

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr., when award was rendered.

Parties to Dispute: (Brotherhood Railway, Carmen of the United States
(and Canada
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

- "1. That the Norfolk and Western Railway Company violated Rules 1, 2, 32, and 33 of the controlling Agreement when Carman R. A. Myers was denied the right to work his assignment on September 30, October 1, 2, 3, and 6, 1981, at Bellevue, Ohio.
2. That the Norfolk and Western Railway Company be ordered to compensate Carman R. A. Myers eight (8) hours at straight time rate of pay for September 30, October 1, 2, 3, and 6, 1981."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and employee and employees involved in this dispute are respectively carrier and employees 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.

Claimant, a Carman with 15 years service at Carrier's Bellevue, Ohio facility, allegedly sustained an on-duty back injury on August 20, 1976.

As a result of said injury, Claimant, on May 15, 1979, brought suit against Carrier in U.S. District Federal Court under the Federal Employers' Liability Act; and Claimant was off work from February 3, 1980 to December 28, 1980 due said injury.

According to the record, pursuant to his return to work, Claimant was examined by his own personal physician, Dr. W. A. Drury, on November 3, 1980, and was released for work on that same day. On the following day, November 4, 1980, Claimant was given another examination by Carrier's physician, Dr. Eaton. Subsequent to this latter examination, Carrier's Regional Medical Director, Dr. H. H. Hopwood, requested that Claimant submit to further examination by an Orthopedic Specialist; and Claimant was examined by Dr. R. Clough, an orthopedic surgeon, on December 16, 1980. On the following day, December 17, 1980, Dr. Hopwood received Dr. Clough's report and notified

Claimant's supervisor, General Foreman H. L. Eichenlaub, that he (Claimant) was approved for return to duty without apparent limitation. Claimant reported for work on December 29, 1980 as authorized.

Because of the delay in returning Claimant to duty, as outlined hereinabove, a time claim was filed in protest of this action requesting pay for Claimant from November 21, 1980 to December 28, 1980, a period of thirty seven (37) days excluding regular assigned rest days. Said claim, however, was settled and Claimant received pay for twenty-one (21) eight (8) hour straight time days as full and final disposition in the matter.

Claimant's lawsuit, referred to above, was heard by a jury on September 17, 1981; and, according to the record, the jury ruled in favor of Carrier's position.

On Tuesday, September 29, 1981, Claimant was informed by General Foreman Eichenlaub that he (Claimant) was again scheduled to be examined by Dr. Hopwood, Carrier's Regional Medical Director, on Monday, October 5, 1981; and that he (Claimant) would be held out of service until his return to work was approved by Dr. Hopwood.

Claimant was examined by Dr. Hopwood as scheduled and was approved to return to work on October 7, 1981. Upon Claimant's return to work, a time claim was filed alleging that Carrier's action was a violation of Rules 1, 2, 32 and 33 of the parties' applicable Agreement and also requesting that Claimant be paid eight (8) hours at the straight time rate of pay for September 30, October 1, 2, 3 and 6, 1981. Said Claim is the focus of the instant dispute.

The Board has carefully read, studied and considered the complete record which has been proffered in this dispute and is persuaded that Organization's position presented herein is correct and, therefore, must prevail.

While the Board generally concurs with Carrier's basic contention(s) in this matter, the application of those principles to the critical facts of this case simply cannot be supported.

Carrier throughout its presentation has contended that, "(T)estimony presented by the Claimant in Court prompted the Carrier's Medical Director to order another examination on his back as there were indications that additional problems might develop" (Underlining added by Board). The evidence of record indicates, however, that (1) Claimant was examined and released for return to duty without limitation, qualification or condition by Carrier's Regional Director on December 17, 1980; (2) during the period of his return to duty and the date on which he gave his testimony in Court, a period of approximately nine (9) months, Claimant regularly performed his normal job duties without mishap or without exception taken by Carrier; and (3) most importantly, Carrier in its presentation has failed to adduce any evidence whatsoever -- not even Claimant's alleged "Court testimony" -- to help substantiate or suggest the specific rationale which was utilized by Carrier in formulating its decision to direct Claimant to undergo another physical

examination thus causing Claimant's loss of five (5) days' pay as a result thereof. While Carrier does have ". . .the right and responsibility to determine the fitness and ability of its employees" (See: Second Division Awards 3137, 4700 and 4324; and Third Division Awards 728 and 3151), Carrier in the instant case has failed to establish that there was "good and sufficient cause" to direct Claimant's reexamination, since there is nothing in the record -- except the fact that Claimant testified at his Court hearing -- to indicate that Claimant's back condition had deteriorated or changed in any way whatsoever subsequent to his December 17, 1980 examination and unconditional release to return to work on December 29, 1980.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dover -Executive Secretary

Dated at Chicago, Illinois this 19th day of February 1986.

