

Award No. 6312

Docket No. 6189

2-EJ&E-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph E. Cole when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

Temporary Carman Robert A. Hase, Jr., hereinafter referred to as Claimant, was unjustly disqualified by Chief Surgeon, Dr. F. L. Wilke, in violation of Medical Disqualification Appeal Procedures for a period from July 1, 1970 up to and including July 15, 1970. This is a loss of work totaling 85 hours.

The Elgin, Joliet and Eastern Railway Company, hereinafter referred to as the Carrier, be ordered to compensate the Claimant for a total of 85 hours at the pro rata rate of pay.

EMPLOYEES' STATEMENT OF FACTS: The Claimant went to his family doctor May 19, 1970, subsequently was hospitalized from May 22, 1970 to June 1, 1970.

After being discharged from the hospital and being advised by his doctor that he could return to work, he reported for work on June 3, 1970, and was instructed by Mr. L. Howard, Division General Car Foreman, that he would have to pass physical examination by a company doctor before he could return to work. Claimant reported to hospital on June 3, 1970, for physical exam and was told to come back June 4, 1970, because the Carrier's doctor was not available on June 3. June 4, 1970, Claimant returned to the hospital, was examined by Carrier's Dr. Zebell, and given clearance to, and did, return to work same day, June 4, 1970.

Claimant worked for almost a month and at approximately 9:00 A.M. on July 1, 1970, he was called to the office of Mr. L. T. Howard, Division General Car Foreman, given a letter signed by Mr. L. T. Howard that he was temporarily disapproved for work and sent home. Claimant was notified by letter dated July 14, 1970, signed by L. T. Howard, Division General Car Foreman, that he (Claimant) was permanently disqualified from working for the Carrier.

"No rule of this jurisdiction is more firmly established than the one that a Carrier is possessed with certain discretionary powers in determining the fitness of an employe for service and that its exercise of those powers in respect to such matters will not be disturbed in the absence of a clear affirmative showing they have been exercised in an unreasonable, arbitrary or capricious manner."

Second Division Award No. 3137 (Ferguson)

"Considering the salient facts we are of the opinion that the Carrier was acting in good faith and was not being hypercritical of the Claimant in its pursuit of safety for all concerned. Its actions here stand the test of reasonableness and was not arbitrary."

Carrier states that its physical and mental requirements are reasonable and, in the instant case, no indication of capricious or discriminatory application of such standards is shown. Certainly no fault can be found with the expeditious manner in which Carrier returned the Claimant to service upon receipt of information that the condition which led to his disqualification was removed. It should be noted here that Claimant, through his prompt release of information from his personal physician and the prompt action taken by his doctor are to be commended and played a great part in Claimant's short-lived disqualification.

In view of the foregoing, Carrier finally asserts that the action taken by the Chief Surgeon in withholding Claimant from service was within its inherent powers and responsibilities of management, was violative of no rule of agreement, and requests this claim be denied in its entirety.

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.

1 It is recognized that the Carrier has the right to set up medical qualifications so that the safety for everyone is maintained, both for the carrier and the employes.

2 Pursuant to instructions from the proper superior, Mr. L. Howard, Claimant presented himself to the Company Physician for examination. He had received assurances that he was able to work for the carrier by his own personal physician Dr. Van Arsdale. This was on June 4, 1970. The Company Physician, with full knowledge according to the record, released the claimant for work, and the claimant returned to service. Dr. Zebell was the Company Physician to whom the Claimant was instructed to be examined by.

3 This finding was reviewed by the Carrier's Chief Surgeon Frank L. Wilkie, M.D. who disagreed with the Company physician, Dr. Zebell, and the Claimant's personal Physician, Dr. Van Arsdale. Pursuant to his letter of June 26th, Carrier's Exhibit B, Claimant was removed from service.

This is an academic disagreement of Company Physicians. 4

The Medical Disqualification Procedure Agreement was violated by the action taken by the Carrier above, if it results in loss by the Claimant. 5

Either the Medical Disqualification Procedure must be followed, or the claimant must be made whole. 6

The Chief Surgeon may not be a dictator, whether benevolent or otherwise, but must respect the rights of the employe as well as protecting the Carrier, who is the Surgeon's employer. Doctor Zebell's findings have nearly as much weight as Doctor Wilkie, from the record. 7

The Carrier is ordered to pay to the Claimant, as compensation, for a total of 85 hours at the pro rata rate of pay. 8

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1972.