Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8639
SECOND DIVISION Docket No. 8069
2-SCL-EW-'81

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That the Seaboard Coast Line Railroad Company violated the contractual rights of Electrician Apprentice R. R. Rodriguez, when they denied him the provisions of Item 4 of the Mediation Agreement Case No. A-9106 effective February 1, 1973.

2. Carrier also violated Rules 1, 32, 35 & 36(h) of the current Agreement in this claim of Claimant.

3. That, therefore, Claimant Rodriguez be compensated for eight (8) hours each day, forty (40) hours each week, at pro rata rate, plus health and welfare, vacation rights, all overtime he would have made at the punitive rate of pay and all other benefits accruing to Claimant's position as Electrician Apprentice, Hialeah, Florida. Claim beginning October 6, 1977 and ending when Claimant is allowed to fill his position, both dates inclusive.

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.

Claimant, Robert R. Rodriguez, formerly an Electrician Apprentice at Carrier's facility at Hialeah, Florida sustained an on-the-job injury to his back while performing the duty of sliding batteries into battery box on Amtrak 2788 on date of April 14, 1977. Claimant was immediately sent to Fisher Medical Center for examination and treatment. At a subsequent date, Claimant was issued a Form MED-4 and approved to return to work on May 5, 1977; however, he returned to work instead on May 6, 1977. In the early afternoon of May 6, 1977, Claimant marked off for the purpose of seeing his personal physician and remained off until July 6, 1977. During this interim two (2) month period, Claimant was examined by Carrier physicians, Dr. Irwin Perlmutter, Dr. Harry Beller and Dr. David Kirsh. In a letter dated June 29, 1977, Dr. Perlmutter certified Claimant had been under his care and advised that Claimant could be returned to work as of July 5, 1977. Claimant returned to work on July 6, 1977, inasmuch as Perlmutter's

letter was not received by Dr. Adney K. Sutphin, Carrier's Chief Medical Officer, until July 6, 1977. Claimant completed eight (8) hours of work on July 6 and 7, and then on the morning of July 8, 1977, he apprised his supervisor that he wanted to mark off at Noon in order to see Dr. Beller. It is alleged by Carrier that during this exchange with his supervisor, Claimant stated he did not feel he could perform all the duties of his Craft. It is further alleged by Carrier that in another conversation on July 8, 1977, this one between Claimant and the Assistant Master Mechanic, Claimant several times advised he had a bad bone in his back and he did not want to further injure himself by performing his duties of an Electrician Apprentice. On July 11, 1977, Claimant apprised the Assistant Master Mechanic that Dr. Beller had, on July 8, 1977, referred him to see Dr. Perlmutter but that Perlmutter was not able to see him at that time. In response, the Assistant Master Mechanic informed Claimant that in view of their discussion on July 8, 1977, regarding the back injury and Claimant's reluctance to engage in duties which he felt might further injure his back, he (Assistant Master Mechanic), could not allow Claimant to return to work without a statement from the physician declaring he was physically fit to perform his normal duties. In a letter dated July 12, 1977, written by Dr. Perlmutter and received by Dr. Sutphin on July 14, 1977 Dr. Perlmutter advised the following:

> "This is to certify that Mr. Robert Rodriguez is under our care and should do only light duty at work and return here in a couple of weeks for re-evaluation."

In a conversation with the Assistant Master Mechanic, Dr. Sutphin was advised there was no such light duty available.

Subsequently, Dr. Sutphin received another letter from Dr. Perlmutter, this one dated July 27, 1977, in which Dr. Perlmutter advised the following:

> "Mr. Roberto Rodriguez was examined at this office on 7/27/77. He is unable to lift heavy batteries at work. His back hurts. He has had some pain in the back of both legs.
>
> Objectively to clincal examination, there is no evidence of organic neurological dysfunction.
>
> It is the impression that he has spondylolisthesis which difficulty was aggravated by his injury in April at work."

According to the Carrier, it heard nothing more from either the Claimant or Dr. Perlmutter until October 6, 1977, when Dr. Sutphin received a letter from Perlmutter dated October 3, 1977, wherein Dr. Perlmutter related the following:

> "Mr. Rodriguez called the office today, 10/3/77, and feels that he is able to return to work.
>
> It is recommended that he be given a trial at regular work."

