

Award No. 11839
Docket No. PC-13780

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

**ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN
PULLMAN SYSTEM**

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and on behalf of Conductor I. C. Scott, Dallas District, that The Pullman Company violated Rule 25 of the Agreement between The Pullman Company and its Conductors, when:

1. On January 1, 1962, the Company declined to permit Conductor Scott to return to work.

We further hold that the Company acted arbitrarily and capriciously in withholding Conductor Scott from service subsequent to January 1, 1962.

2. Because of this violation, we now ask that Conductor Scott be credited and paid for each trip that he was entitled to under the terms of Rule 38 of the Agreement, from January 1, 1962, and subsequent dates, until such time as he is permitted to return to service in accordance with the rules of the Agreement, the record to be checked to determine each date that Conductor Scott was due an assignment under the provisions of Rule 38 and other applicable rules of the Agreement.

Rule 9 and the Memorandum of Understanding Concerning Compensation for Wage Loss are also involved.

EMPLOYEES' STATEMENT OF FACTS:

I.

There is an Agreement between the parties, bearing the effective date of September 21, 1957, and amendments thereto, on file with your Honorable Board, and by this reference is made a part of this submission the same as though fully set out herein.

II.

For easy reference and convenience of the Board, the most pertinent parts of Rules 25, 38 and 9, which are directly applicable to this dispute, are quoted as follows:

The Organization's claim in behalf of Conductor Scott is without merit and should be denied.

All data presented herewith in support of the Company's position have heretofore been submitted in substance to the employe or his representative and made a part of this dispute.

(Exhibits not reproduced).

OPINION OF BOARD: Because the parties disagree as to the interpretations of various medical statements presented in this case, we find it necessary to set forth a detailed review of the facts and to include pertinent correspondence from the doctors involved. These interpretations are of significance in the claim made by Pullman Conductor I. C. Scott that Carrier acted arbitrarily and capriciously and in violation of Rule 25 of the Agreement when it denied his request to return to work. This claim Carrier refutes on the grounds that the doctors' reports indicate that his physical condition is such as to disqualify him for safe work as a conductor.

Prior to November 15, 1961, the date of his removal from service, Claimant was a Pullman Conductor for Carrier for the past nineteen years. While in service from Dallas, Texas to Denver, Colorado, he blacked out and fell in the vestibule of one of the cars. He was removed to Amarillo, Texas on a passing train where he was examined by Doctor P. R. Garre that morning. The doctor submitted a written report November 17, 1961 to Mr. Nelson of the FW&D Railway Company which reads as follows:

"Dear Mr. Nelson:

"As per your request by telephone, the following report is on the above named individual. Mr. Scott was seen in my office on the morning of November 15, 1961, at your request. He gave the following history of the incident: He stated that while on the train coming into Amarillo, he experienced a blackout and can remember nothing for a considerable period of time. He stated that he injured his hand and bit his tongue. There were no witnesses available for a description of the episode.

"He states that about the age of 14 or 15, he had what were described as seizures and was treated for them over a period of time with good results. He states that for the past several months he has again experienced episodes of transient disorientation and confusion. He consulted his personal physician in Dallas and was given a complete and thorough examination including skull x-rays and electroencephalogram. He was placed on medication of some type. I presume this was a sedative and anti-convulsant medication.

"From the description he gives I would be inclined to consider his condition an epileptic form equivalent. I feel that a man in this condition with this history of multiple recent episodes should be very carefully evaluated before being allowed to return to his regular duties."

At the Company's request, Claimant was examined by Doctor W. W. Shortal of the Shortal Clinic in Dallas on November 27, 1961 and on November 30, 1961 he submitted a report to Mr. Weinbrenner of the Railroad. His report follows:

"Dear Mr. Weinbrenner:

Re: I. C. Scott, Conductor

"At your request, we examined I. C. Scott on November 27, 1961, a conductor of 19 years of service.

"History as given by Mr. Scott is as follows: He says his mother told him that between the ages of 3 and 4 years, he had frequent convulsive seizures. This condition was dormant until he was about 14 years of age. He began to have them again at irregular intervals at which time he would become drowsy and a great many times fall asleep and awake with a severe headache and lacerations on his tongue and lips. In the last few years he has suffered a few dizzy spells, but they passed off without the loss of consciousness.. On November 15, 1961, he had a seizure while on duty, fell and hurt his hand, lost consciousness and was carried to a hospital in Amarillo, Texas. The report from this Doctor, you have in your files.

"Mr. Scott had consulted at intervals before this attack with Dr. W. D. Waldron, 1315 W. Jefferson, Dallas, Texas. He gave Dr. Waldron a similar history that we have enumerated. An encephalogram was made and patient was referred to Dr. L. M. Pence, 212 N. Westmoreland, Dallas. Dr. Pence felt that he has some irregularity in the right parietal occipital region. These doctors are of the opinion that these were epileptic type seizures.

