Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD SECOND DIVISION

Award No. 6716
Docket No. 6618
2-EL-EW-'74

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. 100, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(The Erie Lackawanna Railway Company

Dispute: Claim of Employes:

1. That under the current agreement, Electrician John Corbliss was unjustly held out of service from May 3, 1972 until August 1, 1972.

2. That accordingly the Carrier be ordered to restore to the aforesaid employe all pay due him from the first day he was held out of service until the day he was returned to service, at the applicable Electrician's rate for each working day he has been improperly held from service, plus six percent (6%) of the total of all such pay; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment and sickness benefits for the above described period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above described period; and all other benefits that would normally accrue to him had he been working in the above described period in order to make him whole.

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.

If it were not for the serious consequences and impact, this case could best be described as a comedy of errors.

In September, 1971, Claimant following three months of sick leave, advised that he was ready to return to his position as an electrician with Carrier. He was, by arrangement of Carrier examined by a physician and permitted to return to his regular position. Subsequent to Claimant returning to work, Carrier's Chief Surgeon, after further review of Claimant's condition, ordered Claimant "restricted to light duties only and to be reexamined every six (6) months." It must be noted that Carrier's Chief Surgeon's report and the basis therefor is not included in the record before us. In any event, this determination of Carrier's Chief Surgeon of October, 1971 either never was communicated to management at Carrier's installation where Claimant was employed, or was "lost" in Carrier's records, or from the time Claimant returned to work in September 1971, until May, 1972, Claimant, without incident or reported difficulty performed the duties of his position. Allegedly Carrier's Chief Surgeon, following a examination on an unknown date in the spring of 1972 reissued a limitation on Claimant's work. Said report and the basis therefor is also not in the record before us. However, early in May, 1972, Local Supervision of Carrier, claiming an "oversight in September and October, 1972, removed Claimant from service on the ground that he must be confined to "lighter type duty", which was not immediately available unless agreement could be reached to "create a vacancy" in the "MU Shed" where Claimant would perform a bench job (brush holders). Nowhere in its submission or its rebuttal does Carrier controvert Petitioner's contention that to effectuate Carrier's proposed "light duty" placement of Claimant would entail displacement of an employe properly occupying the position and could have a material impact on Claimant's seniority rights and benefits stemming therefrom.

Carrier's Chief Surgeon, made a unilaterial determination on June 1, 1972, without any indication of medical support therefor, and despite a medical report by an apparently qualified physician that Claimant was in adequate physical condition to perform the duties of an electrician without limitation, that "our records show that this man had a coronary and we do not allow such to do strenuous labor". It was not until July 11, 1972 that the Chief Surgeon advised that arrangements were made for a Carrier's designated Physician to examine claimant later that month.

The specialist chosen by Carrier, apparently sustained Claimant's physician's findings that no restriction on the work to be performed by claimant in his classification was necessary, although the details of the Carrier designated specialist's report are not included in this record. This report was received at Carrier's Medical Department on July 24, 1972. The Chief Surgeon telegraphed local supervision on July 28, 1972 that Claimant was "qualified as an electrician". Claimant was restored to work August 1, 1972.

This record depicts a crass disregard for the rights and earning needs of an employee. Nothing in this record discloses a conflict, based upon credible, probative medical determination that Claimant's continued performance, past May 3, 1972, of work he was doing between September, 1971 and that date would prove harmful to him, his coworkers or detrimental to Carrier. Carrier's Chief Surgeon, as far as this record discloses, made an arbitrary and capricious decision, based on generalities, that restriction to "light duty" was necessary. He did not define this nor did he indicate that he was aware of the electrician's job content, but labelled it as "strenuous". There was really no valid conflict between doctors to warrant invoking the "Understanding on Physical Examinations" by the Carrier. The reverting back, in May, 1972, to the Chief Surgeon's recommendations of almost nine months earlier, and removing Claimant from service based on that report smacks of maladministration of acceptable controls for the protection of employes and Carrier following an employe's serious illness. Claimant should not be made to suffer that casual and procrastinating fashion with which the Carrier's Medical Department dealt with his case. There was no reason for Claimant to sustain the loss of three months' pay. Carrier's argument that Claimant could have mitigated the damage is not found to be meritorious based on the record herein.

Rule 32 of the Controlling Agreement between the parties specifies the remedy applicable to those circumstances to reinstatement of the employe "with his seniority rights unimpaired, and compensated for wage loss if any..." This Board has held that it is not empowered to expand upon the express Agreement and therefore may not grant fringe benefits and/or interest in addition to making Claimant whole for actual loss of wages sustained by him due to improper action by Carrier. Carrier is obligated to restore to Claimant "all pay due him from the first day he was held out of service in May, 1972 until the day he was returned to service in August, 1972."

A W A R D

Claim sustained to the extent set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By [signature]
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 25th day of June, 1974.