In reponse, Dr. Sutphin, in a letter to the Claimant dated October 6, 1977, apprised him that he was being medically disqualified for further service with Carrier as an Electrician Apprentice. Dr. Sutphin's letter reads in whole as follows:

> "Dr. Irwin Perlmutter has notified this office that you have been released to be given a trial at regular work. As you know, this was done on two prior occasions-May 5, 1977 and again on July 6, 1977. On both occasions you worked for only one or two days and then reported that you were unable to hold up.
>
> You have a congenital condidtion of your back which does indeed result in a certain weakness of the back and in view of your history of repeated back complaints, I cannot approve your return to any job requiring heavy lifting or repetitive bending.
>
> You are therefore, medically disqualified for further service with Seaboard Coast Line Railroad Company as an electrician apprentice.
>
> I very much regret that this decision is necessary and I assure you that it is made in your best interest."

In a letter to Dr. Sutphin dated October 17, 1977, Claimant requested that Sutphin examine him personally in order to determine first hand his fitness to return to work. In response, Dr. Sutphin by letter to Claimant dated October 26, 1977, refused Claimant's request stating that since his opinion was based on X-ray findings, Claimant's medical history and the fact that he had already been given two (2) trials to return to work, a personal examination would be of no avail in altering his opinion.

In a letter dated November 19, 1977, in answer to a letter dated November 7, 1977, written by Dr. Perlmutter to Dr. Sutphin on behalf of the Claimant, Dr. Sutphin apprised Dr. Perlmutter the Claimant had been medically disqualified as an Electrician Apprentice but that he had referred Claimant's case to Carrier's Rehabilitation Committee in an effort to locate some gainful employment for him in some less strenuous job.

According to the Carrier, a Carrier representative from the Rehabilitation Committee travelled to Miami, Florida to interview the Claimant to determine what skills he might have that would qualify him for other employment. Carrier relates Claimant declined to take a clerical adaptability test, was very evasive in answers to all questions he was asked and by all appearances gave the impression he was not interested in any employment with the Carrier other than as an electrician apprentice.

On January 11, 1978, Claimant was seen, tested and otherwise examined by his personal physician, Dr. Patrick J. Barry, who, on the basis of his findings noted the following excerpted from a letter of the same date:

"This twenty four year old electrician for Seaboard Coastline was examined by me today.

At the present time the patient is completely asymptomatic.

The patient is a well-developed, well nourished male in apparent general good health.

The patient has a bilateral spondylolysis but no spondylolisthesis.

COMMENT

This patient appears to have had a low back sprain in April of 1977. He has recovered from this. At the time he was seen, an incidental spondylolysis noted. This was present at the time he was hired by Seaboard, and is still present. I do not see any contraindication to this patient's resuming heavy work."

The Organization notes that Dr. Barry's findings regarding Claimant's fitness to return to work is in direct disagreement with the findings of Carrier's Chief Medical Officer, Dr. Sutphin, who found Claimant medically unfit to resume his duties and thereupon acted to medically disqualify the Claimant from service as an Electrician Apprentice. Under these circumstances, the Organization contends, Claimant is entitled to an examination by a neutral physician in order to resolve the difference of opinion held by and between Dr. Barry and Dr. Sutphin. Such examination by a neutral doctor is guaranteed, asserts the Organization, by the terms of the February 1, 1973 Mediation Agreement (Case No. A-9106), particularly Item 4 which reads as follows:

"4. Physically disqualified employees will be notified by the Company doctor in writing of the specific disqualifying condition(s).

When employees protest their removal from service because of physical disqualification by the Company, the case will be handled as follows:

(a) The employees or their representative will file direct with the Personnel and Labor Relations Department such written protest of the disqualification. There must accompany the written protest a copy of the medical findings of the employees' personal physician who has been responsible for their primary care during the disability in question, such findings

"to include a brief history of illness or injury, diagnosis, duration of care, treatment, prognosis and a statement of opinion as to the employees' physical ability to safely perform their normal duties. If there is a bona fide difference of medical opinion between the employees' doctor and the Company doctor, the employees' doctor and the Company's doctor shall exchange medical data available to each of them and shall communicate or confer to determine if the difference can be resolved by them. If the two doctors are unable to resolve the case, they shall mutually agree upon a third or neutral doctor for disposition, who shall be a specialist in the disability for which the employee was physically disqualified.

