Award No. 6320
Docket No. 6074
2-RDG-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

READING COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, the Reading Company unjustly and improperly withheld Car Inspector William Pletz from service starting April 9, 1970 and continuing into the future.

2. That accordingly, the Reading Company be ordered to compensate William Pletz for all time lost, plus 6% interest per annum, commencing April 9, 1970.

Further, make him whole for all vacation rights.

Further, pay the premiums for Hospital, Surgical and Medical Benefits for all time held out of service.

Further, pay the premiums for Group Life Insurance for all time held out of service.

EMPLOYES' STATEMENT OF FACTS: Car Inspector William Pletz, hereinafter referred to as the Claimant, is regularly employed by the Reading Company, hereinafter referred to as the Carrier, at its Abrams Mechanical Facility, Abrams, Pennsylvania. Claimant has a total of eighteen (18) years service with the Carrier.

April 9, 1970, Claimant reported for duty, after being off sick for an extended period. Claimant presented a return to duty certificate from his personal physician, which stated he had no restrictions and that "* * * he may return to his usual duties."

General Foreman Davis sent Claimant to the Medical Examiners for a medical examination to determine his fitness for work, this, without placing Claimant on duty as required by "Regulations for handling and reporting employes holding positions in the scope of Shop Crafts or Firemen and Oilers' Agreements, who remain away from their work because of sickness or accident."

disabled from performing any and every kind of duty for compensation. Carrier submits that under the unique circumstances present in this case it had an obligation and duty to prevent the claimant from killing himself. This is particularly valid where Carrier's chief medical examiner has concurred with the claimant's own diagnosis of his condition that he is not fit for duty.

Your Board has long determined that where conflicting medical opinions are present it will not intervene when the Carrier's medical examiner has acted reasonably upon the facts and the claimant's medical record. Must the Carrier subject itself to a widow's negligence action by returning an employe to work when both the man and its chief medical examiner agree that such action will place his life in danger? Indeed, in this case the claimant suffered a third heart attack twenty-five days after stating that he knew his work placed his life in danger. Carrier submits that the promulgation of the "E-7 Instructions" was not intended to abrogate common sense and prudence. Furthermore, they should not be construed to allow a claim advanced to recover monetary damages for an employe desiring to commit suicide.

Assuming **arguendo** that the "E-7 Instructions" are applicable, Carrier notes that the claimant has not complied with them. Contrary to his notice of April 11, 1970, the claimant failed to present his physician at the hearing and hence deprived Carrier of the opportunity of examing him and of confronting him with the testimony of its medical examiner. Moreover, the claimant or his organization have never requested that a third disinterested doctor be called upon to render his opinion, Carrier submits that it had no obligation under the totality of the circumstances to return the claimant to duty after the April 14, 1970 hearing where he presented no medical testimony and when no request was advanced for a third doctor's opinion. Carrier suggests that the absence of a request for third party evaluation is in itself significant.

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 were given due notice of hearing thereon.

The Employes contend that Carrier erred when on April 9, 1970, it refused to allow Claimant to return to service in accordance with the practice established by Carrier's Regulations contained in its Standard Instructions E-7.

Claimant a Car Inspector with 18 years service, suffered a heart attack on November 11, 1960, and was off work until March 16, 1961. He returned to duty with the provision he remain under medical care. He was off duty from March 6, 1965 until April 6, 1966, due to arterioscherotic heart disease. On August 8, 1965, he applied for disability benefits under his Travelers Insurance Policy stating that he was:

> "* * * totally and continuously disabled from performing any and every kind of duty for compensation."

Due to his heart condition, Claimant left his employment on December 8, 1969. On April 9, 1970, Claimant reported for duty. He presented a return to duty certificate from his personal physician, which stated that he had no restrictions and that "* * * he may return to his usual duties."

The General Foreman instructed Claimant to report to Carrier's Chief Medical Officer, and on April 13, 1970, he did so for the purpose of obtaining a return to work card.

The Medical Examiner refused to issue Claimant a return-to-duty slip. Claimant returned to his place of employment and the General Foreman refused to allow him to continue on duty.

On April 9, 1970, Claimant was given notice, in accordance with Rule 34, to appear for hearing and investigation at 10:00 A. M., April 14, 1970, in connection with his being physically able to perform his duties. He was instructed that it was his responsibility to have his physician present at the hearing.

The hearing was held on April 14, 1970, and Claimant failed to have his physician present. Thereafter, Claimant was informed he would not be permitted to return to work for medical reasons.

The two pertinent sections of Carrier's Standard Instructions E-7 read as follows:

> "Handling and reporting sick cases.
>
> 1. (c) * * * If the Medical Examiner does not pass him as being in proper condition to resume work, he will nevertheless be permitted to continue on duty. * *
>
> * * * If an agreement cannot be reached, the employe's physician and the carrier's physician shall agree upon a third disinterested doctor or surgeon of high repute in the field of the disease, etc., from which the employe is alleged to be suffering. The employe, while under pay, will be examined by this third doctor, and the findings of this doctor shall be final and binding and put in effect. * * *"

The Employes rely upon Second Division N.R.A.B. Award No. 5173 (Weston). This Award involved the same parties. In Award No. 5173, Referee Weston stated:

> "* * * All we are deciding is that it was arbitrary and discriminatory for Carrier to neglect to hold a reasonably prompt hearing in this matter and to apply its established procedures to Claimant's situation."

In the instant case, the Claimant was afforded a prompt hearing. We further find that it was incumbent upon the Claimant to invoke the provisions of Standard Instructions E-7 and request an evaluation by a third doctor. The Employes recognize that these Instructions become agreement between the parties, as evidenced by their Submission to this Board.

Under the terms of Standard Instructions E-7, Claimant is entitled for pay for any time the would have worked from April 9, 1970, until the date of the hearing on April 14, 1970. The balance of the Claim will be denied.

AWARD

Claim sustained for pay for any time Claimant would have worked from April 9, 1970, until April 14, 1970. The remainder of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1972.

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