Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7064
SECOND DIVISION Docket No. 6910
2-C&O-CM-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Chesapeake and Ohio Railway Company

Dispute: Claim of Employes:

1. That Carman, W. O. Hicks, regularly assigned second shift transportation yards, work week Saturday through Wednesday, rest days, Thursday and Friday, was unjustly removed from service on September 15, 1973 without being afforded a fair hearing as set forth in Rule 37 of the Shop Crafts Controlling Agreement. Hicks was removed from service in a very discriminatory manner.

2. Accordingly, Carman W. O. Hicks is entitled to be restored to service with seniority rights unimpaired, made whole for all vacation rights, for all health and welfare and insurance benefits, for pension benefits including Railroad Retirement and Unemployment Insurance and paid for all time lost, plus 6% interest per annum, commencing September 15, 1973 until such time he is restored to service.

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.

At the time of the various incidents giving rise to this dispute, Claimant was regularly assigned as Carman at Carrier's transportation yards, Columbus, Ohio. His vacation time in 1973 extended from June 2 to June 6. It appears that while on vacation in Florida, Claimant became ill and was hospitalized there. June 7 and 8 were Claimant's rest days. On June 9 and 10 Claimant marked off sick. He reported to work on June 11. Carrier asserts that it did not know at this time the exact nature of Claimant's illness, and that shortly thereafter it learned that Claimant's illness involved onsets of convulsions and periods of unconsciousness. Carrier decided, therefore, to have Claimant "medically evaluated".

Accordingly, on July 6, 1973 Carrier notified Claimant by letter to report on July 11 for physical examination by Dr. Obetz, a neurologist. Claimant protested in writing "this unexplained attack" and as a result Dr. Obetz did not examine him.

On July 13, 1973, Carrier responded to Claimant's "protest" and advised him that another examination had been arranged for July 17 with its Dr. Davies. Claimant was also instructed to have his medical records sent to Carrier's Medical Department and to execute a medical release form. After this examination Claimant returned to work. However, because of a dispute as to payment of Claimant's hospital bill in Florida, he failed to give Carrier the requested medical records. Carrier asserts that in the absence of these records, it could not complete its medical evaluation of Claimant.

Accordingly, on September 15, 1973 Claimant was verbally notified that he was medically disqualified from service until he submitted satisfactory evidence of his complete recovery from illness.

Thereafter, Carrier wrote to Claimant on November 6, 1973 scheduling a neurological examination on November 14 with Dr. McSweeney in Cincinnati. It appears that this examination actually took place for Carrier received that doctor's report "early in December, 1973". Thereupon, Carrier's physician evaluated the report and released Claimant for service but stipulated recheck examination at ninety day intervals.

Prior thereto, on November 8 and 9, 1973, Claimant requested Carrier's physician to complete sickness benefit forms for benefits dated from September 15, 1973. This request was complied with. Assumedly, he received such benefits.

Petitioner contends that Carrier violated the controlling Agreement in that Claimant was unjustly removed from service without being afforded a fair hearing as provided by Rule 37. Additionally, it is demanded that Claimant "be restored to service" with payment for all time loss and restoration of various benefits set forth in the claim. It appears, however, that Claimant was in fact restored to service and that he was actually "held out of service" from September 15, 1973 through December 12, 1973. This is the period, therefore, applicable to the wage loss claim.

Carrier responds that Rule 37 is inapplicable since it relates primarily to discipline cases; that Claimant was withheld from service not for disciplinary reasons but for medical reasons. Consequently, that the "fair hearing" required under Rule 37 does not come into play for no discipline was here involved nor was any disciplinary penalty assessed.

Based upon our analysis of the many prior Awards cited as precedent by Carrier and Organization, we find the following established principles controlling upon the facts of this dispute. As paraphrased below, these principles are supported by the weight of authority in this Division.

Firstly, Carrier has the managerial right where evidence of physical disability is present to require an employe to submit to physical examination as a condition precedent to return to duty, and Carrier is justified in requiring that such medical examination be evaluated by its physician.

See Awards 6569 and 6700 (both cited as precedent by Carrier and Organization) as well as Awards 839, 1703, 2788, 3749, 4158, 4700, 5652, 6207 and 6278.

Secondly, where an adverse medical report is present, Carrier is not in violation of the Agreement when it exercises its management prerogative to hold an employe out of service pending proof of improvement of a physical disability condition justifying restoration to service.

See Awards 839, 2147, 2788, 3108 and 4524, among others.