(b) The neutral doctor shall have the benefit of the findings of the employees' doctor and the Company's doctor, and each of them may make such representation to the neutral as is felt pertinent to his examination and opinion. The Company's doctor shall provide the neutral with a statement defining normal duties of the employees' position, and a copy shall be furnished to the employees' representative and the employees' physician. If the employees' representative disagrees with the Company doctor's statement of normal duties, the representative may file with the neutral doctor a statement of any exceptions, with supporting evidence and will furnish copies to the Company's doctor and Vice President of Personnel and Labor Relations. The neutral doctor will examine the employee and render report of findings as promptly as reasonably practical within thirty (30) days after his selection, if possible. The neutral's findings, which shall be final and binding, except as provided in paragraph (d), will set forth the physical condition of the employee and give forth the physical condition of the employee and give opinion as to whether the employee is physically capable of safely performing the employee's normal duties.

(c) If the neutral doctor decides that the employee is fit to continue in service and safely perform the employee's normal duties, such neutral doctor shall also render a further opinion, as to whether such fitness existed at the time the employee was withheld from service. If the neutral doctor concludes that the employee possessed such fitness when withheld from service, the employee will be

"compensated for actual loss of normal earnings during the period withheld for each working day withheld from assignment and will not be deprived of any other contractual benefit to which he may be eligible.

(d) If the decision is adverse to the employee and does not involve permanent type disability, but the employee's personal physician who has been responsible for his primary care during the disability in question later contends (limited to once within the three (3) year period commencing with date of disqualification by the neutral doctor) that the disqualifying condition has improved to the degree the employee can safely perform his normal duties and submits written evidence to support such contentions thereof (as described in paragraph (a)), the provisions of item 4(a) and (b) may be again invoked by the employee's representative. Item 4(c) will not be applicable. Consideration will be given request for further examination by a Company doctor provided good and sufficient reasons therefore are presented in writing to the Vice President, Personnel and Labor Relations. If such consideration is given, the Company doctor's decision will be final and binding.

(e) The Company and the employee will take care of the expenses of their respective doctors and the expenses of the neutral (including hospital, laboratory or X-ray costs as may be necessarily incurred) shall be borne on 50/50 basis by the employee and the Company."

The Organization argues Carrier's refusal to submit Claimant's case before a neutral physician is not only violative of the Mediation Agreement it is also in violation of Rules 32 and 35(c) of the Controlling Agreement, effective January 1, 1968. These rules read as follows:

Rule 32, in pertinent part:

"No employee shall be disciplined without a fair hearing by a designated officer of the Company."

Rule 35(c) in pertinent part:

"If his application is not approved, he can be removed from the service during this sixty-day period without an investigation."

The Organization takes the position that Carrier could have, at any time during Claimant's first sixty (60) days on the job following date of hire on November 14, 1974, dismissed him for just and sufficient cause, such as for his congenital back condition, in accordance with Rule 35(c). But this the Carrier did not do. Instead, argues the Organization, Carrier's having taken Claimant out of service and then dismissed him on the basis of his medical condition, that is the spondylolysis, nearly three (3) years after he was initially hired, in fact, amounts to a disciplinary action for which Claimant was not afforded an investigation. Such an action, argues the Organization, is violative of Rule 32.

The Carrier argues it was well within its rights to medically disqualify Claimant on the basis of his congenital back condition and contends it would have dismissed Claimant within his first sixty (60) days of employment had it known then of his spondylolysis. Carrier asserts the Board has held many times that it is the prerogative of Carrier to determine the physical qualifications of its employees so long as its findings are not arbitrary, capricious or exercised in bad faith. In support of this position, Carrier makes reference to Third Division Award 14249, and cites in relevant part Second Division Award 7134 which reads in relevant part as follows:

> "It is well established that this Board is not empowered to impose its own individual opinions, but we must abide the dictates of previous Awards which clearly indicate the paramount right of a Carrier to establish its health standards; which should not be disturbed, absent some showing of arbitrary rules or improper application. Accordingly, this claim is denied."

