

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

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the controlling Agreement, the provisions were violated when the Carrier improperly dismissed Car Inspector W. L. Stoops from service on the date of May 2, 1978, without a hearing.
2. That accordingly, the Carrier be ordered to reimburse Car Inspector W. L. Stoops for all lost wages commencing from May 2, 1978 and that W. L. Stoops be made whole for all losses and benefits as though he had not been removed from service. This includes all overtime, vacations, health and welfare; as though this incident had not taken place.

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 were given due notice of hearing thereon.

Claimant was removed from service on May 2, 1978, pending a complete physical and mental examination, on the grounds of an emotional outburst in the presence of Acting General Foreman Deau, accompanied by swearing, on May 1, and a second outburst at a safety meeting the next day, May 2. On June 6, 1978 Claimant was examined by Dr. Hill, a psychiatrist, who had previously examined Claimant about three years earlier. Dr. Hill, based on a diagnostic test, prescribed treatment before Claimant could be returned to work.

Petitioner alleges Claimant was disciplined without a fair hearing on the allegation of an "emotional outburst"; that he was discriminated against by being withheld from service for 35 days before being examined by a physician; and that Claimant was "provoked, intimidated and harassed" by Foreman Deau who, Petitioner claims, "pushes the men too hard" and who provoked the May 1 incident. Petitioner denies any emotional outburst at the May 2 safety meeting, asserting that Claimant only listed unsafe conditions and their causes.

Petitioner also asserts that Carrier has never furnished it with competent medical evidence to support Claimant's disqualification, nor has Dr. Hill responded to Claimant's Attorney's request for information.

Petitioner contends that Carrier removal of Claimant from service violates Rule 32:

"No employe shall be disciplined without a fair hearing
***."

Dr. Hill's initial report (prior to the results of the diagnostic test) obtained by Petitioner through another attorney concludes:

"At this time, I really don't know what to say about his going back to work. I think that would depend on a hearing that is held so that both sides can air their grievance."

Petitioner charges that Dr. Hill's use of the term "grievance" supports its claim that this is a discipline case, and not a medical one.

On the issue of Claimant's fitness for duty, Petitioner submits statements from three doctors who report, respectively, "(Claimant) is not suffering from any psychiatric oriented illness that would prevent him from being gainfully employed"; (Claimant is) "in good health and good physical condition"; and (Claimant) "is mentally alert, physically fit and free from any contagious or communicable diseases".

Petitioner cites in support of its claim Awards 6561, 6716, 6880, and 7033, where the Board found that Carrier had not met the burden of proof to qualify the claimants involved on physical grounds.

The record includes a letter dated January 12, 1978 - some 4 months prior to the incidents which gave rise to the instant case - from the Organization's General Chairman to Carrier's Car Manager. The General Chairman wrote that Claimant had called him complaining of intimidation and harassment by Foreman Deau, and he requested the Car Manager to investigate Claimant's allegations and that the two meet to discuss the matter.

With respect to the May 1 incident, Carrier submitted a statement by two carmen that shortly after the start of the shift, Claimant angrily approached and swore at Foreman Deau and then got in his car and drove off. Another employee's statement referred to Claimant's angry reaction (including pounding the desk), when Foreman Deau was instructing them on filling out company forms.

As to the May 2 incident, Petitioner submitted a statement signed by 10 carmen in attendance at the safety meeting to the effect that Claimant, after asking permission to speak, "and in keeping his voice low and in a gentlemanly manner, proceeded to air what he considered was the reason for so many carmen being injured". The statement added that the meeting chairman, Carrier's Car Manager, asked Claimant to see him after the meeting and, in answer to Claimant's

question as to whether any action would be taken against him "for his airing his opinion of the safety situation", the Car Manager said "he in no way intended to take any action against him but just wanted to talk".

Carrier disputes this version of the May 2 safety meeting, quoting the Car Manager's statement that Claimant "had lost all control" and that Claimant himself agreed that he was in no frame of mind to go to work.