"Since our examination, Mr. Scott has again reported to Dr. Waldron and he tells me that he is of the same opinion as before.

"Our examination revealed: Blood pressure, 130/90; heart and lungs within normal limits; eyes react normally to light and accommodation; reflexes sluggish. Patient complains of dizziness on sudden change from recumbent to upright position. In lieu of the recent neurological examination, I did not advise them to be repeated at the present time.

"It is my opinion that Mr. Scott is suffering from idiopathic epilepsy and is unsafe for continuation as a conductor."

On December 6, 1961, Doctor R. M. Graham, the Company's Doctor of Medicine and Sanitation, reported that Claimant "appeared to have idiopathic epilepsy" and Mr. Scott was notified that he was out of service.

Claimant's written request to Dr. Graham on December 29, 1961 for an appointment for the purpose of an examination was refused in a reply dated January 3, 1962. Dr. Graham wrote: "I am sorry, but I do not think further examinations here would change the situation. As your doctors have undoubtedly advised you, you are subject to repeated epileptiform seizures, and should not seek employment in a hazardous occupation."

Doctor L. M. Pence, Claimant's Neurologist, again examined him and wrote the following report on January 15, 1962:

"To Whom It May Concern:

"Mr. Irvin C. Scott came by again today. He has been taking Dilantin o. 1 gr. t. i. d. regularly and feels very well—he is denying all spells since November 20, 1961.

"He looks much better today. The new EEG is very greatly improved and could be considered as normal except for very minor irritability in left temporal area. This is not enough to be considered as significant.

"He should continue his medication for at least a year after it was started (until November, 1962). If no spells recur, then a trial on no medication might be indicated.

"In the meantime, it is conceivable he would be perfectly safe to return to work. However, the decision here rests with his Medical Director."

In response to Mr. Scott's request for reinstatement, Carrier offered him his job after a year's observation providing he remained free of seizures without medication during this period. Organization countered by proposing a re-examination of Mr. Scott by a physician acceptable to both parties. Neither proposal was accepted.

Mr. Scott's claim led to a hearing on June 21, 1962 as a result of which Carrier denied him the right to return to work.

Our study of the record does not convince us that there is enough evidence to conclude that Claimant is suffering from an illness which makes him unfit to return to his position as Pullman Conductor. The Company physicians, Doctor P. R. Garre and Doctor W. W. Shortal, each saw Mr. Scott on only one occasion. Dr. Garre's report is based primarily on the verbal statements concerning Mr. Scott's medical past which he says were made by Claimant. He does not give a definite diagnosis, but writes: "from the description he (Scott) gives, I would be inclined to consider his condition an epileptic form equivalent." Apparently, Dr. Garre did not regard his examination as conclusive, because he suggests that Mr. Scott's condition "should be very carefully evaluated before being allowed to return to duty." Dr. Garre, however, did not see Mr. Scott for a more extensive follow-up examination. We do not find that his report is, therefore, an adequate basis for deciding that Claimant is not physically fit to return to work.

The second physician, Dr. Shortal, who examined Mr. Scott for Carrier, made a definite diagnosis of idiopathic epilepsy and wrote, " — that Mr. Scott is unsafe for continuation as a conductor." In his letter to Mr. Weinbrenner, Dr. Shortal apparently accepts the neurological findings of Dr. Pence, but he makes a diagnosis that does not appear on the report of Dr. Pence or of Dr. Waldron. He indicates that these "doctors are of the opinion that these were epileptic type seizures." We, however, do not find the term epileptic type seizures in the reports of Dr. Pence or of Dr. Waldron, and since the latter on January 10, 1962, wrote: "The exact cause of Mr. Scott's fainting has not been determined, "we find there is a conflict concerning the nature of Mr. Scott's physical condition. This conflict is significant because the nature and extent of the ailment must be considered in determining his fitness to return for safe work as Pullman Conductor.

In addition to not giving a specific diagnosis of idiopathic epilepsy or epileptic type seizures, Dr. Pence and Dr. Waldron state that Mr. Scott is physically fit to return to work. Dr. Waldron says: "Mr. Scott now seems essentially well. He is doing very well on his medicine and apparently is entirely able to resume his position as Pullman Conductor." Dr. Pence takes a similar position in these words: "In the meantime it is conceivable he would be perfectly safe to return to work."

To accept Dr. Shortal's diagnosis without additional confirmation would be to ignore the opinion of the two physicians who examined Mr. Scott more than once and to ignore his nineteen years of service as Pullman Conductor without medical incidents prior to November 15, 1961. We consider reasonable Claimant's request on December 29, 1961 for re-examination by Carrier's doctor to re-evaluate his condition.

