



Award No. 5847

Docket No. 5739

2-SOU-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Carmen)**

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement Carman G. B. Massey, Birmingham, Alabama, was unjustly held out of service beginning July 25, 1967 through September 1, 1967.
2. That accordingly, the Carrier be ordered to reimburse the aforesaid employe for all time lost beginning July 25, 1967 through September 1, 1967.

EMPLOYEES' STATEMENT OF FACTS: Carman G. B. Massey, Birmingham, Alabama, hereinafter referred to as the claimant, is employed by the Southern Railway Company, hereinafter referred to as the carrier, as a carman at carrier's Birmingham Shops, Birmingham, Alabama, with a seniority date of July 13, 1937, thus has been in the employ of the carrier for thirty (30) years.

While on his job, claimant was notified on July 7, 1967, by Carrier's Car Foreman, Mr. Dan Rogers, that he he was to report to Dr. A. I. Chenoweth, carrier's physician, for a physical examination at 1:30 P.M., July 10, 1967, in order to determine if he was able to stay on his job and perform his duties. Claimant reported for the physical examination on the appointed date.

On July 25, 1967, at 4:30 P.M., one-half hour after claimant's shift began he was removed from service by General Foreman, Mr. B. H. McMichael, who gave him a copy of a letter from Carrier's Chief Surgeon, Dr. Max P. Rogers, dated July 21, 1967.

On July 31, 1967, Dr. Charles R. Kessler, claimant's family physician, gave a written opinion of his findings as regards the physical condition and health of claimant.

On August 1, 1967, Dr. A. I. Chenoweth, carrier's physician, filled out a form for the United States Railroad Retirement Board and under Item 8, "Objective Findings," stated:

"None significant — Examination only 7-10-67 at request of Southern Railway — Not under our treatment."

sult of the examinations given Massey in July and August 1967 are as stated in the reports quoted hereinabove.

Contrary to the claim presented and the various allegations made by the brotherhood, Carman G. B. Massey was not unjustly held out of service beginning July 25, 1967 through September 1, 1967 and there is no basis for the demand made by the brotherhood that carrier be required to pay former Carman Massey for time lost during that period. In view of all the evidence the Board should so hold and make a denial award.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employ 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.

Carrier employed Claimant as an apprentice Carman about 1932. After serving his apprenticeship he became a Carman Helper advancing to and establishing seniority as a Carman on July 6, 1937, a status which he continued to enjoy at all times material herein. He was born March 29, 1911; age 56 years at the time of occurrences material herein. Carrier stated: "(Claimant) served Carrier well throughout the years and was a loyal and faithful employee."

On July 7, 1967, Claimant was directed by Master Mechanic to report to Carrier's Medical Doctor at 1:30 P.M. July 10, 1967, for examination to determine whether he was physically qualified to continue the performance of his duties as Carman. Carrier gives as reason for the direction:

"Prior to July 7, 1967, the Master Mechanic at Birmingham, Alabama had received numerous complaints from Foreman Dan J. Rogers, Jr. that Carman Massey (Claimant) had become uncooperative, that there had been several altercations with him concerning the performance of his assigned duties and that he was simply not fully performing his duties and keeping up his part of the work. Prior to July 7, 1967 Mr. W. H. Higgins, Local Chairman of Carmen at Birmingham, also complained to the Master Mechanic that something would have to be done about Mr. Massey, that he was not cooperative and that his co-workers were refusing to work with him because he was not fully performing his duties and keeping up his part of the work.

In view of Carman Massey's past record which was good and his medical history, the Master Mechanic felt that the cause of the change in Massey's behavior was influenced by his physical condition and strictly medical in nature. . . .

Claimant reported for the medical examination at the time appointed. On July 25, 1967, at 4:30 P.M. — one-half hour after his shift began — he was served with copy of the following communication, relative to his status, addressed to the Master Mechanic, under date of July 21, 1967 and signed by Carrier's Chief Surgeon, Max P. Rogers, M.D.:

"I have received the report of the examination on the above named employee from Dr. Chenoweth. On the basis of his findings, this man is disqualified for service."

