984