Carrier insists that Claimant was not disciplined but was removed from service for medical reasons, and hence Rule 32 is not applicable (Second Division Awards 2799, 4099). Carrier's action, it asserts, was prompted by prior instances of Claimant's psychiatric problems.

As to the time lapse between Claimant's removal from service and his examination by Dr. Hill, Carrier states that this was due to Dr. Hill's schedule.

Carrier maintains that it not only has the right but the duty to require a physical or mental examination where circumstances arise which make it evident that an employee's condition or conduct warrants such examination and that the Board has so held on numerous occasions.

The record discloses that on June 29, 1978 Claimant was notified by Carrier's Chief Medical Officer that Dr. Hill's examination indicated that Claimant undergo treatment before he could return to work; that he would not be permitted to return to work "until the treatment has been carried out, and Dr. Hill is satisfied as to your fitness". The Medical Officer also offered to send Dr. Hill's report to Claimant's personal physician if Claimant so requested. Carrier asserts Claimant has not obtained the necessary treatment recommended by Dr. Hill nor submitted himself for re-examination by Dr. Hill.

This Board has on numerous occasions held that a Carrier has the right (as well as duty) to determine an employee's fitness for service and ability to perform his work without hazard to himself or others, including the right to require employees to undergo medical examination. Such right to require a physical (or mental) examination, it must be clearly understood, must not be exercised arbitrarily or capriciously, and must be premised on a reasonable belief, or substantial evidence, that such an examination is necessary before an employee may be permitted to return to work.

Claimant was notified by the Chief Medical Officer's letter of June 29, 1978 that he was disqualified for service based on Dr. Hill's examination; that he was required to undergo treatment before he could return to work; and that following such treatment, he was to be re-examined by Dr. Hill, for determination of his fitness for duty at that time. No evidence was submitted by Petitioner that Claimant underwent treatment for his condition, nor did Claimant request a copy of Dr. Hill's report to be sent to his personal physician.

The statements by Claimant's personal physicians do not specifically address Claimant's condition as diagnosed by Dr. Hill, so that one can not conclude that a divergence of medical opinion exists between Dr. Hill and Claimant's personal doctors. Although Dr. Sams, one of the Claimant's doctors, stated that Claimant

was "not suffering from any psychiatric oriented illness that would prevent him from being gainfully employed", this statement does not effectively rebut Dr. Hill's findings, related specifically to Claimant's job duties as a Car Inspector.

This Board is not in a position to make medical determinations. Dr. Hill's evaluation of Claimant's condition has not been substantively controverted and supports Carrier's action in suspending Claimant from service pending examination.

Although some 35 days elapsed between the date Claimant was removed from service and Dr. Hill's examination, Carrier's statement that the delay was occasioned by Dr. Hill's schedule was not rebutted. Dr. Hill had examined Claimant some 3 years earlier and was thus familiar with Claimant's prior history.

Claimant, who has since been returned to service, did not comply with the qualifications prescribed by Carrier's Chief Medical Examiner as to obtaining treatment and submitting himself for re-examination by Dr. Hill as a precondition for returning to service. Had he done so, it is likely that he could have returned to work earlier.

The record does not support Claimant's charge of conspiracy; in fact, the Organization's submission includes the following statement: "The Organization certainly does not deny the fact that the Claimant did swear and become emotional; ***".

Based on the foregoing and the entire record, we find that Carrier's action was not arbitrary or unreasonable and that the contract was not violated. Accordingly, we must deny the claim.

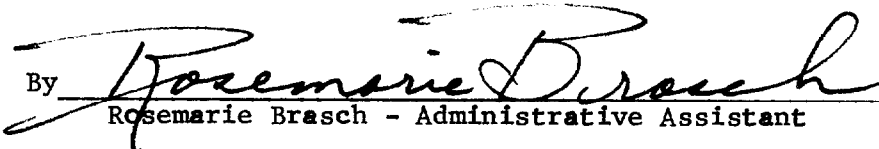
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of April, 1981.