Award No. 4099
Docket No. 3886
2-NYC-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 103,
RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.—C. I. O.
(CARMEN)**

**THE NEW YORK CENTRAL RAILROAD COMPANY
(WESTERN DISTRICT)**

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement Mr. Samuel Benedict was unjustly held out of service as of September 8, 1958.

2. That Mr. Samuel Benedict be restored to service and compensated for all time lost.

EMPLOYES' STATEMENT OF FACTS: Mr. Benedict was employed as a laborer in the car department, Ashtabula, Ohio., Old Shop March 9, 1942, promoted to carman helper July 25, 1942 and worked as such until April 3, 1952 exclusive of Military service from which he returned to work November 27, 1945.

On April 3, 1952 Mr. Benedict was promoted to temporary carman and after accumulating four years experience he was given a seniority date on the carman's roster of November 21, 1955.

On or about February 28, 1954 Mr. Benedict was burned about the chest while operating an oxyacetylene torch in the performance of his duties as a carman.

On or about May 10, 1956 Mr. Benedict in the course of his duties as a carman, inspector-repairer at the Ashtabula, Ohio., West Yards injured his back.

Having failed to reach a satisfactory settlement with the railroad claim agent in his injury claim of February 28, 1954, Mr. Benedict engaged the services of an attorney and filed suit against the New York Central Railroad Company, September 8, 1956.

and compensated for his net wage loss, if any, resulting from said suspension * * *."

It will be noted it specifies "compensated for his net wage loss, if any". Thus, the carrier can only be obligated to pay a claimant the difference, if any, between what he would have earned in his railroad employment and what he did earn in outside employment. Awards of the Adjustment Board have so held and there has never been any dispute on this property where settlements are made in accordance with the provisions of Rule 36 referred to above.

While the carrier maintains there is no support for any sustaining award, it deemed it necessary to make the foregoing comments to show there is no basis or support in the agreement for a claim of full compensation for all time lost by the claimant who has not complied with the required procedure.

The carrier submits that every opportunity was given to the claimant to establish he was physically fit to return to work. The claimant's failure to do so does not support the employes' claim that Mr. Benedict was unjustly held out of service.

The facts and circumstances amply justify the action taken by the carrier and the Board is respectfully requested to deny the claim.

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 were given due notice of hearing thereon.

The Claimant S. J. Benedict, has been employed by the Carrier as a Carman at Ashtabula, Ohio. In February, 1954 he suffered burns on his chest while operating an oxyacetylene torch in the performance of his duties and was on leave of absence for about one month. In May, 1956, he sustained a back injury while opening a car journal box lid and was on leave of absence until the beginning of December, 1957. He claimed that the two injuries were caused by the Carrier's negligence and filed suit against the latter in which he sought $50,000 damages ($15,000 for the 1954 injury and $35,000 for the 1956 injury). The suit was settled for $10,000 in November, 1957.

On December 4, 1957, he temporarily returned to active duty and filled a vacation relief position until December 16, 1957, when he was furloughed. He temporarily returned to active duty on August 18, 1958, and filled a vacation relief position until September 7, 1958, when he was again furloughed. On September 11, 1958, he bid on a permanent position as a night shift car inspector which was then being bulletined. On the same day, he was informed by Shop Foreman C. F. Larson that he had to take a physical examination before he could start to work on the bulletined permanent position. On September 15, 1958, he was examined by the Carrier's physician, Dr. O. J. Lighthizer, who found that the Claimant had a limitation of motion in the lumbo-sacro area of the spine as well as a diminished left patallar reflex. As a result the physician rejected him for re-employment and he has been held out of service ever since.

The Claimant filed a grievance in which he requested re-instatement to active service and compensation for all time lost. The Carrier denied the grievance.

This case rests upon the answer to two questions: (a) whether the Carrier violated the applicable labor agreement when it held the Claimant out of service without a hearing, and (b) whether it violated the Understanding Relating to Physical Examinations of Employes, effective as of January 1, 1943, (hereinafter referred to as the "Understanding") when it required the Claimant to take a physical examination on September 11, 1958, although no such request was made on the two previous occasions where he temporarily returned to active service (see: Organization Exhibit "G"). For the reasons hereinafter stated, we are of the opinion that the answer to both questions is in the negative.

