(Supplemental)

Award No. 4602

Docket No. 4464

2-MKT-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 8, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Carman J. C. Henry was unjustly treated by Carrier when they disqualified him for further service on March 6, 1962, following a physical examination which took place on February 23, 1962.

2. That accordingly, Carrier be ordered to restore Carman J. C. Henry to the service and reimburse him for all time lost since April 16, 1962.

Pursuant to the "Findings" in your Docket No. 4464, Award No. 4602, ex parte supplemental request is hereby respectfully made for decision on the merits of the dispute referred to your division which could not be resolved between the parties.

The developments between the date of Award 4602, December 9, 1964, and the present date are reflected by the following correspondence:

"December 30, 1964.

Mr. A. F. Winkel,
Vice President—Personnel,
M-K-T Railroad Company,
Katy Office Building,
Dallas 2, Texas.

Dear Sir:

We have this date received from the National Railroad Adjustment Board, Second Division, Chicago, Illinois, Award No. 4602.

It is noted that Referee J. Harvey Daly request that a tripartite medical examination be given Mr. J. C. Henry to determine his physical condition.

The Organization respectfully suggest that the Carrier join us in having this examination made in sufficient time that the medical panel can submit their findings to the Board on or before January 15, 1965 in compliance with paragraph 5 on page 4 of the Award.

The Claimants Doctor will be Dr. D. H. Darling, M.D. Medical Art Building, Sherman, Texas.

Will you Please Advise.

Yours very truly,

/s/ O. F. Fike
General Chairman—Carmen."

"MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Dallas 2, Texas, January 26, 1965
PR—74511-M.

Mr. O. F. Fike,
General Chairman,
Brotherhood Railway Carmen of America,
P. O. Box 649,
Denison, Texas.

Dear Sir:

This letter will confirm my verbal advice to you on January 7, 1965, that our Company will not voluntarily comply with Award No. 4602 and the accompanying Order, both dated December 9, 1964 (received December 28, 1964), in Docket No. 4464 of the National Railroad Adjustment, Second Division.

We have taken this position because of our sincere belief that the award and order are void for the same reason that the United States Court of Appeals for the Ninth Circuit nullified Award No. 17646 and the accompanying Order in Docket No. 33531 of the National Railroad Adjustment Board, First Division in **Gunther v San Diego & Arizona Eastern Railway Company**, 336 F. 2d 543, namely:

> "In our judgement, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it." (page 547).

Yours very truly,

A. F. Winkel."

It is obvious from the foregoing that the carrier does not desire to participate in the establishment of the facts on which findings in connection with

the dispute could be based, therefore, it must be assumed that carrier has something to hide and accordingly the dispute should be disposed of on the basis of the employes' record established in this case which clearly shows that three reputable and qualified doctors have found the claimant physically qualified for service.

The decision of the U. S. Court of Appeals for the Ninth Circuit upon which the carrier bases its refusal to comply with your Award 4602 does not in our opinion support carrier's position for the reason that the Ninth Circuits decision is based upon Award 17646 of the First Division, the pertinent part of which reads:

> "If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.
>
> AWARD: Claim disposed of per Findings."

From the above findings it is self-evident that the award is entirely different to the award in the instant case in that the First Division relinquished its jurisdiction and delegated ultimate judgment on the controlling issue to an outside agency. Whereas, in the instant award your board retained jurisdiction while ordering the parties to submit the claimant to a neutral doctor for examination with instructions for the neutral doctor to submit his findings direct to your board so that your board could evaluate such findings and make final disposition of the claim.

The action of your board in the instant case is clearly supported by the decision of the U. S. Court of Appeals for the Fifth Circuit in the case of Hodges v. Atlantic Coast Line Railroad Company, 310 F. 2d 438 and as such should have been complied with by the carrier.

In view of the carrier's refusal to comply with a decision of your Board made in accordance with the dictum of the U. S. Court of Appeals for the Fifth Circuit on a similar case, it must be concluded that no grounds existed which justified the removal from service of the claimant (Carman J. C. Henry) on March 6, 1962, and accordingly the Employes request that this division settles the dispute in line with their function to adjust disputes as prescribed by the Railway Labor Act, as amended on the basis of the record presently before you.

A favorable decision on this dispute appears to be warranted and we respectfully request that you so find.

REPLY TO ORGANIZATION'S REQUEST FOR DECISION: Pursuant to the joint letter of February 16, 1965, by the chairman and vice-chairman of the board, the carrier files this reply to the organization's request for decision dated February 8, 1965.

In its Award No. 4602 dated December 9, 1964, the board made the following declarations:

> "2. The question of the Claimant's physical fitness is essential to a final disposition of this claim.