The report of examination referred to in the communication was not given to Claimant. He, therefore, was uninformed as to findings in support of the conclusionary statement that he was "disqualified for service."

There is no evidence of probative value or issue raised on the property that Claimant was guilty of the conduct which Carrier avers as reason for directing the medical examination. If Carrier had chosen to make the alleged conduct a cause of action its recourse was, by contract, prescribed in Rule 34 relative to disciplinary proceedings. Inasmuch as Carrier elected the physical disqualification route it bore the burden of proving, when its finding was challenged, that Claimant was, *de facto*, physically disqualified. See, *Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257 (1965).

We are cognizant that Carrier has an inherent uninhibited right to direct a physical examination of an employe concerning whom it has reasonable grounds to suspect physical disqualification — this is in the employe's selfish interest, fellow workers' protection and the public interest in preservation of life, limb and property. We honor this premise. Of concern to us, however, is potential perversion of the premise by use of it as an evasive tool in lieu of contractual mandated disciplinary procedures, indispensable condition precedent to discipline.

We are convinced from our study of the record in this case that the Mastor Mechanic acted in good faith and out of consideration of Claimant and protection of his interests; and, the operating personnel, in view of the Chief Surgeon's bare expressed finding of Claimant's physical disqualification, was required to remove Claimant from service on July 25, 1967.

While Carrier has the right to order an employe to subject himself to medical examination by its Medical Doctors for determination of the employe's physical qualification to perform the duties of his position it may not exercise the right in derogation of the employe's vested contractual rights. The costs of the examination, to such extent as Carrier deems necessary, it being at its instigation, are to be borne by Carrier. It has no prerogative to command that an employe undertake, at his expense, the engagement of Medical Doctors to determine his physical qualification. The employe may, of course, do so of his own volition and submit the findings of his Doctors. Carrier's Medical Doctor's suggestion to an employe that he, in his interest, consult the physicians who have administered unto him is laudatory and is emblematic of the respected tenets of professional concern for the person. Such a suggestion however, legally, is advisory; it is not a legally recognized mandate.

It is firmly established in the case law of the various Divisions of the National Railroad Adjustment Board that when petitioned to resolve a dispute our consideration is confined to the issues raised and material evidence in the record made on the property. We do so in this dispute.

When Carrier's finding of physical disqualification gives rise to a dispute the burden of proving the finding by substantial material and relevant evidence of probative value is Carrier's. Cf. *Gunther* case, *supra*. The sole issue confronting us is whether Carrier satisfied the burden.

Succintly, Claimant was on sick leave and underwent surgical procedures and a recuperative period from February 1966 until Carrier's Doctor Chenoweth found him physically qualified to return to his position on December 16, 1966, all of which is detailed in the evidence of record.

We look at the report, in toto, of Carrier's Medical Doctor, A. I. Chenoweth to Carrier's Chief Surgeon, under date of July 12, 1967, following his examination of Claimant on June 10, 1967. This is the report on which the Chief Surgeon, supposedly, predicated his finding that Claimant was "physically disqualified":

SUMMARY OF FINDINGS: [This patient was referred by his master mechanic because he has been reported by his foreman and several co-workers to be unable to carry out the duties expected of him.

Since last examined in this office, approximately seven months ago, this employee has returned to work and has worked with regularity since then.

History, as related by the patient, revealed that he underwent considerable weight loss during the first three months of this year, and as a result of this, reported to his physician for a check-up. He was reassured that all was well and he continued to work. In his words, he has had no trouble on the job except for altercations with his supervisor. He states that there is more work to be done than any one person is reasonably expected to do. He considers himself able to handle an ordinary day's work, and in answer to a direct question, states that he does as much as his co-workers, but refuses to do more than his share.

