Award No. 4771
Docket No. 4622
2-NYC&StL-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. 57, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY (Wheeling and Lake Erie District)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier unjustly withheld Carman William R. Slinger from the service November 1, 1962 to November 26, 1962, both dates inclusive.

2. That accordingly, the Carrier be ordered to make the aforesaid employe whole for damages sustained as a result of the aforesaid unjust treatment, which shall include:

(a) Compensation at the applicable Carmen's rate for all time lost,

(b) Credit all time lost for vacation benefits,

(c) Payment of Health and Welfare and Group Life Insurance premiums so as to maintain continuity of said benefits.

EMPLOYES' STATEMENT OF FACTS: Carman William R. Slinger, hereinafter referred to as the claimant, entered the service of the New York, Chicago and St. Louis Railroad Company, Wheeling and Lake Erie District, hereinafter referred to as the carrier on July 2, 1953, being promoted to carman on December 30, 1960. At the time this dispute arose claimant was regularly assigned as a carman on the steel program line with work week of Monday through Friday, Saturday and Sunday rest days.

After being promoted to carman, claimant was furloughed March 23, 1961. Claimant was recalled to the service June 5, 1961 at which time he was required by carrier to take a physical examination. Claimant passed his physical, returned to service and worked continuously until he received the following letter dated October 31, 1962.

often the employe, for his own good, heeds the warning and diligently pursues a weight reduction program. In some cases the employe is diligent for a while, then returns to his former carelessness, with a result that more stringent measures must be adopted. The instant case is one of several where the employe had to be withheld from service because of his failure to reduce his weight. While not all have involved, as here, the carman's craft, none of the organizations, except the petitioner and only in this one case, have taken exception to the carrier's efforts and action.

In none of the hundreds of overweight cases which it has been confronted with has the carrier arbitrarily and without urging before final warning withheld an employe from service simply because his weight had reached a certain arbitrarily arrived at figure. As the record in this case bears out, the employe's attention is called to his condition and he is urged to make a reduction in his weight. In so cautioning the employe at the outset of dealing with his weight problem, the carrier is concerned more that some reduction be made rather than a certain number of pounds be taken off in a given period. In the instant case, after the employe was warned by the medical director, he made weight reductions of eight and one-half pounds, two and one-half pounds, and seven pounds in successive 90-day periods. At the next examination, however, made after an interval of slightly more than three months, the medical director found that instead of having made a further reduction the claimant permitted his weight to increase nine pounds since the previous examiantion. It was at this point that he was withheld from service. As the record shows, such period of withholding (21 days) proved efficacious. He reduced his weight from 261 to 248 pounds. By that showing the claimant proved that he could cope with his weight problem.

In citing Addendum G, the employes insisted that an opinion of another doctor be brought into the case. It is the carrier's contention that the purpose of Addendum G, quoted above, is to provide for the services of another doctor to "verify the **diagnosis** of the Company doctor." (Emphasis ours.) Such an examination in this case was unnecessary, because at no time were the claimant's weight figures, the only reason for his disqualification, questioned by the employes. There was no "diagnosis" to verify. The employes' efforts in this respect are merely another attempt to have someone else set the carrier's physical standards. As has been stated, the setting of such standards is a field which all divisions of the board have consistently declined to enter.

In summary, it is the carrier's position that:

1. It has the right to set physical standards for its employes.
2. The right to set such standards was not in this case exercised in an arbitrary, capricious or unreasonable manner.
3. The standard which has been set was not here applied in an arbitrary, capricious, unreasonable or discriminatory fashion.

The instant case is, therefore, without merit, and the Board is respectfully requested to so rule.

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.

Claimant was furloughed on March 23, 1961, but on June 5, 1961, was recalled to duty and given a physical examination which disclosed that his weight was 276 pounds. The Carrier's medical director permitted him to resume work, but warned him concerning overweight and ordered occasional examinations.

On subsequent examinations his weight was as follows: July 22, 1961, 270 pounds; November 25, 1961, 261½; April 3, 1962, 259; July 10, 1962, 252; and October 22, 1962, 261. As result of the last examination cited, Claimant was suspended from service by the Carrier on October 31, 1962, pending another examination set for November 26, 1962. Thus he started the above period of service at a weight of 276 pounds and made a maximum reduction of 24 pounds, of which when suspended he had regained only 9 pounds.

The November 26 examination showed his weight as 248 pounds, a maximum reduction of 28 pounds since June 5, 1961, and he was returned to duty. By May 5, 1963, he had regained 16 of the 28 pounds. Whether he was again suspended does not appear in the record.

The Agreement does not provide for such suspension; but the Carrier retains all rights not forbidden by law nor relinquished by the Agreement. On the other hand, seniority confers certain rights to employment which are subject to only reasonable limitations.

The Carrier says:

> "* * * in every case of an employe gaining weight or having a weight problem, there must be a time or an area at which an em-employee, because of his weight, becomes a hazard to himself and to others;"

and that:

> "To carry 261 and as much as 270 pounds would certainly impair his ability and efficiency to the extent that it would be hazardous not only for him but for his fellow employes," etc.

But Carrier permitted Claimant to start this period of service at a weight of 276 pounds. It explains this by saying the work was expected to effect a quick reduction of weight. But that is not the point; if the weight constituted a hazard the reduction should have been required before resuming work. Since a weight of 276 pounds was not considered a hazard, certainly 261 pounds constituted none.

The Carrier cites Award No. 3749, in which this Division held that the establishing of standards of physical fitness was a responsibility of manage-

ment with which the Board should not interfere in the absence of bad faith or abuse. But the Carrier has set up no standards, and says that it "merely insists that improvement (weight reduction), however slight, continue to be made." (Parenthesis added.)

In other words, Claimant was deprived of four weeks' employment to which his seniority entitled him, not because of any hazard or other emergency, but merely because he had regained 9 of the 24 pounds he had lost during the employment. While the action was apparently taken in good faith, the reason given for it was inadequate, and not in furtherance of any definite standard of physical fitness or operating safety.

The record presents no issue under Claim 2 (c), but Claims 1, 2 (a) and 2 (b) should be sustained.

AWARD

Claim sustained to the extent indicated in the Findings.

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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