

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
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(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That under the controlling agreement, the provisions were violated when the Carrier improperly dismissed Lead Car Inspector L. E. Wilson from service on December 12, 1980, up to April 23, 1981.
2. That accordingly the Carrier be ordered to reimburse Lead Car Inspector L. E. Wilson for all time lost beginning on the date of December 12, 1980, eight (8) hours per day at the Lead Car Inspector's rate of pay, straight time rate.
3. That he also be compensated for each minute of overtime he would have worked during the time unjustly held from service, at time and one-half.

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 employes 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.

The record indicates that the Claimant is employed by the Burlington Northern Railway Company Inc. at the Carrier's Kansas Avenue Train Yard, Springfield, Missouri as a Lead Car Inspector.

The Claimant maintains he was unjustly and arbitrarily dealt with by the Carrier. A violation of agreement rules 1, 6, 11, 17, 18, 20, 30, and 34 is asserted. The Organization contends that the Claimant was denied his contractual right to work his regular assignment and that the Carrier filled the Claimant's assignment with a junior employe.

The Claimant charges that he was removed from service without properly notifying him as to why, without sending him to the Carrier doctor for examination, and without the benefit of a hearing, conference or an investigation. An oral hearing was not requested.

The Carrier asserts that the only issue is whether any rule was violated when it withheld the Claimant from service because he did not supply medical evidence that he was medically fit to work. It denies any rule violation and submits that its actions in withholding the Claimant from service until it was medically determined that it was safe for him to work. The Carrier states that it was the Claimant's act in declining to secure a doctor's statement which caused him to be withheld from service.

A review of the Claimant's record indicates that he was on leave for medical reasons from April 18, 1977-November 16, 1977 and later from July 1, 1980 until November 14, 1980. The Carrier maintains that upon his return to work, the Claimant's on-the-job conduct between November 14, 1980 and December 3, 1980 caused sufficient concern that the Car Foreman spoke to the Claimant on December 3, 1980. Since the Claimant was to be on vacation from December 5-9, 1980, the Car Foreman suggested that he return to his doctor for "further evaluation and treatment." The Carrier asserts, the Car Foreman also told the Claimant to have his doctor give him a written statement concerning his condition. When the Claimant attempted to return to work on December 12, 1980 without his doctor's report, he was held out of service.

The Organization asserted in its letter to the Carrier on April 2, 1981, that:

"Prior to this incident, Mr. Wilson went to his personal physician, Dr. Phillip J. LeFevre, on July 2, 1980, and obtained a leave of absence from the Carrier beginning on July 2nd and ending July 31, 1980. Dr. LeFevre completed the Carrier's form G-118 on July 28, 1980, releasing him to return to work on July 31, 1980. Even though this was not a full 30 day period, the Carrier insisted upon a physical examination by a Carrier doctor before they would allow him the opportunity to work. Dr. P. J. LeFevre had released Mr. Wilson to resume work on July 31, 1980, with no restrictions or qualifications.

On July 28, 1980, the Carrier required Mr. Wilson to submit to a physical examination by their physician, Dr. Lowe. The Carrier's Medical Consultant, on August 4, 1980, recommended that Mr. Wilson continue on leave of absence due to the fact that he was on medication. On October 27, 1980, Dr. LeFevre again released Mr. Wilson to return to work and again without restrictions or qualifications. By this time Mr. Wilson was fully off all medication. A second form G-118 was completed on October 30, 1980, by Dr. LeFevre to release Mr. Wilson. He made this decision after having read for a second time the Carrier's work description for a Carman. Then, on November 6, 1980, the Clayton Surgical Group stated, 'Mr. Wilson is satisfactory to return to work in accord with form G-118 completed by Dr. P. J. LeFevre and the form G-26, part 3, completed by Dr. H. A. Lowe.' (This action as such was in itself not justified and another claim prior to this incident has been progressed.)

We are at a loss as to the reasons why Mr. Wilson was sent home on December 12, 1980 and why he is still being held out of service. A careful search of Carrier's rules and a careful review of the agreement rules, reveal nothing that would allow such unjust and unfair treatment of anyone in the Carrier's employ or who is a member of this Organization.

