Award No. 4524

Docket No. 4488

2-L&N-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L - C. I. O. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1—That Carman W. E. Williams, Montgomery, Alabama was improperly withheld from service from January 16, 1962 through August 3, 1962, and

2.—Accordingly the Carrier should be ordered to additionally compensate him for all time lost during that time.

EMPLOYES STATEMENT OF FACTS: On October 28, 1961, Carman W. E. Williams fainted during his tour of duty at the L&N Passenger Station, Montgomery, Alabama. He was examined by Dr. Harry Glazer at St. Margaret's Hospital in Montgomery and was allowed to return to work on the next work day of his regular assignment.

At the time the incident occurred, Mr. Williams was working the last day of a vacation vacancy which was assigned Tuesday through Friday on the second shift (3:00 to 11:00 P. M.), in the train yard, and Saturday on the first shift (7:00 A. M. to 3:00 P. M.) at the passenger station. He then returned to his regular position (Car Repairer) in the car shop, which was assigned Monday through Friday, on the first shift (7:00 A. M. to 3:30 P. M.), He (Williams) was given a complete physical examination by Dr. J. M. Barnes, company physician, on November 2, 1961, who after consulting with the company's District Surgeon, Dr. John L. Branch, recommended that Mr. Williams not be disqualified for work and that a decision relative to his physical qualifications be held in abeyance for at least 30 days. At the same time, Dr. Barnes referred Mr. Williams to Dr. W. H. Till, of Prattville, Alabama, for observation, further studies, and treatment, and, in addition, made available to Dr. Till the results of his examination. Nevertheless, Mr. Williams was removed from service of the company by local officials, effective November 20, 1961.

Under date of December 6, 1961, Mr. Williams was given a statement by Dr. Till recommending that he be allowed to return to work. He was also examined again by Dr. Barnes, company physician, on December 4, 1961.

has also been recognized by the courts. For instance, in **M. St.P.&S.M.M. Ry. Co. v. Rock,** 279, U.S. 140, the Supreme Court of the United States said:

> "The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them, and to exclude the unfit from their service."

Carriers have also been held responsible for damages by courts which held them negligent due to having retained in their employment employes having physical defects.

For instance, in the case of **Knobel Admx. v. Pennsylvania R. Co., 1962** F. Supp. 771, a judgment of $55,000.00 was entered against the railroad due to being held negligent in retaining a clerk in its service who was suffering from epilepsy and who had limited vision, and whose duties required him to traverse hard-surfaced floors, and in permitting packages to lie on the floor where employe could trip over them due to his limited vision.

In addition, a railroad was held negligent and responsible in damages in the case of **Shepard Admx. v. NYNH&H R. Co.,** 300 F. 2nd 129, by the United States Court of Appeals, Second Circuit. In that case the company was held negligent due to having rehired an employe knowing of his prior stay at a mental hospital and without having an allegedly fully adequate report on his condition, and knowing of his conduct after re-employment.

Also, in the case of Bayles v. L&N R. Co., 129 So. 2d 679, the court held that Bayles had alleged a cause of action against this railroad when he charged that his injuries were due to his being assigned work which this railroad knew he was physically unable to perform. In that case the court said:

> "But the United States Court of Appeals for the Third Circuit has said that where a plaintiff can prove that management forced a sick employe, of whole illness they knew or should have known, into work for which he was unfitted because of his physical condition, a case is made out for the jury under the Federal Employes' Liability Act. Dunn v. Black Lick Railroad, 3 Cir., 267 F. 2d 571; Nuttall v. Reading Company, 3 Circ., 235 F. 2d 546. See also Dunn v. Conemaugh & Black Lick Railroad, D. C., 162 F. Supp. 324, and Brown v. Pennsylvania Railroad Co., D. C., 179 F. Supp. 858."

In conclusion carrier reiterates that it was entirely justified in removing and withholding Claimant Williams from service so long as there was reasonable doubt concerning his ability to safely perform the duties of a carman. Further, that its action in so doing was not arbitrary or unreasonable, and was not in violation of any provision of the controlling agreement. In fact, had the carrier done otherwise it would have been derelict in meeting its responsibility for the safety of Mr. Williams and the employes with whom he works. The claim of the employes is entirely without merit and should be denied.

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.

The Division finds that there is adequate evidence in the record of this case to support the action of the Carrier in withholding the Claimant from service for the period of time involved in this claim.

The medical evidence contained in the record indicates that Dr. Barnes—the Carrier physician—on December 5, 1961 originally made a tentative diagnosis that the Claimant was suffering from functional hypoglycemia but he did not want to express any final opinion on the Claimant's condition for at least 30 days until the condition could be studied under control. Although Dr. Barnes suggested that the Claimant be allowed to work during this period, his report, taken as a whole, cannot be construed as any unequivocal determination that the Claimant was not suffering from, or subjected to, the illness which had caused his original condition.

All the other medical testimony in the record both from the Claimant's physicians and the neutral doctor, chosen by both parties, do not refute or reject the possibility that the Claimant had suffered from hypoglycemia. The medical reports most favorable to the Claimant only indicate that he was recovering or had recovered from the disability from which he had been suffering.

The report of Dr. Yow—the neutral physician—states in part: "I would agree with the initial diagnosis of functional hypoglycemia * * * His medical status in the fall of 1961 exhibited evidence of functional hypoglycemia * * * It would appear therefore that a remission or control has occurred."

On the basis of the record before it, the Division cannot hold that the Carrier's action was arbitrary or unreasonable or that it did not have good and sufficient reasons for withholding the Claimant from service until there has been rendered a definitive medical opinion from a neutral source that the Claimant was no longer suffering from, or subject to, the condition which had caused his original disability.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June, 1964.