Award No. 6207
Docket No. 6068
2-SCL-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

SEABOARD COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under terms of the agreement, Carman T. E. Pittman was unjustly held out of service on September 13, 14 and 15, 1969.

2. That accordingly the Carrier be ordered to compensate Carman T. E. Pittman for three eight (8) hour days at pro rata rate of his regular assigned position.

EMPLOYES' STATEMENT OF FACTS: Mr. T. E. Pittman, Carman, (hereinafter referred to as Claimant), is employed by the Seaboard Coast Line Railroad Company (hereinafter referred to as Carrier) at Brunswick, Georgia as a car inspector on 4:00 P. M. to 12:00 Midnight shift. While on duty September 8, 1969 the Claimant became sick and fainted. He was carried to Glenn Memorial Hospital where his illness was diagnosed syncope (fainting) due to gastroenteritis (inflammation of stomach and intestine). He responded to treatment and was subsequently released from the hospital.

On September 12, 1969 Claimant reported to Dr. W. S. Snyder, the Carrier's local physician, who examined the Claimant and confirmed the diagnosis of syncope and gastroenteritis. Dr. Snyder presented the Claimant with company form Med-4, Seaboard Coast Line Railroad Company certificate of ability to work which stated Claimant will be able to work on September 13, 1969.

The Claimant reported to his place of employment at 3:00 P. M. on September 12, 1969 and presented his certificate of his ability to work. This was so that arrangements could be made for him to resume his regular duties on the following day.

A clerk in the office at Brunswick called the Master Mechanic's office in Waycross, Georgia and reported the Claimant had been certified able to work on September 13, 1969. The Master Mechanic's office advised the supervision in Brunswick to tell the Claimant they would let him know on Monday September 15, 1969 if he would be allowed to resume his duties.

The respondent Carrier reserves the right, if and when it is furnished ex parte petition filed by the petitioner in this case, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered herein.

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, a Car Inspector, while on duty on September 8, 1969 became ill and fainted, and was taken by ambulance to Glen Memorial Hospital. Diagnosis of his illness there was syncope (fainting) because of gastroenteritis (inflammation of stomach and intestinal tract). Upon release from the hospital Claimant reported to Carrier's local physician who issued Company form Med-4 certifying Claimant as being able to return to work on September 13, 1969.

Claimant reported to work on September 13, 1969 but was not permitted to return to work until September 16, 1969, and thus was denied the opportunity on September 13, 14, and 15 to work.

The delay in permitting Claimant to return to work was occasioned by Carrier's procedure of requiring its Chief Medical Officer, located in Jacksonville, Florida to review the Claimant's medical status, including the findings and conclusions of Carrier's local physician.

The record discloses that Carrier's procedure of review of Claimant's physical status, which this Board asserts is a proper exercise of Carrier's managerial obligation, is by itself not a violation of the Agreement in this instance, consisted in fact of the following:

1) Dispatch of Claimant's medical file on Friday, September 12, 1969 to the Chief Medical Officer in Jacksonville;

2) Receipt of Claimant's file by Chief Medical Officer on Monday, September 15;

3) Review of Claimant's medical file and, decision of Chief Medical Examiner on September 15, that Claimant was in fact fit to return to work, which information was transmitted on that afternoon of September 15 by telephone to Brunswick, Georgia, the Claimant's work location.

To Claimant, each day's compensation is vital. The issue before the Board is whether the Claimant should be deprived of compensation for three days because Carrier's Chief Medical Officer's office is apparently closed on Satur-

day and Sunday, and because Carrier's Chief Medical Officer was unable, because of the press of other work on Monday, to review and to reach the conclusion that Claimant was fit to return to work, until late in the afternoon of Monday, the 15th, at which time he transmitted such conclusion via telephone to Brunswick, too late apparently for Claimant to return to work as his position had already been filled.

The Board in considering this dispute found considerable light in the findings contained in Award 5847 (Dorsey) which sustained a claim for compensation for something over a month's out of service essentially "for the reason that Carrier's Chief Surgeon's judgment to hold Claimant out of service was not 'buttressed by substantial evidence of probative value,'" reasoning as follows:

> ". . . (3) where 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 findings when put in issue, carrier became obligated to make whole claimant for loss of the fruits of his contractual entitlements for the period that he was held out of service; (5) claimant was wrongfully held out of service July 25, 1967 through September 1, 1967, and we therefore will sustain the claim."

In a word, Carrier has the right to establish a procedure for the medical examination of employes so as to decide whether or not to permit them to return to work. However, Carrier's judgment to hold an employe out of service needs to be solidly grounded on a medical finding of substantial probative value.

