

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12492
Docket No. 12335
92-2-91-2-122

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(Brotherhood Railway Carmen/
Division of TCU
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (formerly
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

"1. That the Chesapeake & Ohio Railroad Company (CSX Transportation, Inc.) (hereinafter "carrier") violated the provisions of Rule 37 and 38 of the Shop Crafts Agreement between Transportation Communications International Union -- Carman's Division and the Chesapeake & Ohio Railroad Company (CSX Transportation Inc.) (revised June 1, 1969) and the service rights of Carman L. D. Massie (hereinafter "claimant") when on May 11, 1989 the carrier capriciously and arbitrarily medically disqualified the claimant from service pending a psychiatric evaluation without "good and sufficient cause" and without the benefit of incident or reasonable suspicion.

2. Accordingly, the claimant is entitled to be compensated for all lost time commencing May 14, 1989 and continuing through July 7, 1989. Additionally, the claimant is entitled to be compensated for any and all benefits accruing to other employes as a condition of employment, including but not limited to vacation rights, qualifying time and credit to the Railroad Retirement Board for unemployment and sick benefits and reimbursement for all losses sustained account of loss of coverage under Health and Welfare and Life Insurance Agreements during the time he was held out of service."

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.

On May 11, 1989, the Claimant was advised by the Carrier's Chief Medical Officer that the Medical Department wanted a psychiatric evaluation to determine the Claimant's fitness for service. He was informed by this notice that an appointment had been made for him to meet with a psychiatrist on June 23, 1989. The Claimant subsequently called the psychiatrist's office and cancelled the June 23, 1989 appointment. Another appointment was made for him, which he kept, on June 30, 1989. After receiving the psychiatrist's report, the Carrier's Medical Department concluded that the Claimant was qualified for service. The Carrier's officials at Raceland Shop, Russell, Kentucky, where he was employed as a Painter, were notified to that effect on July 7, 1989, and the Claimant was cleared to return to work. The Claimant was on vacation from July 10-14, 1989. He went back to work on July 17, 1989.

The Claimant was serving a suspension from May 9-13, 1989, for allegedly violating Carrier's Rules and this suspension is the subject of a separate claim. This is noted for the record because the original May 11, 1989 notification sent to the Claimant by the Medical Department was received by him while on suspension and ultimately affects the relief requested by the Organization as does the vacation time he was taking from July 10-14, 1989 as cited in the foregoing.

Shortly after receiving the May 11, 1989 notice from the Medical Department, the Claimant contacted his Local Chairman who then filed a claim on May 22, 1989, with the General Plant Manager at the Raceland Shop. The claim alleged that the Carrier had improperly disciplined the Claimant without a hearing in violation of Agreement Rules 37 and 38. The claim requested a hearing. The claim also requested compensation for all time lost by the Claimant, on a continuing basis.

As a preliminary matter the Board concludes that the instant case does not deal with disciplinary matters, per se, therefore, the allegation by the Organization that the Carrier was in violation of Rules 37 and 38 of the Agreement is dismissed.

On the other hand, this Board has ruled that Carriers may remove an employee from service pending medical proof that the employee is medically qualified to perform service, (Second Division Awards 7863, 12193). However, it is incumbent upon the Carrier, as moving party, to bear the burden that such action is reasonable.

According to the Organization, the Carrier presented "...absolutely no evidence to indicate that there (was) anything wrong with..." the Claimant when it first removed him from service. When the Claimant himself inquired why he was being held out of service, he was told by the Chief Medical Officer's office that his "...supervisors thought his temper was a threat to other employees." The Organization argues that there is "...no foundation for any of (the Carrier's) supervisors to make such allegations" and that the Claimant has "...not been charged with any conduct considered improper..." nor has he ever been "...accused of doing anything wrong with regard to his temper that would indicate that he was psychologically unfit..." The Organization also states arguendo that it took an inordinate amount of time for the Carrier to schedule an appointment for the Claimant with a doctor after he was notified on May 11, 1989.

In response, the Carrier argues that the Chief Medical Officer had "...promptly advised Claimant of the reasons for his removal from service and made the earliest available appointment with a specialist near the residence of the Claimant." Further, according to the Carrier, the "...fact that this examination required a specialist in his field, and not merely a regular medical Doctor, partially accounted for the time required to obtain the initial appointment." The Carrier also argued that the Claimant had failed to cooperate and further delayed the process by missing the June 23, 1989 appointment.

Prior to considering whether the time frame in which the Claimant was examined was reasonable, the Board must rule on the preliminary question of whether the Carrier acted reasonably when it held the Claimant out of service in the first place and requested a medical examination. The brunt of the Carrier's argument is that a medical examination was justified because it was ordered by the Chief Medical Officer. However, this case does not deal with physical disabilities but rather with the elusive domain of an alleged psychological disorder. A complete review of this case shows that the Carrier never stated the reason or reasons, in the record on the property, why the Medical Officer concluded that a psychiatric examination was necessary. The Board must go to the appeal by the General Chairman to learn only that the Chief Medical Officer told the Claimant by phone that his superiors apparently advised that the Claimant had "a temper." Clearly, the Board is not justified in using evidence, couched in such general language, and presented by the Claimant in his own defense, to conclude that the Carrier's case in chief has been soundly established. The Board must conclude on the basis of the evidence of record that the "...Carrier offered no explanation for Claimant's removal from service."

The Carrier does get into certain details, in its Submission to the Board, about an alleged incident which took place on May 10, 1989. Such information comes late in the season for a forum such as this, however, and is inadmissible as evidence in framing any decision on this case since it is well established that the Board will not "...consider material nor arguments which were not submitted during the handling of a claim on property" (Fourth Division Award 4132). This firmly entrenched doctrine, which is codified in Circular No. 1, has been articulated in many arbitration Awards in this industry (See Second Division Award 12193 which resolved a comparable dispute, between the parties, as well as Third Division Awards 20841, 21463, 26257; also Fourth Division Awards 4136, 4137). On merits the claim is sustained.

The Carrier argues, lastly, that the Claimant himself was responsible for extending the time for the medical determination in his case by missing the June 23, 1989 appointment. In an internal memo to the Organization, which is part of the record, the Claimant writes that he had called the Chief Medical Officer and advised him that his brother was going to be married on June 23, 1989, and that he was best man and asked (the Chief Medical Officer) why he couldn't make the examination sooner than June 23, 1989. The Claimant states that he was told that no appointment was available so a new appointment had to be scheduled for June 30, 1989. None of this is rebutted by the Carrier. The Board cannot reasonably conclude, therefore, that the delay was the result of actions by the Claimant, since he acted responsibly by advising the Medical Department of the conflict between the first appointment and an important event in his personal life, and he had requested that the June 23, 1989 appointment be rescheduled earlier, and not later.

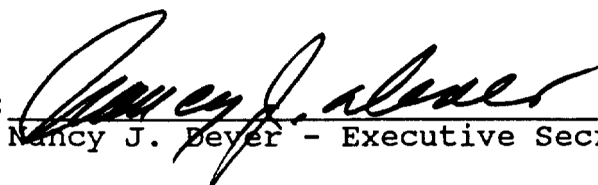
In view of the above, the Carrier shall pay the Claimant for all time lost between May 14 and July 7, 1989.

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 9th day of December 1992.