Award No. 6262
Docket No. 6107
2-C&O-MA-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

THE CHESAPEAKE & OHIO RAILWAY COMPANY (Chesapeake District)

DISPUTE: CLAIM OF EMPLOYES:

1 — That under the current agreement Machinist A. L. Ross was unjustly given an entry against his service record.

2 — That accordingly the Carrier be ordered to clear the service record of Machinist A. L. Ross in connection with this charge.

EMPLOYES' STATEMENT OF FACTS: Machinist A. L. Ross, hereinafter referred to as the claimant was employed by the Chesapeake & Ohio Railroad, hereinafter referred to as the carrier, for a period of forty-four (44) years and two (2) months at various shops on Carrier's property, having transferred to Carrier's Huntington, West Virginia Shop on January 6, 1969 because of a coordination of facilities at Ashland, Kentucky, following his work and bringing his Ashland seniority with him to Huntington, West Virginia.

Machinist Ross was assigned on the first shift 7:00 A. M. to 3:30 P. M. Monday through Friday, with rest days Saturday and Sunday.

The Carrier represented by Mr. D. W. Walker, Shop Superintendent, Huntington Shops, notified claimant under date of February 13, 1970 to attend an investigation to be held in Production Manager's Office at Huntington Shop at 9:00 A. M. February 19, 1970; however, this date was by mutual agreement changed to February 25, 1970 at 1:00 P. M. on the following charge:

> "You are hereby charged with failure to follow the instructions outlined in my letter dated January 13, 1970, File A-115-2-R, wherein you were instructed to report to Dr. R. R. Dennison's office for a recheck examination during the month of January, 1970."

Shop Superintendent Walker's letter is attached hereto and will be marked Exhibit A.

partment representative, had not returned to work, and has signed up with the Railroad Retirement Board for unemployment insurance. Ross now has other claims pending alleging that he is being improperly withheld from the service of the carrier, etc.

It is well established that the carrier has the right to determine whether its employes are physically qualified to perform service with reasonable safety to themselves, other employes, the carrier, and the public at large. Ross' refusal to undergo physical examination in order that this determination may be made is tantamount to a complete refusal to recognize authority at an attempt to impose his personal whims over the rights of all others.

Carrier submits that the minimal discipline rendered is extremely lenient and urges that this Board deny the claim of the Employes as submitted.

All data herein submitted in support of carrier's position has been presented to the Employes or duly authorized representatives thereof and made a part of the question in dispute.

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.

Petitioner seeks to have a negative entry removed from claimant's service record.

There is no controversy concerning the facts. The claimant, who has been an employe of the Carrier in excess of forty years, had suffered an injury on the job early in 1970. His claim thereon was resolved by a successful action at law which resulted in his recovering a substantial sum of money from the Carrier in the Fall of 1969. At approximately that time, claimant had complained of back pains and dizziness to his foreman and was instructed to secure a physical examination by a physician designated by the Carrier's Medical Examiner. He did not promptly comply with this directive, but eventually submitted to the medical review in November and December, 1968. He was then found to be physically qualified to continue his work as a machinist.

In the Spring of 1969, the claimant, with the assistance of his organization applied for and was granted the benefits of Rule 23 of the Controlling Agreement, which reads:

> "Employes who have given continuous long and faithful service in the employ of the Company, and who have become unable to handle heavy work to advantage, will, senior being sufficient, be given perference for such light work in their line as they are competent to handle."

At the request of his Employer, claimant was again examined by a Carrier designated doctor in July, 1969. Again he was found to be sufficiently fit

to continue on the job he was performing. He was advised that he would be expected to submit to physical check-ups at six month intervals. Although he and his organization representative protested this requirement orally, no further steps were taken by him or his organization with reference thereto. In January, 1970, Claimant's supervisor handed him a letter from Carrier's Superintendent of Shops at Huntington, West Virginia, ordering him to have a physical recheck by Carrier designated doctor prior to the end of that month. Claimant failed to honor this directive. Early in February, 1970, the Superintendent of Shops personally sought out claimant and asked him whether he had taken the recheck pursuant to the notice of January 13, 1970. Upon receiving a negative reply, he asked claimant whether he was going to comply with the order and received the following answer: "No, I am not going to take my physical. That's my stand."

An investigation was instituted by the Carrier to determine whether the claimant should be disciplined for refusal to adhere to instructions. Following a hearing, duly conducted on the property, and at which claimant was present and represented by several officials of his Organization, the Carrier imposed the penalty of an entry in his service record of his failure to comply with instructions.

The Petitioner charges that the Carrier was, by ordering frequent physical examinations of the claimant, seeking to harass him because of his successful law suit against it. It further claims that the notice of January 13, 1970 was vague and indefinite and therefore claimant properly disregarded it.

In Award 5847 (Dorsey) we summarized our long held position as follows:

> "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.
>
> 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 to his position it may not exercise the right in derogation of the employe's vested contractual right. * * *"

We do not consider that the contents of the January 13, 1970 notice, on which Petitioner laid great stress, is a meaningful factor. From January 13 to sometime early in February, claimant never indicated to anyone in supervision that he desired more specific arrangements made for his examination. In fact he clearly indicated defiance of the order in his uncontroverted statement to the Superintendent of Shops quoted hereinabove. It is quite apparent that claimant would not submit to the physical recheck regardless of what was in the January 13, 1970 notice.

Did claimant's belief that he was being harassed warrant his refusal to comply with the Carrier's instructions? More than twenty-five years ago, one of the sages in the field of adjudication of labor-management disputes, Professor Harry Shulman, laid down the principle clearly applicable hereto in the following manner:

"The employe * * * must * * * normally obey the order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it upon himself to disobey * * * He may not refuse to obey merely because the order violates some right of his under the contract. The remedy under the contract for a violation of right lies in the grievance procedure. To refuse obedience because of a claimed contract violation would be to substitute individual action for collective bargaining and to replace the grievance procedure with extra-contractual methods * * * Some men apparently think that, when a violation of contract seems clear, the employe may refuse to obey and thus resort to self-help rather than the grievance procedure. This is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in the collective negotiation through the grievance procedure. But in the second place, and more important, the grievance procedure is prescribed in the contract, precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a 'clear' violation and a 'doubtful' violation is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the prescribed manner * * *" (Ford Motor Co. and U.A.W. —3 LA779-1944)

This concept eventually evolved into a short statement, namely, employes must comply with a management order, unless same would probably be hazardous to his health or safety, and then grieve if he considers the order improper or contrary to his contractual rights.

Although we might be sympathetic with an employe who had given so many years of service to his employer, we cannot afford the disruption of the basic concepts essential to proper and safe operation of the railroads which would stem from sustaining the views urged by the claimant and Petitioner herein.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 13th day of March 1972.

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