We find that under the circumstances in this case, the advice of medical experts affords the best means of determining the truth concerning Mr. Scott's physical qualifications now and as of January 1, 1962; and that the Division should have the reports of such medical experts for consideration before finally disposing of this claim.

We therefore further find, direct, and order that on or before January 1, 1964 the Carrier and the Claimant or his representative shall each select a doctor qualified to determine the physical qualifications of Claimant Scott for restoration to the service to which his seniority would entitle him, the two doctors thus selected thereafter to agree, on or before February 1, 1964 upon a third similarly qualified doctor, and all three doctors, having full access to Mr. Scott's entire medical history, to examine him on or before March 1, 1964, and, based upon their examination and consideration of his medical history, to each make a written report, on or before April 1, 1964, to this Division of the National Railroad Adjustment Board: (1) as to Mr. Scott's current physical qualifications for restoration to service, and (2) if and to the extent they can do so, as to his physical qualifications for restoration to service as of January 1, 1962.

We further find and direct that these reports of the three medical doctors so selected shall be added to and be made a part of the Division's docket file and record in this case for the consideration of Members of the Division in finally disposing of this claim; and that final disposition of the claim by this Division shall await receipt and consideration of these reports.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein.

AWARD

Case remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of November, 1963

DISSENT TO AWARD NO. 11839, DOCKET NO. PC-13780

While in the Opinion of Board in Award 11839 the majority state:

"Our study of the record does not convince us that there is enough evidence to conclude that Claimant is suffering from an illness which makes him unfit to return to his position as Pullman Conductor. * * *"

they also indicate, by, among other things, remanding the case back to the parties for additional medical reports, that the Organization did not fulfill its burden of proof in the record to show that Claimant was physically fit to return to work as conductor. It was the Organization's burden to maintain its claim on the basis of its own proof; its having failed in this respect the claim should have been denied. This Board has consistently so decided in awards too numerous to mention.

In a case involving a laborer having this same ailment, this Division held as follows in Award 8233:

"The circumstances in this case are not normal. Circular 1 to the contrary, we cannot close our eyes to the fact that Claimant's physical problem is that he is subject to epileptiform seizures. We must and will recognize this fact for one reason, and one reason only: Claimant's life and the lives of those with whom he may be working are involved. The value of one human life, or the protection of one human life from the hazard of injury, transcends all the procedural rules this Board may ever write.

"Irrespective of how lax Carrier may have been before March 26, 1954 on hiring or rehiring of Claimant, or how inconsistent some of its evidence may be of incidents and injuries involving claimant prior thereto, the fact remains that on the morning of March 26, 1954 Carrier had before it two medical reports—one from Dr. Donald S. Thatcher and the other from Dr. H. W. Hafke and Dr. F. J. Millen covering examinations of Claimant Marcks, indicating a history of epileptiform seizures since about the age of 14. The details of these reports are of no concern. We lack the knowledge and authority to pass upon them.

"Upon the advice of its Chief Surgeon, Dr. R. Householder, Carrier disapproved Claimant for service on the basis of

'History of attacks of epileptiform seizures while on duty and corroboration by electroencephalogram findings under date of March 9, 1954.'

"To sustain part one of the claim that the Carrier shall now be required to

'reinstate Employee W. F. Marcks on position he occupied on March 26, 1954,'

would be to knowingly and willingly subject Claimant and those with whom he may be working to the hazard of injury. This we will not do.

"Carrier had the perfect right to place him in a 'disapproved for service' category on the basis of the evidence and advice in its

possession. Claimant Marcks was not 'removed from service' as Organization claims.

"* * *

"With respect to part 2 of the claim that Carrier

'Compensate Employee W. F. Marcks for all loss sustained from March 26, 1954 until he is returned to Carrier's service,'

it must be noted that this Award holds Carrier violated Rule 22 (g) only by failing to grant Claimant an investigation. We have not held that Carrier's disapproval of Claimant for Service was not justified in view of the medical evidence and advice of its Chief Surgeon. There is no evidence before us that such action on Carrier's part was violative of the Agreement.

"It is most unfortunate that Claimant Marcks was subject to epileptiform seizures. There is no evidence that Claimant's name does not continue to be carried on Carrier's seniority list. Should Claimant's physical condition change to the point where Carrier and its Chief Surgeon are satisfied his return to employment would cause no hazard to himself or others, he can be returned to employment in accordance with the applicable provisions of the Agreement.

"But we can find no justification to sustain Part 2 of this claim because Claimant's loss of earnings in this case is not attributable to Carrier's violation of Rule 22(g), directly or indirectly."

