



Award No. 14224
Docket No. MW-15502

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it unjustly withheld Section Laborer Mitchell Shank from service. (Carrier's File 30-5-105.)

(2) Mr. Mitchell Shank now be returned to service with seniority, vacation and all other rights unimpaired and he be allowed payment at the Section Laborer's rate for the assigned working hours actually lost while out of service, (Rule 19(f)) beginning with November 23, 1963.

EMPLOYEES' STATEMENT OF FACTS: On September 6, 1963, the claimant had an epileptic seizure which necessitated his absence from work for several days. Since he felt that it would be advisable to have a physical examination before returning to work, the claimant, on September 10, 1963, submitted to such an examination by his personal physician. At the conclusion of the examination, the doctor advised him that he could return to work whenever he so desired. Nonetheless, upon being notified of the claimant's desire to return to work, the Carrier's Division Engineer wrote:

"Brewster, Ohio
September 19, 1963

Mr. Mitchell Shank
R. D. No. 2
Dillonvale, Ohio

Dear Sir:

Doctor J. W. Houk, NKP Medical Director, has advised that before a decision can be reached as to your qualifications for duty, it will be necessary that additional study be made.

Therefore, he has arranged an appointment for you with Dr. Wanner at the Wheeling Clinic on Friday, October 4, 1963, at 10:30 A. M.

Carrier's Exhibit H — June 11, 1964 — Denial of appeal — Director of Personnel to General Chairman

Carrier's Exhibit I — June 17, 1964 — Letter — General Chairman to Director of Personnel

Carrier's Exhibit J — July 1, 1964 — Affirmation of denial — Director of Personnel to General Chairman

(Exhibits not reproduced.)

OPINION OF BOARD: On September 6, 1963, Claimant had an epileptic seizure while on duty. At the direction of Carrier, he submitted to an examination on October 4, 1963, by Dr. A. L. Wanner, who confirmed the diagnosis and added,

"It is my opinion that it would be feasible for him to resume his regular work as a section laborer."

Claimant was also examined on November 23, 1963, by Dr. G. Ortiz, who sometimes acted as a Carrier physician, and on December 17, 1963, by Dr. H. W. Brettel, his personal physician, both of whom certified that he could return to work. Despite these medical reports, Carrier's Medical Director, Dr. Houk, disqualified him from all service.

Claimant persisted in his efforts to return to work and on February 12, 1964, submitted to examination by Carrier-appointed Dr. Karnosh whose report was never disclosed. On the basis of this examination, Claimant was again disqualified.

All the medical evidence in the record indicates that Claimant, although suffering from epilepsy, was thought medically able to return to work. Dr. Karnosh's report was not disclosed. We may presume that Carrier did not disclose its contents because it did not help Carrier's defense. The failure to produce vital evidence in one's possession, without explanation, invites the conclusion that it was unfavorable.

Carrier defends its position by saying that it had the right to set medical standards for its employes and, in the exercise of such right, it may disqualify for service a known epileptic whose duties require him to be around moving cars, equipment and machinery. It may not, however, set medical standards which are arbitrary, capricious, discriminatory or contrary to medical opinion.

There is no evidence in the record that any physician who examined Claimant thought him incapable of doing his work. Carrier's Medical Director, Dr. Houk, acted not on the prognoses or opinions of the examining physicians but on the fact that Claimant was an epileptic. If the mere fact of epilepsy was sufficient to disqualify Claimant, Dr. Houk did not take such a position but submitted Claimant to examination after examination apparently in hope that some doctor would make the prognosis desired.

Carrier described the opinions of the three physicians as that of "outsiders" who did not have responsibility for determining fitness of the Carrier's employes and did not know the risks and conditions under which a section laborer worked. Being a track worker, his duties affected the safety of fellow

workers and the public in general. At least one of these "outsiders," however, was chosen by the Carrier to make the examination.

The only doubt raised by this defense is whether the physicians knew the nature of the duties of a section hand and related their prognoses to those duties. While we may presume that Drs. Wanner and Karnosh, having been appointed by Carrier, knew the nature of those duties, we cannot be certain. The risk for the future, if they did not, may be great. Accordingly, while this Board believes that Claimant was unjustly disqualified from his position and is entitled to be made whole for any loss of earnings he may have suffered thereby up to the effective date of this award, his return to service should be qualified as follows: If Claimant wishes to resume employment with Carrier, he should submit to examination by a board of three physicians, one appointed by the Carrier and one by the Claimant, and the third by the other two physicians. The decision of a majority of said physicians shall prevail as to Claimant's ability to return to work as a section laborer with reasonable regard to his own safety, and that of his fellow workers and the general public. If the decision is that Claimant be returned to his position, Carrier shall continue him in service after the effective date of this award. Otherwise, Carrier's obligation to Claimant shall cease as of said date. Award 8724.

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; and

That Carrier's disqualification of Claimant was improper.

AWARD

Claim sustained to extent set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1966.