

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

1. That under the current agreement, Mechanical Department Electrician W. R. Broucher was unjustly treated when he was withheld from service on March 28, 1990, following medical examination ordered by the Southern Pacific Transportation Company (Western Lines).

2. That accordingly, the Southern Pacific Transportation Company be ordered to compensate Electrician W. R. Broucher for all time lost, with all rights unimpaired, including service and seniority, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and the loss of wages; including interest at the rate of ten percent (10%) per annum.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 March 28, 1990, Claimant, an Electrician with the Carrier since February 12, 1976, was advised by the Assistant Plant Manager that he was being removed from service, pending a medical examination by Dr. Clancy, a Carrier paid physician, after Claimant stated that he was unable to do more than five traction motors per day. Claimant submitted to a physical examination performed on March 29, 1990, by Dr. Clancy, who subsequently reported the results of his examination to the Carrier's Chief Medical Officer, Dr. H. E. Hyder. An April 6, 1990, memo from Dr. Hyder's office advised the Assistant Plant Manager that Claimant was not medically approved for return to work, that he should remain under the care and treatment of his personal physician, and once released by his personal physician, should also be medically

approved by Dr. Clancy. In a letter dated April 9, 1990, Claimant was informed of his need for care and treatment by his personal physician and the need for his personal physician to complete and return a medical release to Carrier's Chief Medical Officer. In a letter dated April 13, 1990, Claimant asked the Assistant Plant Manager that he be advised of the reasons he was being removed from service, and on April 26, 1990, the Organization filed a grievance alleging violation of Rules 38 and 39 of the Agreement because the Carrier did not hold a Hearing as provided for by Rule 39.

Rule 39 reads:

"No employee shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall, in writing, be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38. If it is found that an employee has been unjustly suspended or dismissed from service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal. Stenographic report of hearing will be taken if requested and employee's representatives will be furnished with a copy."

After Claimant's attorney, in a letter dated September 7, 1990, wrote to Dr. Clancy to protest lack of specificity in his earlier completed diagnostic forms, to ask him to explain the medical basis for his opinion that Claimant was unable to work, and to specify the treatment Claimant needed to return to work, Dr. Hyder wrote a memo on September 13, 1990, advising that Claimant was medically approved to return to work on September 20. While the Carrier, in response to Organization's grievance, declined to have an Investigation on the property, the parties did hold a conference on this matter on November 9, 1990, but did not reach resolution of the grievance.

The Carrier has the right to make medical determinations concerning the physical and mental qualifications of employees and to suspend or remove them from service if found medically unfit. Such suspensions are not disciplinary in nature and the Investigatory requirements of Rule 39 do not apply. See, e.g.: First Division Award 23989; Second Division Awards 9961, 11232, and 11612; Third Division Awards 25801, 28506.

However, the right to make medical determinations and to take related actions is not unlimited. The Board may reverse a Carrier's determination where it is pretextual, arbitrary, or unreasonable. See, e.g., Third Division Award 25186. The Carrier must have a rational basis for its determinations and the employee must be informed of the medical basis for the Carrier's action so that the employee, if he or she believes the Carrier's determination is erroneous, would be able to advise other medical practitioners, whose medical opinions the employee might seek as evidence that the Carrier's determination is erroneous, of the medical findings that are at issue.

In the case at bar the employee was informed that he was not medically approved to work (but not advised of the medical diagnosis), told that in order to return to duty he must remain under the care and treatment of his personal physician, and advised that "[a]t such time that your personal physician feels that you are medically able to return to work, please have him complete the attached CS 5662 Form and forward to Dr. Hyder's office."

Approximately six months later, but a week after Claimant's attorney wrote to Dr. Clancy asking him to explain the medical basis for his opinion that the Claimant was unable to return to work (and not after receiving any certification from the Claimant's personal physician stating that he was fit to return to work and without requiring any subsequent medical examination by a Carrier-paid physician), Dr. Hyder approved Claimant's return to duty on September 20, 1990, with no mention of the alleged medical condition that presumably improved during the period of the Claimant's removal from service.

The Board concludes that the Carrier did not, on the record, sustain its limited burden of evidence that would allow the Board to uphold the Carrier's determination that the Claimant was removed from service (and later reinstated) for medical reasons.

Accordingly, the Board sustains the Claim and directs that the Claimant be made whole under the terms of the contract for the period he was removed from service. Interest will not be allowed, as there is no contract provision for the payment of interest. See Second Division Awards 11479, 11767, 12200.

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 22nd day of April 1992.