Thirdly, Carrier's determination of medical disqualification must be supported by probative evidence and not merely by suspicion or inference.

See Awards 3108, 5943 and 7033 among others.

Fourthly, that the Organization has the burden or proof that Carrier's action in holding Claimant out of service was arbitrary, capricious or discriminatory.

> "The setting up of standards of physical fitness is a responsibility of Management, and may not be challenged by us in the absence of evidence of bad faith or abuse."

See Awards 3749 (citing 1st Div. Award 17154), and Awards 2147, 3108 and 4158 among others.

Fifthly, where Carrier elects to have such physical examination of an employe, it must act with reasonable dispatch and an employe cannot be penalized for Carrier's delay or for factors beyond his control. Moreover, in the absence of unusual circumstances, a period of five days has been held "reasonably sufficient time" for scheduling the examination.

See Awards 6569 and 6700, supra, as well as Awards 6206, 6207, 6278 and 7033, among others.

Applying the foregoing principles to the instant dispute we reach the following findings and conclusions:

1. Rule 37, which relates primarily to disciplinary procedures is not applicable here. Carrier held Claimant out of service solely for medical reasons; no discipline was here involved nor was any disciplinary penalty assessed. Additionally, Carrier's managerial decision to so hold Claimant out of service is clearly supported by the weight of authority cited above.

Nor do Awards 6738, 17072 (3rd Div.) and 19565 (3rd Div.), cited by Petitioner, hold to the contrary. Each of these cases relates solely to disciplinary procedures and penalties and are not germane to this dispute.

2. There is substantial probative evidence in the record warranting Carrier's medical disqualification of Claimant and justifying its request for medical examination and prior medical records - before restoring him to service. Thus, for example, the statement of Dr. Newfield, Claimant's "attending physician", dated June 14, 1973, indicates a diagnosis of "convulsions, etiology unknown" and in response to the question whether "Patient ever had same or similar conditions", the doctor states "approx: 6 years ago". The record further indicates that Claimant has a record of attacks of unconsciousness and convulsions. In these circumstances, plus the fact of Claimant's accident and hospitalization while on vacation, Carrier was warranted in holding Claimant out of service "for medical reasons" pending medical reevaluation.

3. We have set forth in detail the various procedures relating to scheduling of the medical examination to show that initially Carrier acted with reasonable dispatch in scheduling the various requested physical examinations within five day periods. However, in scheduling the neurological examination with Dr. McSweeney on November 14, 1973, Carrier states:

> "The neurological specialist needed in this case had a full schedule, so an examination was not possible until November 14, 1973." (Emphasis added)

Moreover, that "Carrier did not receive Dr. McSweeney's report on Claimant until early December, 1973."

These two aspects of delay - the two month period in scheduling the examination and the delay in receiving the report - are not attributable to any fault on the part of Claimant nor are they due to any factors within his control. The choice of physicians was Carrier's and the resultant delay is directly attributable to such choice.

Under the controlling principles and supporting precedent cited above, therefore, we cannot sustain Carrier's position in charging Claimant with loss of wages during such extended period of time approximately three months duration. Based on the established "reasonable time" principle, and bearing in mind the particular circumstances of this case, we find that a period of twelve days is the maximum time chargeable to Claimant for conducting the examination (five days), receipt of the report (five days) and its evaluation by Carrier's physician (two days).

We do not intend to establish a twelve day period as precedent for scheduling medical examinations. We apply it here in view of the potentially serious nature of Claimant's physical condition and the fact that a neurological examination and medical evaluation were warranted under the

facts detailed above. We limit the twelve day period, therefore, to the specific facts and circumstances of this case.

Accordingly, on the basis of the entire record and controlling authority, we will sustain the claim in the following manner:

a) Claimant was actually held out of service from September 15 through December 12, 1973. He is entitled to be reimbursed for all such time held out of service, less twelve days.

b) Carrier is entitled to an offset against such amount to the extent of all sick benefit payments actually received by Claimant during this period.

c) With respect to the various other demands detailed in the Statement of Claim including the demand for interest, same are denied. There is no Rule in the Agreement supporting such claims, nor are they supported by the overwhelming weight of authority.

See, for example, Awards 2675, 6574, 6758, 6830 and 7046; Third Division Awards 13478, 18433, 20014, 20547 and 20919; First Division Awards 12989 and 13098; and Fourth Division Award 2368; among a host of others.

A W A R D

Claim sustained in accordance with above findings.

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 4th day of June, 1976.