Award No. 2626
Docket No. 2465
2-AT&SF-EW-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, AFL (Electrical Workers)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

"1. That under the current agreement, the Carrier unjustly dealt with Electrician Helper J. A. Johnson when they refused to allow him to return to work on January 7, 1955.

2. That the Carrier be ordered to compensate Mr. Johnson eight (8) hours for each day he was held out of service from January 7, 1955 through March 7, 1955 at the applicable rate of pay."

EMPLOYES' STATEMENT OF FACTS: Electrician Helper, J. A. Johnson hereinafter referred to as the claimant, is an hourly rated electrician helper regularly employed by the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the carrier, at the Los Angeles 8th Street Coach Yards, as an electrician helper.

October 18, 1954, the claimant reported to the Los Angeles Santa Fe Hospital for a physical check-up and was confined there from that date until October 28, 1954, and denied the right to resume his regular helper duties until March 8, 1955. Check-up did not reveal any physical defect that would justify holding the claimant out of service. Current agreement effective August 1, 1945 as subsequently amended is controlling.

POSITION OF EMPLOYES: It is the position of the employes that the claimant was unjustly held out of his regular employment from October 28, 1954 until March 8, 1955, and we claim time for the claimant from January 7, 1955 until March 8, 1955.

The carrier most certainly has an obligation to watch over the safety and welfare of its employes and would be remiss if it did not do so. Had we allowed Mr. Johnson to return to work in the face of the chief surgeon's findings and he had suffered a fainting attack on the job, he might have been seriously or even fatally injured. It is things of this nature which the carrier must guard against.

The employes contend that Mr. Johnson should have been permitted to return to work on the basis of report from outside Dr. Betz which was dated December 27, 1954 and which Mr. Johnson presented to the master mechanic January 7, 1955. It is true that Dr. Betz found nothing wrong with Mr. Johnson except moderate secondary anemia but it is equally true that the doctors at the Association Hospital could find nothing wrong with him when he was confined there in October 1954. The two medical reports gave practically identical findings and since it was considered that Mr. Johnson should be held out of service on the basis of the chief surgeon's report of October 31, 1954 and to which the employes took no exception and as a result of which no claim was filed, the carrier could see no reason to take any action on the basis of Dr. Betz' report.

Furthermore, we have no way of knowing what Mr. Johnson told Dr. Betz when he went to him for a physical examination. It is entirely possible that he made no mention to Dr. Betz of his fainting attack, but even if he did, it is most unlikely that the doctor was aware of the hazards of Mr. Johnson's occupation, as were the Association doctors.

The carrier also calls attention to the fact that Mr. Johnson made no overtures toward being re-examined by Hospital Association doctors until he called on Master Mechanic Huebner February 5, 1955 and explained things about his physical condition which he had not explained to the Association doctors. The carrier calls the Board's attention to the fact that as soon as Mr. Johnson called attention to a condition which he alone had known all along, the wheels were placed in motion to have him re-examined to determine if he could be returned to work without hazard to himself. Just as soon as the re-examination was completed at the Association Hospital, Mr. Johnson was allowed to return to work.

The carrier submits that the record as detailed herein proves beyond a shadow of a doubt that its handling of this matter was proper in every respect and that any loss of time which Claimant Johnson suffered was due to his failure to apprise the Hospital Association doctors of circumstances which undoubtedly caused his fainting attack.

The carrier further contends that under these circumstances the claim is utterly without merit and respectfully asks that the Board so hold.

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.

The parties to said dispute were given due notice of hearing thereon.

On October 18, 1954, claimant reported to the Los Angeles Santa Fe Hospital for a physical check-up complaining that he had suffered a fainting spell while at home, which he reported, continued for an estimated one-half hour. He was confined to the hospital for a period of ten days. A complete physical examination failed to develop a satisfactory explanation for the complained of attack.

Claimant worked as a battery flusher in connection with which duties he drove a Buda truck with a barrel of water on it.

The carrier's doctor reported that he could do all types of work not requiring him to be around moving equipment or above the ground. The carrier contends that there was no work at Los Angeles for an electricians helper which would meet the requirements laid down by the doctor. This was not disputed by the Organization. Claimant was carried on leave of absence.

On January 7, 1955, claimant presented a letter dated December 27, 1954, from a Doctor of Osteopathy stating that his examination and laboratory studies revealed nothing abnormal except for a moderate secondary anemia and that in his opinion, claimant could resume his customary occupation while the anemia was being treated.

On February 5, 1955, claimant called on the master mechanic and discussed his case at length. For the first time, he explained that prior to his attack he had been dieting and described in detail what he had been eating. This new information resulted in a re-examination at the hospital, March 2-7, 1955, and he returned to work the day following his release.

The claim made is that the carrier unjustly dealt with claimant when they refused to allow him to return to work on January 7, 1955, the date upon which he presented his personal doctor's report to carrier's representatives. The Organization relies on Rule 33 (d), providing, in part, as follows:

> "No employe will be disciplined without first being given an investigation * * *."

This rule has no application to the instant claim as there is present in this record no grounds for discipline or any evidence of intent to apply discipline. Claimants course of action in a case such as this, is to proceed under the provisions of Appendix B (19).

It may be argued that fault was initially claimants in not revealing pertinent facts at time of first examination, or, that the fault was the physician's for no making full inquiry of the patient during the course of the examination. We do not feel justified or required by the facts presented to undertake such a determination. Medics are not to be considered infallible or guarantors of results. Both examining physicians appear to have acted capably and in good faith. Their differences in opinion concerning claimant's ability to work, can, in light of the later developed facts, be explained perhaps by the time difference in conducting the examinations and the benefits from the intervening care in the hospital. Based upon the symptoms reported and the dangers attendant upon reoccurrence, the restrictions placed upon type of qualified employment by carrier's doctor would seem justified and we so find.

That brings us down to what we consider to be the more pertinent issue inherent in the claim. The fact is disputed whether or not the local chairman made request that a neutral doctor be appointed to examine claimant some-

time between December 28, 1954 and the time the private physician's report was tendered on January 7, 1955. If so, Appendix B (19) required a neutral medic to be appointed to serve as the third member of an examining board and the decision of such board would be accepted as final. The expenses of such neutral, while limited in amount, was required to be borne equally by the parties.

The burden is upon the Organization to prove that a request for convening an examining board was in fact made. The point is not considered in the Organization's submissions but was raised in the general chairman's letter of December 6, 1955, addressed to Mr. Comer, and denied in his reply dated January 23, 1956, which correspondence was a part of carrier's submission. Bare assertions and denials, while raising an issue, do not justify a finding, unless proof is offered. Proof of such request and carrier's refusal to proceed in accordance with the provisions of Appendix B (19) are required before a sustaining award would be justified in this case.

While the rule in question does not so require, questions of this sort could be avoided in the future if requests for convening an examining board and consent to assume the proportionate costs thereof, be expressed in writing.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1957.