Award No. 5902
Docket No. 5686
2-WT-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 106, RAILWAY EMPLOYES' DEPARTMENT, A. F. L.-C. I. O. (CARMEN)

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Car Cleaner, Mildred A. Worrell, was unjustly removed from the service of the Carrier commencing at 10:00 A.M. August 9, 1967 and until November 1, 1967.

2. That Carrier refused to comply with agreement to have Mildred A. Worrell examined by a neutral eye Doctor.

3. That accordingly the Carrier be ordered to compensate Mildred A. Worrell for all time lost between August 9, 1967 and November 1, 1967 and to comply with agreement to have Mildred A. Worrell examined by a neutral Eye Doctor.

EMPLOYES' STATEMENT OF FACTS: Mildred A. Worrell, hereinafter referred to as the claimant was employed as car cleaner on the 8:00 A.M. to 4:00 P.M. shift, coach yard, Washington Terminal Company, hereinafter referred to as the carrier.

On August 9, 1967 the claimant was ordered by carrier's car foreman to report to its medical examiner because claimant had been wearing tinted eye lenses. The claimant reported as ordered and during this visit carrier's medical examiner, Dr. Kelly, determined and issued affidavit to claimant stating that she did not meet the requirements of (G-45) for vision and that she was not allowed to wear dark glasses on carrier's premises and removed her from the service.

On August 9, 1967 the claimants general chairman filed claim with carrier's master mechanic, requesting that the claimant be restored to the service and be compensated for all time lost since 10:00 A.M., August 9, 1967.

On August 29, 1967 carrier's master mechanic replied and denied the claim on the basis that claimant failed to meet the requirements for vision in accordance with company standards and that claimant was advised that she would not be permitted to work until she had obtained corrective glasses.

ophthamologist, Doctor Cox, for an examination to find out specifically whether claimant suffered from any condition which, if she performed her normal duties with clear instead of colored glasses, could subject her to a risk of harm, a risk, if any, greater for her than for other cleaners who perform the same duties without colored glasses. (Doctor Cox, after a detailed examination, found nothing in claimant's eyes which would necessitate her using sunglasses in her work as a car cleaner.)

Regardless of this result (and the added expense), the general chairman insisted that his "agreement" with the master mechanic was to send the claimant to a "neutral" doctor—apparently misunderstanding what a "neutral" is and by whom he's paid. There was no offer by the organization to share the expense of this specialist. More importantly, nothing in the schedule agreement between the organization and the carrier provides for the use of a neutral doctor; the master mechanic had no authority to agree to any departure or addition to the basic agreement; and furthermore, there was no proper set of circumstances here which would occasion the invoking of a 3-doctor board or a neutral doctor. If any agreements are made to invoke a 3-doctor board, they are made at the manager's level not by department heads. The carrier would have had the right to repudiate at any time the "agreement" which the general chairman here suggests was made.

Public Law Board No. 127, E. v. L.I., Referee Dolnick, September 5, 1968, position of carrier sustained.

> ". . . An unauthorized agreement, which modifies the terms of the basic agreement, and which was executed by an administrative officer who has no power to bind his principal, may be repudiated at any time."

See further, Second Division **Awards 3782 and 3783**, (TWU v. P&LE, and LE&E, Referee Stone, Denied) wherein unauthorized commitments on a claim by a master mechanic without approval or apparent knowledge of the director of personnel were held not controlling.

Returning to the present case, except so much as was later ratified, the oral agreement ascribed by the general chairman to have been made between himself and the Master Mechanic was not binding upon the carrier. Once the claim and grievance had been appealed to the carrier's Manager, it was he and his labor relations representative who had the authority to dispose of the matter, not the master mechanic. Whatever, if anything, the master mechanic might thereafter have agreed to with the general chairman was not binding upon the carrier and had no force and effect. It may not properly be used by the organization as a basis for asking payment of the present claim.

The claimant was justifiably withheld from service and the time lost was due to her own volition.

Claim 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.

Claimant Mildred A. Worrell, a Car Cleaner, was off work from August 9 through November 1, 1967. Petitioner asserts she was unjustly removed in violation of the Agreement and should be compensated for the time lost. Carrier, on the other hand, affirms that Claimant's time off was her own responsibility. Petitioner also contends—and Carrier denies—that Carrier has failed to live up to a verbal agreement made by its Master Mechanic that Mrs. Worrell be examined by a "neutral" eye doctor. It asks that such agreement be enforced.

