Award No. 4766
Docket No. 4597
2-C&O-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region)

DISPUTE: CLAIM OF EMPLOYES:

1. Claim that Carman C. T. Eubank was unjustly dealt with and his service rights and rules of the controlling agreement were violated when the Chesapeake and Ohio Railway Company would not permit Carman C. T. Eubank to return to work Oct. 5, 1962, at Fulton Shops, Richmond, Virginia.

2. That accordingly the Chesapeake and Ohio Railway Company be ordered to compensate Carman Eubank eight (8) hours, Oct. 6, 1962, and eight (8) hours each day five (5) day each week subsequent to Oct. 6, 1962, to include May 16, 1963.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company hereinafter referred to as the carrier, maintains a car repair shop track and transportation yard at Richmond, Virginia, known as the Fulton Shops, were they employ a number of carmen including Carman C. T. Eubank, hereinafter referred to as the claimant and who holds seniority at Fulton Shops as carman under the provisions of Rule 31 of the controlling agreement.

Claimant was absent from work prior to October 5, 1962. Claimant reported for work on October 5, 1962 and was advised by supervisor in charge to report and work. However, later in the day Mr. Clements, supervisor in charge, called Mr. Eubank, claimant, and advised him not to report for service as the doctor was holding him off and that his annual examination was being set up for October 9, 1962, with Dr. Charles McKeown. Claimant was denied his service rights to work October 6, 1962. However, he was not notified of his disqualification by notice of letter. On October 22, 1962, at approximately 1:25 P. M., Mr. Ballenge, general car foreman, called Mr. Eubank's home and talked with claimant's wife. Later the same day claimant called and talked to Mr. Clements by telephone and Mr. Clements advised claimant that he had been disqualified from service. Claimant was pronounced physically qualified for work by Dr. A. L. Smith on October 5, 1962, to return to work on October 6, 1962, in letter to Mr. Ballenge, general car foreman, letter dated October 5, 1962.

Under those facts this Division must say, as it did in Award 1419:

> 'Whatever loss claimant suffered was a consequence of his own misfortune, not of any wrongful act of the carrier'."

And in Award 4324 (Referee McDonald):

> "In accordance with previous awards of this Division, we refuse to substitute our judgment in medical matters to resolve a conflict such as we find here, unless it appears that the Carrier was acting in an arbitrary or capricious manner, under the record before us, in holding Claimant out of service. The record herein supports no such finding by us, and accordingly we must deny the Claim."

As there has been no showing that the carrier's action could in any manner be considered as arbitrary or capricious, and as there is no medical panel rule in the collective bargaining agreement, the claim should be denied.

Conclusions

The Carrier has shown:

(1) That Eubank is estopped from now asserting that he was qualified to perform work as carman during the period in question.

(2) That competent and adequate medical authority has ruled that he was not physically qualified.

(3) That it is the prerogative and responsibility of management to establish and maintain physical standards for its employes.

(4) Carrier's action was not arbitrary, capricious or an abuse of discretion.

(5) That the claim is without merit in all respects and a denial award should be rendered.

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 claim is that Claimant "was unjustly dealt with and his service rights and rules of the controlling agreement were violated" when the Carrier refused to let him return to work on October 5, 1962, and ordered his annual physical examination to be given him on October 9th.

Claimant had been receiving special orthopedic examinations since 1958. On September 19, 1962, he took time off for treatment of his chronic trouble; on October 5th he reported for work, but because of his history of back trouble and the fact that he was wearing a back brace, he was held out of service. When examined by a specialist he was found disqualified because of a degenerative type arthritis of the lumbar spine and partial ankylosis of the right

shoulder. Treatment was recommended, after which Claimant was reexamined by the Carrier's specialist on April 26, 1963, was thereafter pronounced fit, and resumed service on May 17th.

Meantime he had applied to the Railroad Retirement Board for an annuity because of permanent total disability, was granted it as of September 19, 1962, and received it until his return to service in May as above stated. The carrier contends that by claiming total permanent disability, establishing the claim and receiving benefits, he is estopped to claim that the Carrier should have allowed him to resume work on October 5th, 1962.

The Employes' objection to the Carrier's fact statements and arguments concerning the disability annuity as not having been presented on the property must be sustained.

The employes' contention on the merits is that on October 5, 1962, two doctors, one of whom was Carrier's, had found him fit for service in October, and that the Carrier acted unjustly by not agreeing to have a third doctor examine him and decide his fitness to resume work. The Carrier did assent to such examination to determine whether Claimant's condition was as found by the orthopedic specialist, but the Organization rejected that as insufficient.

No rule nor established practice requires such agreement, but the Carrier's refusal to accede to the demand is claimed to be in violation of Section 2, First of the Railway Labor Act, which provides as follows:

> "First. It shall be duty of all Carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, * * *."

The provision declares it the duty of employes as well as carriers to exert reasonable efforts to settle disputes; but it does not obligate either to accede to the other's demands, or make refusal a violation of law.

Moreover, the record is entirely bare of any evidence that Claimant was found fit for service in October by two doctors, or even by one. The Carrier's doctor merely authorized an examination to be made, and the other merely wrote:

> "Mr. Eubank has improved and will return to work on 10/6/62."

That he had improved and would return to work does not approximate a statement that he had been examined and found medically fit to resume work.

The record discloses no violation of the Agreement or of Claimant's rights thereunder.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.

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