

The Second Division consisted of the regular members and in addition Referee David H. Brown when award was rendered.

Parties To Dispute: { Sheet Metal Workers' International Association
{
{ Illinois Central Gulf Railroad Company

Dispute: Claim of Employee:

1. That the Illinois Central Gulf Railroad Company violated the controlling agreement on March 15, 1978, when Sheet Metal Worker R. I. Meeks, who was returning to service after being physically disqualified and later qualified by company, was improperly refused right to return to service under the provisions of Rule 22. Additionally, company improperly withheld Mr. Meeks from service from February 6, 1978, which is twelve (12) days following physical which was administered by company doctor on January 24, 1978 and resulted in Mr. Meeks being improperly withheld from service.
2. That accordingly, the Company be ordered to restore Mr. Meeks to service with all seniority rights unimpaired, and under the provisions of Rule 22 of the controlling agreement.
3. Compensate Mr. Meeks for all time lost.
4. Make Mr. Meeks whole for all vacation rights.
5. Reimburse Mr. Meeks and/or his dependents, for all medical expenses incurred while employee was unjustly held out of service.
6. Pay Mr. Meeks estate whatever benefits the claimant has accrued with regards to group life insurance for all time claimant was improperly held out of service.
7. Pay Mr. Meeks for all contractual holidays.
8. Pay Mr. Meeks for all contractual sick pay.
9. Pay Mr. Meeks for all jury duty attendance.
10. Pay Mr. Meeks premium on GA5000 dental plan.

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.

On December 19, 1975, after formal investigation, Claimant was discharged by Carrier. By our Award No. 7437 issued on January 6, 1978, we ordered Claimant restored to duty with seniority rights intact but without back pay. In line with Carrier's policy that any employee out of service for six months or more must pass a physical examination before reinstatement, Mr. Meeks was given an examination by a company doctor, W. B. Haley, M. D., on January 24, 1978. While out of service, Claimant was involved in an accident in which he suffered a shoulder separation, and the examination on January 24 revealed that he could not lift his left arm above his shoulder height. Because of such fact, he was held to be disqualified for his duties as a sheet metal worker. The findings of Dr. Haley were forwarded to Chief Medical Officer Thomas H. Davison, who on February 21, 1978, confirmed Mr. Meeks' disqualification "... permanently for the unrestricted duties of Pipefitter" with comments: "Permanent restriction--no overhead work with left arm--restricted left shoulder motion". Upon receipt of Doctor Davison's ruling as to his disqualification, Mr. Meeks, on March 6, 1978, mailed to Carrier's Director of Personnel R. G. Richter a statement from Dr. R. B. Miller, an orthopedist, that in his opinion Claimant was physically qualified to return to work without restriction on activity. This certificate was forwarded to Dr. Davison, who directed that Dr. Haley re-examine Mr. Meeks. Dr. Haley again examined Claimant on March 13, 1978, and found that Claimant had full range of motion in his left shoulder, though with some discomfort in the extreme ranges. He approved Claimant's return to work, as did Dr. Davison.

On March 15, 1978, Claimant was advised by telephone that he could return to work. Claimant responded with the advice that he would report for the second shift that day. He reported to work as he had indicated he would. Upon reporting for duty, Mr. Meeks advised his foreman that he wanted to displace the employee who was working the job he held when he was fired. The foreman called Mr. Richter, who advised that Claimant would not be permitted to displace on his old position. Mr. Meeks stated that if he could not do so he was going home. The general foreman then called Mr. Richter to verify the ruling. Mr. Richter told the general foreman to tell Claimant to work an unassigned position that day and that the next morning he and Claimant's local chairman would decide whether or not Claimant had a roll coming under Rule 22 (which prescribes under what circumstances a returning employee "shall return to his regular position"). Mr. Meeks declined to work under such circumstances and left the property. After formal investigation, he was again discharged; however, the issue of such discharge is not before us in this proceeding.

The matter began its return to this Division on April 4, 1978, with a letter from Sheet Metal Workers' Local Chairman Don Buchanan to Director of Personnel R. G. Richter stating that the Union on behalf of the Claimant "wishes to file grievance and present time claim" against Carrier. Mr. Buchanan accused Carrier of "delaying tactics" to avoid implementing Award No. 7437. The letter further stated that on March 15, 1978, Carrier had violated Rule 22 of the Agreement in refusing to allow Claimant to return to his former position.