The general outline of events leading to these claims is clear, although many important facts are disputed. The record reveals:

August 8, 1967. While cleaning the interior of coaches on which the shades were drawn, Claimant wore dark glasses. (Carrier refers to them as "sunglasses", Petitioner as "tinted glasses".) Her supervisor thought she could not see well enough in the darkened area and that the dark glasses might increase the risk of hurting herself or others. When she persisted in wearing them, her supervisors sent her to Carrier's Medical Examiner "to find out if the dark glasses were necessary or not". (Carrier's Ex Parte Submission).

August 9, 1967. Claimant was examined by Dr. Kelly, Carrier's medical Examiner, who noted: "This patient . . . does not meet the requirements of (G45) for vision. She is not allowed to wear dark glasses working on our premises." It appears, although the record is not precise, that Claimant was examined without glasses of any kind. In any event, Dr. Kelly told her that she would not be permitted to work until she had obtained corrective clear-lensed glasses. According to Carrier, she was told to return as soon as possible with a regular pair of glasses.

Later that day General Chairman R. E. Hoover submitted a claim to Master Mechanic J. E. McCabe alleging that Mrs. Worrell had been discharged without investigation and discriminated against in violation of Rules 29 and 32. Her immediate reinstatement was requested.

August 29, 1967. Master Mechanic McCabe denied the claim, noting that (1) Claimant had failed to meet Carrier's vision standards in her August 9 examination; (2) She had been advised by the Medical Examiner that she could not work until she had obtained corrective glasses; (3) Claimant had not been discharged, and could resume duty "as soon as she obtains corrective glasses and satisfies our Medical Examiner that her vision has been corrected."

September 14, 1967. General Chairman Hoover rejected the Master Mechanic's denial, citing an August 15 note from Dr. J. W. Rout, M.D., which stated: "Mrs. Mildred Worrell is under my professional care. At the time of her last visit Mar. 9, 1967, her visual acuity was 20/30-1 corrected to 20/20 in the right eye and 20/30-2 corrected to 20/20-1 in the left. A change of prescription was not indicated at this time. However, tinted lenses were prescribed for Mrs. Worrell when necessary, i.e. during periods of snow and/or glaring sunlight." On the same day the General Chairman appealed McCabe's denial to Manager C. W. Shaw, Jr.

September 26, 1967. Claimant visited Dr. Rout again. He confirmed his previous findings concerning her corrected vision (i.e., 20/20 in each eye). This information was passed on to Manager Shaw at an October 24 conference.

October 27, 1967, Manager Shaw denied the claim, restating Management's position with respect to Claimant's responsibility to return to the Medical Examiner with proper glasses. However, he added, should Mrs. Wor-

rell fail to appear for a return-to-duty physical examination within five days, she would be dropped from the rolls and seniority roster pursuant to Rule 18.

November 1, 1967. Claimant, with her General Chairman, reported to Carrier's Medical Examiner who tested her vision. With the clear, corrective lenses she brought, she fulfilled the requirements (without them she could not). Dr. Kelly then issued her a return-to-duty slip. Petitioner asserts that, at this point, Dr. Kelly was asked what his determination was as to Claimant's use of tinted lenses (especially in light of Dr. Rout's findings), and that he replied (1) They had no medical bearing on her ability to meet (G-45) vision requirements and (2) This was a matter for management to handle and (3) There was no rule governing the use of such lenses. Carrier, on the other hand, asserts that (1) Claimant refused to accept the return-to-duty slip; (2) she insisted that Dr. Kelly stipulate in writing that she would be permitted to wear her "tinted" glasses in accordance with Dr. Rout's prescription since she had an "eye condition" which made them necessary (Dr. Kelly had found no trace of such condition); (3) Dr. Kelly replied that she could wear her clear glasses without harming herself and, in fact, wearing dark glasses when she worked could be harmful to her eyes, aside from constituting a hazard. Carrier emphatically denies that Dr. Kelly said tinted lenses had no medical bearing on vision requirements.

Claimant and her General Chairman then met with Carrier's Assistant Director of Labor Relations and Master Mechanic. According to Petitioner, Claimant explained that she did not use her dark glasses while cleaning inside of cars, but she needed them when she was outside during periods of snow or glaring sunlight. The Master Mechanic then suggested she obtain pink lenses, Petitioner asserts. However, when the matter could not be settled with the Assistant Labor Relations Director, the Master Mechanic proposed that the discussion be continued in his office.