3. The question of the Claimant's physical fitness can only be determined by medical experts."

Despite these positive declarations by the board, the organization now requests the board, in the absence of such determination by "medical experts" which the board deems "essential", to sustain the claim and order claimant restored to service merely because the carrier has declined to comply with the board's directive that it join in the formation of a 3-doctor panel to examine claimant, which the carrier has the legal right to do because such directives of the board have been declared null and void and beyond the jurisdiction of the board in the latest decision on the subject by the federal courts, namely **Gunther v. San Diego & Eastern Railway Company**, 336 F. 2d 543. In that case, the United States Court of Appeals for the Ninth Circuit on September 4, 1964, three months before Award No. 4602 was issued, used the following language in nullifying First Division Award No. 17646:

"In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it" (page 547).

This is precisely what the board did in the instant case. Its action, therefore in ordering a 3-doctor panel in this case, as it did in the **Gunther case**, was and is beyond its jurisdiction and Award No. 4602 and the accompanying order are null and void for the same reasons that the court nullified Award No. 17646 in the **Gunther case**. For these reasons, the organization's request that the board sustain the claim should be denied.

In the alternative, the organization's request should be denied for another reason. If, as the board has declared, the question of claimant's physical fitness is essential to a final disposition of this claim, and such question can only be determined by medical experts, the necessity for such determination was not automatically eliminated by the carrier's refusal to comply with the board's award and order directing the carrier to join in the formation of a 3-doctor panel to examine claimant. If such determination were ever necessary to the final disposition of the case, which the carrier denies, then such determination is still necessary and the organization's remedy, therefore, is not a demand that the board sustain the claim and order claimant restored to service, but to have an enforcement action brought against the carrier in the manner authorized by Section 3 First (p) of the Railway Labor Act, as amended, which reads as follows:

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he

shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." [45 U.S.C.A. Section 153 (p)].

This was the procedure followed in **Hodges v. Atlantic Coast Line Railroad Company**, 310 F. 2d 438, upon which the organization relies. In that case, the court stated that "the Board, in effect, ordered a medical compulsory arbitration" (page 441); that "the Carrier refused to comply with the award" (page 442); that "under the statutory scheme the Board has no sanctions of its own" and that "it has no means save the enforcement proceedings under §153 First (p) to compel compliance" (page 443).

It is respectfully submitted that the organization's request that the claim be sustained should be denied.

FINDINGS: This is a supplement to Award 4602.

In Award 4602 the Board ruled as follows:

"1. A third or neutral doctor is to be selected by the Carrier's and Claimant's physicians;

2. The expenses and fee of the neutral doctor are to be borne equally by the Carrier and the Organization;

3. All members of the medical panel must be thoroughly familiar with the job duties of a Carman—especially the physical demands—prior to examining the Claimant;

4. The neutral doctor must be given special instructions in or even work demonstrations of a Carman's duties so that he shall be fully aware of all job demands;

5. The medical panel must submit their findings—in unequivocal language—to this Board not later than January 15, 1965;

6. The Board shall evaluate such findings and make final disposition of this claim on or before February 28, 1965."

The Carrier refused to comply with the above ruling—basing its refusal on the September 4, 1964 decision of the Ninth Circuit Court of Appeals for the Ninth Circuit in the case of **Gunther v. San Diego & Eastern Railway Company** 336 F 2d 543. In the "Gunther" case, the court decreed that the First Division of the National Railroad Adjustment Board "exceeded its jurisdiction" when it ordered the Carrier to have a 3-doctor panel determine Mr. Gunther's physical fitness.

The Organization is now petitioning this Board to direct the carrier to restore Carman J. C. Henry to service with proper reimbursement for time lost.

In Award 4602 we stated "The question of the Claimant's physical fitness can only be determined by medical experts", and we are still convinced of the truth of that statement. Therefore, it would be illogical for us now to disavow the need for a medical determination and summarily order Mr. Henry returned to service.

We also believe that the time allowances as set forth above should be followed in the determination of a future medical examination, and that such medical findings should be returned to this Division for dispositive action.

The Board is convinced that further dispositive action on its part would be inadvisable and unproductive. Therefore, the Organization should seek its remedy in an enforcement action against the Carrier as is provided for in Section 3, First (p), of The Railway Labor Act and as was done in **Hodges v. Atlantic Coast Line R.R. Co.**, U. S. Court of Appeals, Fifth Circuit, 51 LRRM 2634.

The action in this supplemental Award must be construed as a reaffirmation of our first Award and Order in Award 4602.

AWARD

As stated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April, 1965.