Second Division Award 4244 covered a similar case and also involved a laborer as contrasted with a Pullman Conductor in the instant case. Therein, like in the instant case, Carrier's doctor tried to obtain from Claimant's doctor a report on his current condition and information as to any seizures the Claimant may have had during the preceding year, medication being administered, etc., but, like in the instant case, received no response thereto. The Second Division denied the claim therein holding as follows:

"In view of the showing that the claimant was afflicted with seizures following his accident, we would not be warranted in finding that the Carrier acted arbitrarily in refusing to restore him to service. There does not appear to be any contractual obligation on the part of the carrier to set up a three-man examining board, and there is a lack of preponderance sufficient to establish that it ever agreed to do so. The responsibility that a carrier owes to its employes, to the public, as well as with respect to its own liabilities are all calculated to preclude this Board from substituting its judgment for that of the carrier's with respect to such an involved matter as an employe's physical fitness to work.

"We reject the claim on account of a failure of proof sufficient to sustain it."

In the instant case, the majority in Award 11839 also disagrees with Doctor Graham's decision, stating:

"* * * We consider reasonable Claimant's request on December 29, 1961 for re-examination by Carrier's doctor to re-evaluate his condition.

"We find that under the circumstances in this case, the advice of medical experts affords the best means of determining the truth concerning Mr. Scott's physical qualifications **now and as of January 1, 1962**; and that the Division should have the reports of such medical experts for consideration before finally disposing of this claim." (Emphasis ours).

No rule of the Agreement provides for setting up a medical panel to determine Claimant's fitness to return to work as a conductor and this Board is without authority to write one for the parties. In addition, there is no provision in the Railway Labor Act authorizing this Board to enter interim orders for the purpose of developing additional facts or evidence; this Board's authority is limited by the Railway Labor Act.

Insofar as the information requested concerning Claimant's physical condition as of January 1, 1962 is concerned, the record shows that, within a period of a month and one-half prior thereto, five doctors had made reports on Claimant's condition, only one of which reported that Claimant "apparently is able to resume his position as Pullman Conductor". These reports show that between the ages of three and four years Claimant had frequent seizures, which condition lay dormant until he reached the age of fourteen years when he began to have them again, and that, for several months prior to the seizure on November 15, 1961, he again had been experiencing episodes and had been under treatment therefor by his personal physician.

While Doctor Pence, Neurologist to whom Claimant's own doctor referred him, made a subsequent report on Claimant under date of January 15, 1962, indicating as follows:

"He should continue his medication for at least a year after it was started (until November, 1962). If no spells recur, then a trial on no medication might be indicated.

"In the meantime, it is conceivable he would be perfectly safe to return to work. **However, the decision here rests with his Medical Director.**" (Emphasis ours).

it is significant that Doctor Pence recognized that the decision on whether or not Claimant was safe to return to work as conductor "rests with his Medical Director". This is necessarily so because, among other reasons, it involves the question of safety of the individual himself and other employees as well as the public, for which the Carrier is liable under the law. Thirteen awards were cited to the Referee in which this Division has recognized that Carriers must rely upon the recommendations of their own doctors concerning the fitness of their employees to hold their respective positions.

Furthermore, Carrier offered to accept and be governed by Doctor Pence's recommendation that Claimant continue his medication until November 1962, and then follow with a trial on no medication if no spells recur in the interim. In fact, on November 7, 1962, Carrier wrote Claimant's doctor and requested further advice concerning Claimant's condition at that time. It is significant that Carrier received no reply to that letter.

In addition, and also concerning the question of Claimant's physical condition as of January 1, 1962, the record shows that the Organization in its Ex Parte Submission quoted a letter to Claimant from the National Railroad Retirement Board dated December 27, 1961, indicating that up to that time Claimant had been receiving sick leave pay under the Railroad Retirement Act,

and stating that, if Claimant wanted to claim sickness benefits after December 27, 1961, additional information as to his physical condition would be required and it enclosed a form to be filled out by Claimant's own doctor. Apparently this additional information was furnished because the record contains a later letter from the National Railroad Retirement Board and other evidence indicating that Claimant was continued on sick leave pay by that Board until March 22, 1962.

Obviously, the evidence in the record confirms Doctor Graham's reply to Claimant on January 3, 1962, viz., that further examination at that time would not have changed the situation. Furthermore, the evidence in the record, without more, irrefragably shows that Claimant was not physically qualified for restoration to service as of January 1, 1962.

Insofar as the information requested as to Claimant's current physical qualifications for restoration to service is concerned, the Referee was advised in panel argument that Claimant had applied for and had been adjudged eligible by the National Railroad Retirement Board to receive a disability annuity retroactive to August 21, 1963, which fact is directly related to the question before this Division and is confirmation of other evidence in the record showing that Claimant is not physically fit to perform service as Pullman Conductor.

For the foregoing reasons, among others, we dissent.

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ T. F. Strunck

/s/ G. C. White