Carrier's version of this meeting is quite different. It states that (1) Claimant requested a stipulation that she be permitted to wear her dark glasses in accordance with Dr. Rout's prescription; (2) This request was denied since (a) it is contrary to company policy to permit cleaners to wear sunglasses while on duty, (b) it was improper to condition Claimant's accepting her return-to-duty slip on the general proposition, advanced by Petitioner, that employees be allowed to wear dark glasses, (c) there was no evidence that, as a matter of medical necessity, Claimant was required to wear dark glasses while on duty, (d) if permission were granted, it would only lead to further difficulties since she could insist on wearing dark glasses inside the cars—no matter how dark it was—as long as outside the sun was shining or there was snow on the ground; (3) Claimant was offered the return-to-duty slip, which on her General Chairman's advice, she rejected. They both left the office.

There then ensued a conversation in the Master Mechanic's office between him, Claimant and her General Chairman. The parties disagree on what transpired. Petitioner affirms that the Master Mechanic proposed—and the General Chairman agreed—that (1) Claimant return to work and use her dark glasses during periods of snow and glaring sunlight, (2) Claimant would be examined by Dr. Levine, a neutral physician, to determine whether a lighter shade of tinted lenses could be prescribed, and (3) The claim for compensation would be handled with Carrier's Manager. Carrier, by contrast, states that (1) Claimant and her General Chairman reiterated the previous request, which was denied. (2) However, based on her promise to return to work, the

Master Mechanic agreed to have her examined, at Carrier's expense, by an outside specialist—not the "neutral" Dr. Levine—to check Dr. Kelly's findings. There was absolutely no agreement, Carrier insists, to let Claimant wear dark glasses while on duty.

November 2, 1967. Claimant returned to work wearing clear corrected lenses. Soon thereafter she went on vacation.

November 7, 1967. Claimant was examined by Dr. R. Cox, an opthamoligist, after arrangements had been made by Dr. Kelly.

November 8, 1967. Petitioner's General Chairman rejected Manager Shaw's decision. On the same day Claimant was told to return to Dr. Cox for a second examination.

November 15, 1967. Petitioner's General Chairman protested, to the Master Mechanic, the use of Dr. Cox rather than Dr. Levine.

November 22, 1967. Dr. Cox, following his second examination of Claimant, reported his findings to Carrier. The physician had been asked to determine, if possible, whether Claimant suffered from an eye condition which would subject her to a risk of harm if she performed her duties without colored glasses. He reported that Mrs. Worrell had provided him with the following background information: Twenty years before—after four years of service with Carrier—she obtained spectacles with clear, corrected lenses. Two years later she got plano hook-over lenses because of photophobia (light irritated eyes). Still later she obtained corrected sunglasses. She uses the clear spectacles for inside work; when she leaves the car she switches to dark glasses because the light irritates her eyes; upon arrival at the next car she reverts back to the clear glasses. However, Dr. Cox reported, Mrs. Worrell changed this statement a short time later to say that she wore her clear and dark glasses interchangeably.

Dr. Cox found Claimant's uncorrected vision 20/30-4 and 20/30-1 in the right and left eyes, respectively. Her corrected vision was 20/20-1 in each eye. While finding "a beautiful case of synchysis scintllans" in the right eye, he reported that "The pupils react to light, accommodation and consensually." His diagnosis: "I can find nothing in Mrs. Worrell's eyes that would necessitate her using sunglasses in her work as a car-cleaner."

December 15, 1967. Carrier's Manager rejected General Chairman's claim for time lost, attaching a copy of Dr. Cox's findings. He also admonished Claimant "not to wear other than clear glasses at any time while on duty." (In Petitioner's Rebuttal it states that Claimant has not used tinted lenses since Dr. Cox's examination.)

December 20, 1967. Master Mechanic McCabe rejected the Organization's request that Claimant be examined by Dr. Levine.

* * *

The first issue is whether Mrs. Worrell was unjustly removed from service during the period August 9-November 2, 1967. Petitioner argues that Carrier's action was not only unjust, arbitrary and capricious, but also constituted a violation of Rule 32:

> "An employee who has been in the service of the railroad for thirty (30) days shall not be dismissed for incompetence, neither shall an employee be discharged for any cause without first being given an investigation."