Mr. Wilson had been released by two competent physicians of Springfield, Missouri, and the Carrier's Chief Medical Consultant, Clayton Surgical Group, with office in St. Louis, Missouri. However, Carrier officers have seen fit to overrule their expert medical opinion and insert their own in place. It is unreasonable and totally unjustified to withhold Mr. Wilson from service to secure medical records from his physician to forward to Carrier's Medical Consultants, as all this had been done prior to November 6, 1980. It appears that the Carrier officers involved are questioning the Carrier's Medical Consultant and physician H. A. Lowe."

The right of the Carrier to require a medical examination of an employee when a question of his mental or physical capability to perform his job safely while raised is not in dispute. The fact that there was a discussion between the Claimant and the Car Foreman also is not in dispute. However, the record is less than clear as to what was discussed, the degree of specificity of the concerns expressed by the Car Foreman, or the nature of the directions and the reasons necessary to get a medical statement from his personal physician concerning his fitness.

It is clear that whatever gave cause for the Car Foreman's concerns must be limited to the period November 14, 1980-December 3, 1980. The record indicates the Claimant had been found fit to return to duty by both his personal physician and the Carrier's physician only two weeks earlier.

Given the fact pattern of the instant case, and the existence of such contemporary medical authorization for the Claimant to return to work, the Carrier's insistence on a further medical report from the Claimant's physicians at his expense, must be based on clear and convincing grounds. There is no claim that the Claimant wilfully disobeyed a direct order.

The record does not support the assertion of the Carrier that the Claimant was not mentally and/or medically able to work on December 3, 1980 or during the preceding two weeks. Without advancing any specific, supportable evidence to establish such an assertion for the specific period, the Carrier is bound by the current medical judgements of its own physicians until such time as events warrant a medical reassessment.

In the case before me, there is no conflict of medical testimony between the personal and the Carrier physicians. Both agree the Claimant was fit to return to work on November 14, 1980.

If such a medical reassessment is deemed necessary, given the contemporary nature of the two "return to work" physicals, then such a reassessment must first rest with the Carrier's physician to determine if such a reassessment is indeed needed. The operational staff does not have the medical competency to make such medical judgements.

In Second Division Award 5817, Referee Dorsey notes, in pertinent part, the relative responsibilities and obligations of the parties when a question arises concerning the requirements for physical examination relating to ability to perform:

"We are cognizant that Carrier has an inherent uninhibited right to direct a physical examination of an employe concerning whom it has reasonable grounds to suspect physical disqualification--this is in the employe's selfish interest, fellow workers' protection and the public interest in preservation of life, limb and property. We honor this premise. Of concern to us, however, is potential perversion of the premise by use of it as evasive tool in lieu of contractual mandated disciplinary procedures, indispensable condition precedent to discipline....

While Carrier has the right to order an employe to subject himself to medical examination by its Medical Doctors for determination of the employe's physical qualification to perform the duties of his position it may not exercise the right in derogation of the employe's vested contractual rights. The costs of the examination, to such extent as Carrier deems necessary, it being at its instigation, are to be borne by Carrier. It has no prerogative to command that an employe undertake, at his expense, the engagement of Medical Doctors to determine his physical qualification. The employe may, of course, do so of his volition and submit the findings of his Doctors. Carrier's Medical Doctor's suggestion to an employe that he, in his interest, consult the physicians who have administered unto him is laudatory and is exemplary of the respected tenets of professional concern for the person. Such a suggestion, however, legally, is advisory; it is not a legally recognized mandate."

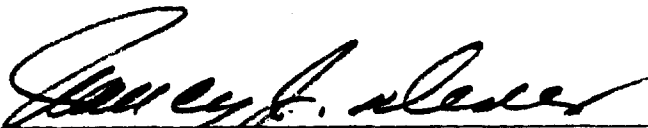
In light of the total record of the case, the Board concludes that the Carrier's action in withholding the Claimant from service for the period December 12, 1980-April 23, 1981 was unwarranted. Claimant shall be reinstated for the period he was held out of service and made whole for those contractual benefits lost during that period.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of June, 1984