1. It is undisputed that the Claimant was not afforded a hearing before he was held out of service on account of Dr. Lighthizer's report. The Claimant argues that he was entitled to a hearing under Rule 36 of the labor agreement which provides, as far as relevant, that "no employe shall be disciplined without a fair hearing by a designated officer of the carrier." The flaw in the Claimant's argument is that he was not held out of service because of a dereliction of duty which might have subjected him to a disciplinary penalty. The sole reason that he was not permitted to return to work was his physical condition as found by the Carrier's doctor. In other words, the Carrier's action involved a matter of safety and not of discipline. Accordingly, Rule 36 has no application to the instant grievance. See: Award 2799 of the Second Division. The procedures for processing the instant grievance are set forth in Rule 35 of the labor agreement. This Rule does not require a hearing. Consequently, the Claimant's argument is without merit.

2. In further support of his claim, the Claimant relies on the Preamble of the Understanding which prescribes, as far as pertinent, that the Carrier shall not abuse its right to request physical examinations, and specifically shall not engage in so-called "fishing expeditions." The Claimant asserts that the Carrier violated this provision when it required him to take the physical examination in question. We disagree.

The Carrier's request for the physical examination was based on Article 3 of the Understanding which states that "an employe who presents himself for duty following a severe . . . injury, furlough or leave of absence may be required to pass a physical examination before resuming duty under the procedure outlined in Article 2 hereof." The latter Article entitles an employe to submit a report of his own doctor to demonstrate that he is physically able to perform his duties. If the Carrier's and the employe's doctors do not agree, then Article 4 of the Understanding provides for the selection of a third and disinterested doctor to be selected by said two doctors. An opinion concurred in by two of the three doctors is conclusive and binding.

The Claimant had been on leave of absence from May, 1956, to December, 1957, or for about one and one-half years, as a result of his 1956 occupational injury. That he regarded the injury as a serious one is evidenced by the substantial amount of damages ($35,000) claimed by him. Thus, under Article 3 of the Understanding it was reasonable for the Carrier to request the physical examination in dispute before it permitted him to resume the duties of the permanent position on which he had bid. In addition, the Claimant had the right to invoke the above described procedures if he believed that he was unjustly dealt with because the report of the Carrier's doctor was erroneous.

Although he was repeatedly advised of this right by the Carrier's officials (see: Organization's Exhibits "C", "E", and "F"), he chose not to exercise it.

In summary, we hold that the Carrier's request for said physical examination was not arbitrary, capricious or an abuse of its managerial discretion within the contemplation of the Preamble of the Understanding.

3. Prior to September 11, 1958, the Claimant was permitted twice temporarily to return to active duty to fill vacation relief positions without being required to take a physical examination. This fact raises the question whether the Carrier's failure to request a physical examination in the two previous instances constituted a waiver of its right under Article 3 of the Understanding. We do not think so.

The Carrier has conceded that its local officials were in error when they permitted the Claimant to return to work in said two instances without requiring a physical examination. However, we fail to see how such errors could reasonably be construed as a permanent relinquishment of the Carrier's right to require the Claimant, who had suffered two occupational accidents in the recent past, to take a physical examination in the interest of himself, his fellow workers, and the Carrier. This is particularly true in view of the fact that the record is devoid of any indication that, contrary to the findings of the Carrier's doctor, the Claimant was physically fit for the permanent position in question. Hence, we are of the opinion that the Carrier did not waive its right under Article 3 of the Understanding to request the physical examination under consideration.

4. In order to avoid misunderstandings, we want to emphasize that this Award does not and should not be read, to imply that the Carrier is entitled permanently to bar the Claimant from returning to active service. The Claimant has not been dismissed therefrom but has been on leave of absence. He is still entitled to request a re-examination under Article 6 of the Understanding and to challenge an adverse report of the Carrier's doctor under Articles 2 and 4 thereof.

AWARD

Claim denied in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1962.