In the instant matter before the Board, Claimant was held out of service, **not because of medical findings,** but rather because of well intentioned but purely administrative and procedural matters within the control of Carrier. This Board sees even more justification for not burdening Claimant with the cost of the procedural delay, than the grounds set forth in No. 5847 justifying an Award granting back pay for over a month.

Award 5537 (Carter) sustained claim in 1951 for compensation for almost a month, essentially on the grounds that Carrier could have and should have examined Claimant within five days of Carrier's receiving medical data that Claimant had recovered from an illness. The Carrier did not so act until almost a month after receipt of such data. In Award No. 5537 the Board also made whole the claimant for the interval between the date of Carrier's receipt of knowledge of Claimant's changed medical status, and the Carrier's obtaining through its own Medical Department confirmation of same. In essence, Award No. 5537 concluded that it was not equitable to place the burden of the cost of Carrier's delay in reaching its own conclusion as to the medical status of the Claimant.

Similarly in Award No. 4083 (Carter), the Board awarded compensation for some six months to a Claimant, essentially on the grounds that Carrier did not, but could have established by physical examination, that Claimant was physically able to return to work within sixty days after employe became ill. The Board found in No. 4083, that Carrier's procedures in that particular instance, namely not causing a medical examination to be made of Claimant,

but rather relying on the observations of Claimant's fellow employes, and the further procedure of Carrier, namely not causing Claimant to be examined periodically during that period, that both such failures resulting in Claimant being held out of service improperly. The Board then concluded that such a set of circumstances imposed a cost on the Claimant which should not be borne soley by him, and consequently the Board made Claimant whole for all time lost, approximately six months less sixty days.

The Board finds in the above cited past Awards sufficient grounds for concluding that previous decisions of the Board have established certain precepts namely that Carrier has every right to satisfy itself that employes are physically fit to perform their respective responsibilities; and the further precept that while Carrier has every right to establish its own medical procedures, it cannot impose their costs on employes. Thus, in the instant matter the Board finds that Claimant should not be required to bear the costs of an administrative procedure, resulting in his being held out of service, when that procedure consists of the fact that the office of Carrier's Chief Medical Officer is not open on Saturday and Sunday. Thus the Board sustains the claim.

AWARD

Claim sustained as per above opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November, 1971.

DISSENT OF CARRIER MEMBERS TO SECOND DIVISION AWARD NO. 6207 DOCKET NO. 6068

U. S. Supreme Court Justice Hugo Black, in a landmark railroad case[1] decided in 1950 defined, perhaps more clearly than anyone, the reasons for the existence of the National Railroad Adjustment Board:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

In this Award neither of the two salient guidelines or purposes have been met. The railroad problem in this case was simply ignored and little more

[1]Slocum v. Delaware, Lackawanna & Western Railroad, 339 U.S. 239, 94 L.ed 795 (1950).

than lip service was given to desirability for any measure of uniformity in the Award making process.

The necessity for safety in railroading is not old fashioned and it demands persistent emphasis notwithstanding this Award. In 1929 the U. S. Supreme Court considered the purpose of the Federal Employes' Liability Act when it stated that "the carriers owe a duty to their patrons as well as to those engaged in the operation of the railroads **to take care to employ only those who are careful and competent** to do the work assigned to them and **to exclude the unfit** from their service."[2] This is the railroad problem the Award ignores.

Considering next the purported reliance on three awards that was undertaken by the Referee, while all the preponderance of awards to the contrary are never discussed, the Award misapplies claimed precedent. Award No. 5847 involved a severe medical dispute that took weeks to resolve rather than the mere affirmation of a local doctor's return to work evaluation over a mere weekend by the carrier in this instance.

Award No. 5537 involved a delay far beyond a reasonable period, and it is highly significant to note that the Board in that case determined that five days was a reasonable period! Award No. 4083 is simply a case of defective railroad procedures wherein reliance was not based upon medical evidence but the observations of fellow employes.

Furthermore, in recent Award 6048, involving the same parties, which award was apparently ignored by the Referee, the Board determined that delay of six days was not arbitrary or unreasonable.

To summarize what this Board has done: it exemplifies the worst type of second guessing into medical expertise on a very serious physical disorder; namely, **fainting or blackout spells.**. To suggest that a reasonable doubt of an employe's ability to return to work should be resolved in his favor constitutes callous disregard for the safety of railroad employes and the public. There was no unreasonable delay. There was no bad faith as is clearly evidenced by the swift efforts to affirm the local physician's report, all of which was accomplished in one working day.

The Award is in serious error and the Carrier Members dissent.

For the Carrier Members:

H. F. M. Braidwood
W. B. Jones

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[2]Minneapolis, St. Paul and S.S.M. RR. v. Rock, 279 U.S. 410 73 L.ed 766 (1929).

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