When questioned regarding symptoms, the patient relates that for the past sixty days he has had some retrosternal discomfort nearly every day. This usually comes on early in the morning and he says it is relieved by a cup of coffee. He considers that this does not interfere with his activities. He admits that an abdominal incisional hernia bothers him slightly and he thinks that someday he may have this repaired. He states that since his examination in March he has regained approximately five pounds of the weight which he lost in the preceding three months.

After taking the patient's history and examining him, I called Dr. Kessler ((his personal physician) to get a report of the x-rays made in March. These were reported negative. I then suggested to Dr. Kessler that in view of the development of retrosternal pain since then, it might be of interest to the patient to be examined again. He agreed that this might be true.

I then telephoned Mr. Massey, whom I had allowed to continue work, pending completion of my evaluation — for the purpose of advising him in the interest of his own well-being, and as an aid to my evaluation, that he return to Dr. Kessler for further study. Mr. Massey immediately became belligerent, referring to the fact that in his opinion this case would eventually be settled in court. As I attempted to explain my reasoning, I was repeatedly interrupted as the employee became obviously more and more incensed. In the end, he blurted in a loud voice, 'I don't give damn what you do — goodbye.' He then hung up the phone.

This reaction of the employee confirmed reports reaching me through Mr. Jay of signs of emotional instability.

It is my considered opinion that while the employee's physical condition is borderline for his job, he manifests marked emotional instability with a paranoid trend. His condition on the whole is such that I should recommend that he be considered not qualified to continue in his present employment. For the patient's sake I believe that he would be much better off retired on a disability pension. (Emphasis Supplied.)

(It is to be noted that this report is not supported, on its face, by a recitation of clinical procedures requisite to conclusions reached. Doctor Chenoweth, it appears, was frustrated and exasperated with Claimant's reactions to his good will attempt to counsel Claimant. The reactions of Claimant, he being of the opinion that he was being unjustly treated, were not unusual to norm. We find that Doctor Chenoweth's declaration that Claimant "manifests marked emotional instability with a paranoid trend" was not buttressed by a showing of recognized psychiatric examination and revelations. Nor do we find support in Doctor Chenoweth's report from which to conclude that Claimant was otherwise physically incompetent to perform his duties as Carman. Ergo, the Chief Surgeon's finding that Claimant was "physically disqualified" is not supported by substantial evidence of probative value. The finding, to prevail, required medical evidence to sustain it — whim is not enough. That it was whim is made certain in Doctor Chenoweth's report to the Chief Surgeon under date of August 16, 1967, following his re-examination of Claimant after receipt of clinical medical reports of Doctor Kessler (thoracic surgeon) and Doctor Angelich (Claimants' family physician), respectively dated July 31 and August 10, 1967, in which each of them concluded that Claimant was physically qualified to perform the duties of his position (Carman). In the report Doctor Chenoweth stated:

" . . . I see no reason for disqualifying this employee (Claimant) at this time on the basis of physical defects. . . .

.....

" . . . I think it must be pointed out that the main factor in the patient's having been disqualified by me, July 12, 1967, was his refusal to cooperate with my suggestion that he go forward with examinations at that time by Dr. Kessler and his personal physicians." (Emphasis supplied.)

After this report, by Doctor Chenoweth, Carrier restored Claimant to service on September 2, 1967.

We find that: (1) Carrier had the right to have Claimant examined by its Medical Doctors to determine whether he was physically qualified to perform the duties of his position (Carman); (2) the finding by Carrier that Claimant was physically disqualified was not absolute — when challenged by Claimant Carrier was put to its proof, Gunther case, supra; (3) when Carrier held Claimant physically disqualified and held him out of service it assumed the risks attendant to fallibility; (4) upon a finding, which we make here,

that Carrier placed Claimant out of service for physical disqualification and failed to prove such finding when put in issue, Carrier became obligated to make whole Claimant for loss of the fruits of his contractual entitlements for the period he was held out of service; (5) Claimant was wrongfully held out of service from July 25, 1967 through September 1, 1967. We, therefore, will sustain the Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.