A "continuing time claim, dating back to and beginning February 6, 1978", was asserted. A negative response, the validity of which we shall hereafter consider, was made by Mr. Richter on May 24, 1978. The matter was subsequently and duly progressed to this tribunal for adjudication.

The first issue is whether or not Carrier was justified in requiring Claimant to be examined by a company physician prior to reinstatement to service. We know of no award holding to the contrary. None is cited by the Organization. Our awards 5641 (Ritter) and 7089 (Twomey) support Carrier's position.

Did Carrier exercise such right in good faith? The Organization takes the position that Carrier engaged in "medical maneuvering" and delaying tactics to avoid implementation of Award 7437. Our order accompanying such award stated, "The Illinois Central Gulf Railroad Company is hereby ordered to make effective Award No. 7437 ... on or before the 6th day of February, 1978." The examination by Dr. Haley took place on January 24, with reasonable promptness, we hold. However, we find unreasonable the delay until February 21 to notify Claimant of his disqualification. Under the circumstances, this decision should have been made and communicated to Claimant by February 6, thus allowing Carrier 13 days to process the report through its Chief Medical Officer. There is no showing as to when Claimant received Dr. Davison's notice of disqualification dated February 21; in the absence of such showing we will assume that such was received on February 23. Fourteen days later Claimant mailed Dr. Miller's certificate to Mr. Richter. Seven days later, within a reasonable time, in our opinion, Dr. Haley confirmed Dr. Miller's findings, and Claimant was offered return to duty the next day. Assuming that Carrier notified Mr. Meeks on February 6 of his disqualification, and applying the same timetable as actually unfolded after February 23, and assuming that Mr. Meeks' condition was the same on such date as on March 15, we find that Claimant should have been offered return to duty as of February 28, 1978. Thus, Carrier's inordinate delay deprived Claimant of the opportunity to work eleven work days between and including the dates of February 28 and March 14.

In our reasoning, we accord to Carrier good faith but charge it with unreasonable delay, and because of such delay assume Claimant's fitness for duty though proof of such is not in the record.

A third issue is whether or not Carrier properly denied the original claim. It is the position of Petitioner that Mr. Richter's letter of May 24, 1978, simply denied the grievance without denying the accompanying time claim. The Committee's position is destroyed by Local Chairman Buchanan's appeal of Mr. Richter's denial, in which Mr. Buchanan states:

"This refers to your letter of May 24, 1978, declining our grievance and continuing time claim we filed April 4, 1978, in behalf of R. I. Meeks." (Emphasis added)

Obviously, Mr. Buchanan understood the effect of Mr. Richter's letter of denial.

The final issue raised by the submissions of the parties concerns Rule 22, it being the Organization's position that we should, in this proceeding, now order Mr. Meeks restored to duty because Carrier refused to allow him to return to his regular position held at the time of his discharge on December 19, 1975. Rule 22, and the interpretation thereof, read as follows:

"ABSENCE FROM WORK

RULE 22. When the requirements of the service will permit, employees, on written request, will be granted leave of absence for a limited time, with privilege of renewal. An employee absent on leave who engages in other employment will lose his seniority unless special provision shall have been made in writing therefor with the proper official and committee representing his craft."

"Interpretation of Rule 22
(Effective 7-1-1963)

An employee reporting for duty after leave of absence, vacation, sickness, disability, or suspension, or for any other legitimate cause, shall return to his regular position and may within five (5) working days exercise seniority to any position in any craft or class in which he holds seniority, bulletined during his absence. If during his absence, his regular position has been abolished, or filled by a senior employee in the exercise of seniority, he may within five (5) working days after reporting for duty exercise seniority.

This agreement will become effective July 1, 1963, and the service by either party of a thirty-day written notice of cancellation shall act automatically to terminate this agreement at the end of the thirty-day period."

While there are numerous references in Petitioner's brief to Claimant being unjustly held out of service prior to the effective date of Award 7437, the award clearly gave effect to a disciplinary suspension of Claimant during the period from December 19, 1975, to February 6, 1978. Thus, we hold that Rule 22 as interpreted by the parties was indeed applicable ("An employee reporting for duty after ... suspension ...") when Mr. Meeks returned to duty on March 15, 1978. Nevertheless, we have no authority, right or reason to order Claimant restored to duty as of any date. In refusing to accept reinstatement on his own terms, however correct, Mr. Meeks violated a cardinal rule (comply now, grieve later) and took himself out of service.

A W A R D

Mr. Meeks' claim for reinstatement is denied. His claim is sustained to the extent of eleven days pay lost on the days indicated in the foregoing 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 10th day of December, 1980.