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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6561
Docket No. 6403
2-LV-CM-'73

The Second Division consisted of the regular members and in addition Referee Edmund W. Schedler, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 96, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Lehigh Valley Railroad Company

Dispute: Claim of Employees:

That the Carrier violated the controlling agreement when they arbitrarily removed Carman Raymond Kindt from service effective September 30, 1971. Buffalo, New York Car Department.

That the Carrier be ordered to return Carman Raymond Kindt to service with seniority unimpaired, compensate him at his applicable rate of pay for all work days lost, payments made on premiums for hospital, surgical and medical benefits, and Group Life Insurance.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

In this dispute the Claimant was withheld from service because the carrier contended the Claimant's health had degenerated over a period of time and that he was not fit to work. Claimant was examined on October 15, 1971 by Orthopedic Surgeon Dr. John Ring and a medical report was furnished to Carrier's Chief Surgeon, Dr. Niles. The evidence disclosed the Claimant was subsequently examined by 5 additional physicians and generally they all approved Claimant's return to work.

The Organization has cited Rule 37 of the Agreement as being applicable to this grievance. Carrier contends that Rule 37 does not apply since the instant dispute is not a disciplinary matter. We do not agree.

The rule states:

Rule 37

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be re-instated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal, less amount earned in other employment."

Discharge grievances due to medical problems ordinarily involve the identical merits as do non-medical discharge grievance. Thus a termination for excessive absenteeism or failure to perform work may be due to long term chronic illness or other illness. Discharge in these instances may not be due to the misconduct of the employe; it may be due to the employe's not being able to work due to poor health. In the instant grievance, Rule 37 applies because the carrier was clearly anticipating that Claimant would no longer be able to perform satisfactorily because he was disabled.

The question before the Board is whether or not the Claimant was disabled to such an extent that he could no longer work. If he was disabled to such an extent, then the carrier could justly dismiss the Claimant.

The carrier's contentions are summarized in Mr. Pace's (Acting for the Chief Mechanical Officer) letter dated December 24, 1971 stating among other things:

"With the combination of the recurrent back problems, evidence of bone spurs in his back on x-ray and uncontrolled tremors of the fingers of both hands secondary to Parkinson's Disease, the question arose whether this man was fit for work. The patient was seen October 15, 1971 by Dr. John Ring, an Orthopedic Surgeon in Buffalo. Because of his problems he felt he was disabled. He noted that his job would require Mr. Kindt to climb in and out of cars both in nice weather and when it is snowing, raining, hot and that there was an element of risk involved in allowing him to carry on this job with his history of recurrent back pain brought on by the simple act of tying his shoes. With the tremor of his fingers his grip may not be secure and it might be dangerous to allow him to climb in and out of cars."

The Claimant's physicians reported:

(1) On October 1, 1971 by Dr. Hamilton J. Clarke:

(a) The above is in good physical condition.

(2) On February 2, 1972 By Neurologist Robert J. Zwirecki, M.D.:

Physical Examination -- Cranials - normal. No papilledema.
Motor Examination -- cogwheeling and moderate tremor,
right arm. Strength is excellent
and symmetrical. Tremor at rest
only. One on intention.

Sensory &
Cerebellar -- normal exam.

DTR's -- brisker right than left
I feel he can return to work safely - tremor not incapacitating and
regresses on intention.

(3) On January 24, 1972 by Dr. E. J. Manning:

The above named patient has been diagnosed as having
Parkinsonism, but his condition is still too mild a case
to take L-Dopa at this time. It is my medical opinion that
there is no reason why this man may not return to work and
perform his usual duties.

(4) On or about February 22, 1972 by Dr. Ralph Shaver:

It is my considered medical opinion that the above named
patient can return to work (or continue working) as of
3/1/72 in the occupation of Car Inspector. It is also
my considered medical opinion that his working in such
occupation will not aggravate the above named condition or
conditions to the extent that it will worsen or disable him.

A claim to return to work with a possible physical impairment should be
considered by examining the duties expected of the employee and the employee's
physical deficiencies. The Referee has carefully reviewed Rule 121, the
classification of work rule for the Carman. The work appears to be painting,
construction, and mechanical in nature and it appears to a majority of this
Board that the Claimant can perform the carman's work. In addition it is noted
the parties clearly contemplated under Rule 23 (Faithful Service) that some employee
with long and faithful service may become unable to handle heavy work to an ad-
vantage and that such employees will be given preference of such light work in
their line as they are able to handle.

The Board also notes that there was no evidence of poor work performance, excessive absenteeism, or any evidence whatsoever that Claimant was not a good employee because of his health.

It is firmly established in the decisions of the various Divisions of the National Railroad Adjustment Board that when petitioned to resolve a dispute that the Board's consideration is confined to the issues raised and material evidence in the record made on the property. We do so in this dispute.

The Carrier's finding of a physical disqualification gives rise to a dispute and the burden of proving the physical disqualification by substantial material evidence of probative value is upon the Carrier. The sole issue before the Board is whether the Carrier satisfied the burden. It is the opinion of the majority of this Board that the Chief Surgeon that the Claimant was physically disqualified is not supported by substantial evidence of probative value. The Carrier's finding, to prevail, required medical evidence to sustain it.

We find that: (1) The Carrier did have the right to have Claimant examined by its physicians to determine if the Claimant was physically qualified to perform the duties of his position; (2) the Carrier's finding that the Claimant was physically disqualified was not absolute and the burden of proof rested with the Carrier; (3) when the Carrier held Claimant physically disqualified and held him out of service it assumed the risks attendant to infallibility; (4) upon a finding, which we make here, the Carrier placed Claimant out of service for physical disqualification and failed to prove such finding when put in issue, Carrier became obligated to make whole Claimant for loss of fruits of his contractual entitlements for the period he was held out of service; (5) Claimant has been wrongfully held out of service since September 29, 1971. We, therefore, will sustain the claim.

A W A R D

The Carrier will:

- (1) Restore the Claimant to service with seniority rights unimpaired.
- (2) Make the Claimant whole for all vacation rights.
- (3) Pay premiums for hospital, surgical, medical benefits, and group life insurance.
- (4) Restore all pay lost from September 29, 1971 until restored to service less any other wages made on any other job during this period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of July, 1973.