Claimant was not accorded an investigation, Petitioner contends, or the opportunity to show that her vision had been corrected. Yet, on March 9, 1967, and

on all the examinations except that of August 9, it was established that she did, in fact, meet Carrier's vision requirements. Moreover, as of August 9, Carrier had no rule barring the use of tinted lenses and Dr. Kelly himself acknowledged that such lenses had no bearing on vision requirements. It had never been the Medical Examiner's practice to remove employes from service, even if corrective glasses were required. Rather, the practice had been to allow employes sufficient time to visit an eye doctor, obtain corrective lenses, and return for re-examination.

There seems to be little doubt that Claimant should not have lost any time from work. In August 1967 she had clear corrective glasses—and had had them for many years—which provided her with the 20/20 vision required by Carrier. She had visited her own eye doctor just five months earlier and he had found no reason to change her prescription. Why then, did she fail the August 9 exam? Either because she was examined without any glasses (as the record indicates) or with dark glasses only—which Dr. Kelly said were prohibited. In any event, the Medical Examiner withheld her from service until she could obtain clear corrective lenses. While Petitioner asserts that, prior thereto, employes in similar circumstances had not been withheld, unfortunately this assertion was first introduced in Petitioner's Rebuttal statement. We are therefore in no position to determine its accuracy. But we do know that (1) Mrs. Worrell had been wearing clear corrective lenses for years and (2) she had fairly recently had her vision re-checked by her own physician. She could easily have reported these facts to Dr. Kelly and offered to return immediately with her clear spectacles (assuming they were not with her at the time). Had she taken this simple and reasonable action, Dr. Kelly would have ascertained without further ado that she did, indeed, have 20/20 corrected vision.

However, for reasons which are not at all clear, Claimant chose to remain silent about her clear spectacles or her examination by Dr. Rout. Under the circumstances, Dr. Kelly's determination was not arbitrary (absent a controlling contrary practice which the record here does not demonstrate). Claimant did not return to Dr. Kelly with clear spectacles and so remained off-duty. Note, furthermore, that when her grievance was denied on August 29, some three weeks later, she was again informed that she could resume work as soon as she returned to Dr. Kelly with clear lenses and passed the test. Yet again, and notwithstanding her long-term possession and use of clear spectacles and knowledge that she had corrected 20/20 vision, she failed to bring her glasses to Dr. Kelly. Instead, she obtained a note from Dr. Rout and paid him another visit. Why she did not comply with the Medical Examiner's (and Carrier's) simple request is difficult to say but, had she done so, she would have not lost any more time from work.

Even though Carrier had been informed—through submission of Dr. Rout's September 14 statement—that Claimant had been wearing corrective spectacles for a long time, it had the right—once the vision issue was raised on August 9—to insist that she bring her glasses in for use in an examination by its Medical Examiner. When Claimant finally acceded to this request (under threat of more serious action affecting her seniority), she passed the vision requirements and was immediately restored to duty on November 2. Since her loss of almost three months' work can be attributed to her own reluctance to comply with Carrier's simple and not unreasonable request to submit to an eye test with her clear corrective lenses, there is no basis for sustaining Petitioner's claims or request for back pay.

* * *

The second issue is whether Carrier refused to comply with an agreement to have Mrs. Worrell examined by a "neutral" eye doctor. Certainly, it should be expected that, in the interest of harmonious employer-employe relations, if nothing else, an agreement made by a responsible Management representative should be honored unless, perhaps, it is violative of the contract or law. This should apply to verbal as well as written agreements. It is often difficult, however, to ascertain the precise contents of a verbal understanding and the present case is illustrative. As noted above, the parties are at odds over what was agreed to in the Master Mechanic's office on November 1. Their disagreement extends to not only who the Claimant was to see but the purpose of the examination. Thus, Petitioner asserts that the new doctor was to determine whether a lighter shade of tinted lenses could be prescribed, while Carrier states that the doctor was to find whether the use of clear lenses would subject Claimant to any risk in the performance of her duties.

We are unable to resolve the conflict in the record. Moreover, even if it were found that a Dr. Levine had been agreed upon, it would be pointless to now order an examination by him in light of the disagreement concerning his function. It may be noted, incidentally, that there is perhaps less conflict with regard to Claimant's wearing of dark glasses than might appear. Dr. Rout has specified that tinted lenses were prescribed only for use during periods of snow or glaring sunlight. Yet a Car Cleaner's duties take her inside cars, not out in the snow or sun. And Dr. Cox found that sunglasses were not needed in Claimant's "work as a car-cleaner". Be that as it may, for the reasons set forth above, Petitioner's second claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1970.

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