

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(The Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That Carman Delmar Carder was unjustly and excessively withheld from service after being recalled from temporary furlough in violation of Rule 18 1/2, 37 and 38 of the Shop Crafts Agreement.

2. Accordingly, Carman Carder is entitled to be compensated eight (8) hours pay at pro rata rate for each work day during the sixty calendar days immediately preceding his return to Carrier service on October 25, 1983.

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.

Claimant is employed as a Carman by Carrier at its Walbridge, Ohio facility. In November, 1982, Claimant was medically disqualified because the Carrier's Chief Medical Officer determined that he was not physically able to perform his Carman duties due to blackouts, hypoglycemia, and substance abuse (alcohol) problems. Sometime thereafter he was furloughed. On April 11, 1983, Claimant's physician notified Carrier's Chief Medical Officer that Claimant was physically qualified to return to work. On May 13, 1983, Carrier's Chief Medical Officer notified Claimant that he must have specific information from Claimant's physician relative to Claimant's blackouts and loss of consciousness before Claimant could return to work.

On July 27, 1983, Carrier recalled five Carmen, including Claimant. The General Car Foreman instructed Claimant that before he could return to work, he must furnish a second medical release from his physician. Claimant's physician executed a second release on July 29, 1983, wherein he stated that in his opinion no further information regarding Claimant's physical condition was needed since his examination was entirely negative. On September 13, 1983, Carrier's Chief Medical Officer notified Claimant that absent an explanation of the etiology (cause) of his blackouts, restrictions had been placed on him that would prevent him from performing Carman duties; also, there were no positions then available that would meet the restrictions. On October 20, 1983, Carrier's Chief Medical Officer received a third report from Claimant's physician, containing the specific information that Carrier had requested. Claimant returned to work on October 25, 1983.

By letter dated November 5, 1983 (received November 14) the Organization filed a Claim on Claimant's behalf, charging that the Carrier violated Rules 18 1/2, 37, and 38 of the current Agreement when it unjustly withheld Claimant from service after he was recalled on July 27, 1983. Rule 18 1/2 provides, in part:

"(a) An employee returning from written leave of absence, absence due to illness or injury, or vacation may -

1. Return to the last regularly assigned position held provided it has not been abolished, or senior employee has not exercised displacement rights thereon"

Rule 37 states, in part, that no employee "will be disciplined by suspension or dismissal without a fair hearing by a designated officer of the company." Also, Rule 38 provides, in part, that employees "shall not be dismissed for incompetency nor shall an employee be suspended or dismissed for any cause without first being given a hearing as provided for in Rule 37." The Organization seeks compensation for Claimant in the amount of eight hours' pay at the pro rata rate for each workday during the sixty calendar days prior to his return to service on October 25, 1983.

The Organization contends that Claimant provided Carrier with a medical release from his physician in April, 1983; Claimant therefore was willing and able to return to work as of his recall on July 27, 1983. The Organization asserts that although Carrier has the right to determine the fitness of its employees, it must do so within a reasonable time. This Board has held that five days is sufficient time for a Carrier to evaluate medical reports and notify the employee of its approval or disapproval to return to work. The Organization therefore contends that Carrier was obligated to, within a reasonable time, either conduct its own examination of Claimant or make its determination from the Reports of Claimant's physician. Carrier did not make a determination within a reasonable time, even though Claimant provided a total of three medical releases. As a result, Claimant was deprived of his right to return to service, and suffered loss of wages and undue hardship from the date of recall, July 27, to his return to work on October 25, 1983.

The Organization points out that although Carrier held Claimant out of service because of his physical condition, Carrier never required Claimant to undergo an examination by one of its own physicians. Moreover, Carrier never has produced evidence to rebut the three medical reports of Claimant's physician. The Organization therefore argues that the record shows Claimant was medically qualified to return to service on the date he was recalled. The Organization contends that Carrier's refusal to return Claimant to service until October 25, 1983 was arbitrary and capricious. The Organization argues that the Claim should be sustained.

The Carrier contends that the Organization failed to prove any violation of an Agreement Rule. The Carrier asserts that Rule 18 1/2 governs only the manner in which a returning employee may select an assignment; the Rule does not require Carrier to permit a physically unqualified employee to return to service. The Carrier therefore argues that Rule 18 1/2 does not apply to this dispute. The Carrier further argues that Rules 37 and 38 are discipline Rules. Claimant was withheld from service pending final approval by the Chief Medical Officer; Claimant was not withheld for disciplinary reasons. Carrier asserts that Rules 37 and 38 also do not apply to this dispute.

The Carrier points out that this Board repeatedly has upheld carriers' right to withhold employees from service for the purpose of determining their fitness for duty. The Carrier contends that it has both the right and the obligation to ascertain whether an employee's physical condition constitutes a danger to the public, other employees, and himself. The Carrier therefore contends that under the circumstances, it was justified in its actions. The Carrier argues that it neither abused its discretion nor violated the Agreement; the Claim should be denied.

The Carrier further argues, however, that even if this Board sustains the Claim, there is no contractual support for the remedy requested by the Organization. Carrier asserts that under Rule 35, the Claim for monetary compensation should be limited to the sixty-day period prior to its receipt of the Claim on November 14, 1983. Rule 35 provides, in part:

"(b) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violations, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof."

The Carrier argues that under Rule 35, any Claim for compensation beyond September 16, 1983, should be barred from consideration.

Carrier also contends that the Board decisions cited by the Organization are distinguishable from this dispute based on the facts of this matter because, in this case, Claimant did not willingly provide Carrier with adequate medical data. Carrier asserts that until it received the third Report from Claimant's physician on October 20, 1983, neither Claimant nor his physician ever provided Carrier with the specific information that it requested and needed.

The Carrier further argues that if there was an unreasonable delay in Claimant's return to work, Claimant is responsible. Carrier's Chief Medical Officer made repeated attempts to obtain the necessary information from Claimant and his physician. Moreover, the Chief Medical Officer attempted, with the information he then had about Claimant's condition, to obtain a restricted position for Claimant so Claimant could return pending Carrier's receipt of the needed medical information. Carrier therefore contends that the Claim should be denied in its entirety.

This Board has reviewed all of the evidence in this case, and we find that it is absolutely clear from the record that the Claimant was released to return to work on July 29, 1983. Dr. James S. Olms, in compliance with the request of the Carrier, issued a letter to the Chief Medical Officer stating that, "The patient's examination was entirely negative, and he is physically able to return to work." There is no question that that was a full release from his doctor and that the Claimant fully complied with the Carrier's request. If Carrier's Chief Medical Officer genuinely needed further information as to the etiology of Claimant's blackouts, which in reality boiled down to "lightheadedness and not loss of consciousness" in October, 1981, in the interest of expediency, he could have telephoned Claimant's physician and asked for a letter to confirm their conversation. As the record reveals, Carrier's Chief Medical Officer simply procrastinated.


Since Claimant was not brought back to work until October 25, 1983, he is entitled to 8 hours pay at his pro rata rate for each workday during the period of September 16, 1983 through October 24, 1983. The Claimant fully complied with the Carrier's orders, and the Carrier had no rational reason for not returning him to work when work became available.

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 4th day of March 1987.