Carrier takes the position it has not violated the 1973 Mediation Agreement in denying the Organization's request to submit Claimant's case before a neutral physician because there was no disagreement among any of the physicians involved that Claimant did, in fact, have the congenital back condition of spondylolysis. Carrier contends the Mediation Agreement provides a medically disqualified employee an avenue of appeal only where there is a difference of medical opinion between an employee's personal physician and Carrier's doctor. Specifically, Carrier makes reference to the following language set forth in Item 4(a):

> "If there is a bona fide difference of medical opinion between the employee's doctor and the Company doctor, the ..."

In the instant case, Carrier vigorously asserts, there was no such bona fide difference and therefore the provisions of the 1973 Mediation Agreement are not applicable here.

As to the Organization's contention its action against the Claimant have been violative of several of the Agreement Rules, Carrier asserts such allegations are without foundation and have no bearing or relevance to the issue in dispute. Carrier avers, Claimant has not been disciplined but has simply been medically disqualified because of his congenital back condition. Carrier notes that a medical disqualification does not constitute discipline and cites, in support of its position, Award 2799, wherein the Board held in relevant part, the following:

"We cannot agree with the contention that the Claimant could not be removed from active service without an investigation or hearing under the rule pertaining to this subject. Claimant's removal from active service did not concern any dereliction of duty for which he might have been subjected to discipline. Matters of physical condition or disability are not a proper subject for handling under the investigation rule of the agreement."

Finally, Carrier asserts Claimant is not physically fit to perform the work of Electrician Apprentice as shown by his two (2) failed attempts to return to work. It is agreed Claimant is afflicted and does, in fact, suffer from the congenital back condition of spondylolysis, for which, Carrier argues, it is not at fault. Claimant's injury, categorized by Carrier as minor in nature, did, in fact, aggravate his condition to the point he was unable to continue the performance of his job. Carrier notes that because of the injury sustained, Claimant retained an attorney who filed claim against it and as a result, a settlement in the amount of $17,000 was made with the Claimant. In sum, Carrier argues, its action of medically disqualifying the Claimant was not either unjust, unfair, arbitrary, capricious, or unreasonable and therefore, the Board should not attempt to substitute its judgment for their own.

Upon a close and careful review of the entire record before us, we find the following:

1. Carrier's action of medically disqualifying the Claimant did not constitute an act of discipline. With regard to this determination, we find significant Carrier's efforts to find alternate employment with it subsequent to Claimant's having been medically disqualified for the job of Electrician Apprentice.

2. Carrier does have the right to medically disqualify an employee any time after date of hire either because of a newly discovered fact about the employee's medical condition or because the employee's medical condition has altered or changed in such a manner as to cause him/her to be deemed not physically fit to perform his/her assigned work.

3. While it is quite accurate to note there were no differences in medical opinion among all the physicians involved in the case at bar as to Claimant's actual medical condition, there was indeed a difference between Claimant's personal physician and Carrier's Chief Medical Officer as to whether Claimant was physically fit, notwithstanding his congenital back problem, to perform the work of an Electrician Apprentice. Our interpretation of Item 4 of the 1973 Mediation Agreement is, that such a difference does fall under and is therefore covered by the language of Item 4(a) which reads:

"If there is a bona fide difference of medical opinion between the employee's doctor and the Company doctor, the ..."

Accordingly, we find Carrier erred in denying Claimant's demand for his case to be put before a neutral doctor. However, this finding is not sufficient to warrant a favorable disposition of the claim here because of two basic mitigating circumstances which are as follows: (a) Claimant was given two (2) opportunities to return to his position and both times the Claimant had to retreat because of his back problem; and (b) Claimant initiated a legal action against Carrier because of his back injury for which Carrier's liability resulted in a substantial monetary settlement to the Claimant.

It is the judgment of this Board that the injury sustained by Claimant was, in and of itself, not of major proportions, yet it aggravated Claimant's congenital back condition to the point he was unable to perform his assigned work on the two (2) occasions he attempted to return to work of an Electrician Apprentice is of such a nature that Claimant would, if allowed to return to this position, be exposed to numerous potential situations in which he would be predisposed toward injuring his back. We cannot in all good conscience either subject Claimant to this possibility or to expose the Carrier once again to another legal action instituted by Claimant in seeking monetary relief for yet a second, third, fourth, or ad infinitum number of injuries to his back.

Based on the foregoing determinations, we find we have no other alternative but to deny the instant claim.

A W A R D

Claim denied.

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 March, 1981.