Award No. 9421

Docket No. CL-8908

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

LEHIGH VALLEY RAILROAD COMPANY

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

1. The carrier violated rules of the Clerks' Agreement when, on Nov. 8, 1954, it arbitrarily removed Mr. Felix Kociczewski from service without formal investigation and/or hearing for the purpose of giving consideration to his grievances, and further,

2. That Mr. Felix Kociczewski be compensated at the rate of $13.44 per day for the period November 8, 1954 to June 17, 1955, a total of 142 working days.

EMPLOYES' STATEMENT OF FACTS: Mr. Felix Kociczewski entered the service of the Lehigh Valley RR Feb. 23, 1954 and worked a total of 158 days. His earnings for the period Feb. 23, 1954 to Nov. 4, 1954 was $2226.73.

On Nov. 4, 1954, Mr. Kociczewski was notified to report to Company Doctor Creighton for physical examination during the week of November 7, 1954. Mr. Kociczewski reported to Dr. Creighton on November 7, 1954 and was advised verbally by the Agent that he failed to pass the physical examination.

Dr. Leon Nowakowski, family physician, advised Mr. Kociczewski to again report to Dr. Creighton, which he did on January 11, 1955, and Company doctor Creighton refused to examine him without the usual form of the Carrier. Mr. Kociczewski offered to pay Dr. Creighton for his services in the examination but he refused to examine him.

Under date of February 12, 1955 Local Chairman Hawkins addressed the following letter to Superintendent Baker:

"Mr. C. W. Baker, Supt.
Lehigh Valley Railroad
Buffalo, N.Y.

492 Lisbone Ave
Buffalo, N.Y.
Feb. 12, 1955

November 5, 1954. Also, no appeal was made in his disqualification for physical reasons by himself or by his organization representative until January 15, 1955, at which time the offer of a reexamination was made by the Carrier if claimant felt his condition had improved to the extent that he could then pass a satisfactory examination.

From the date claimant was examined November 5, 1954 to the date he was jointly examined and found fit to work as laborer on May 24, 1955 was an elapsed time of more than six months, which afforded the claimant ample time and opportunity to improve his blood pressure condition, so that at the time he was jointly reexamined on May 24, 1955, his blood pressure condition had improved, and it was found safe for him to be reemployed in a position as laborer to perform heavy work. There was no evidence presented by claimant or his representatives at any time after November 5, 1954 until the date of the joint examination on May 24, 1955 that claimant's physical condition was satisfactory and that he was fit to work in a position as laborer.

The memorandum which organization representatives did submit from one, Doctor Nowakowski, was an undated memorandum and could not be considered as sufficient supporting evidence to change the actual report of claimant's physical condition as disclosed by the examination he underwent November 5, 1954. The fact of the matter is that claimant's physical fitness to perform the work of a laborer between November 5, 1954 and June 20, 1955 was not determined until his examination on May 24, 1955, the report of which was not received from his own doctor until June 14, 1955.

It is respectfully submitted claimant in this dispute was disqualified as physically unfit to continue working as a laborer after examination on November 5, 1954 and that no proof of his physical fitness to resume work in the position of a laborer was presented until report of his own doctor dated June 14, 1955 was received after his examination on May 24, 1955, and in view of this record this claim is without merit and should be denied.

The facts presented in this submission were made a matter of discussion with the Committee in conference on the property.

OPINION OF BOARD: The Claimant was "disqualified for duty" on the basis of a medical examination by Carrier's physican and without a formal investigation. Several months later, after a physical examination agreed to by the Carrier, he was found fit for work and reinstated.

Contentions

Claimant seeks compensation for the time lost from disqualification to reinstatement on the ground that under Rule 60 of the Agreement he could not be "dismissed" without an investigation.

Carrier responds that Claimant was not dismissed and that, in any event, the discipline-dismissal provision, Rule 60, is not applicable to physical disqualification situations.

The Facts

Claimant was hired in February 1954, as a laborer in the apparent expectation that his employment would be brief. This is theCarrier's explanation for not giving him a physical examination during the first sixty days of his employment. When it was decided that Claimant's employment would be

"permanent" he was sent to the Carrier's medical office for a physical examination and soon thereafter, in November 1954, he was told by the Agent that he had not passed the physical. In January 1955, he attempted to have the same Carrier physician examine him. The doctor refused because Claimant did not have the required order slip.

In February 1955, the Organization asked for his reinstatement, reciting these facts in somewhat greater detail, and alleging violations of Rules 60 and 74. A few days later Carrier denied his request for reinstatement and back pay but offered to arrange for a physical examination if he thought he could pass one. Still in February, the Organization presented a memorandum from Claimant's family doctor which stated that he had been "seen" "for hypertension" and reported the range of Claimant's blood pressure. The Carrier physician had found Claimant to be suffering from high blood pressure and an enlarged heart.

Thereafter, it took several weeks to complete each step of the arrangements for the physical examination by two physicians — one chosen by the Company and one chosen by the Claimant. In July, the doctors reported that Claimant was fit for duty and he was put back to work a few day after receipt of the report.

The Claimed Rules Violations

Claimant invokes Rules 74 and 60 as the basis for his Claim.

Rule 74 provides, in part:

> "The applications of new employes shall be approved or disapproved within sixty (60) days after the applicant begins work, unless a longer time is mutually agreed to."

It is undisputed that no action was taken disapproving Claimant during the first sixty days of his employment. This Rule, however, adds little to Rule 60 which provides:

> "An employe who has been in the service more than sixty (60) days, or whose application has been formally approved shall not be disciplined or dismissed without investigation and hearing. He may, however, be held out of service pending such investigation and hearing. The investigation shall be held within ten (10) days of the date when charged with the offense, or held from service, and he shall be apprised of the precise charges against him. A decision will be rendered with ten (10) days after completion of investigation and hearing."

The Carrier insists that Rule 60 does not apply because he was "disqualified" and not "dismissed", pointing out, for example, that there is no showing that the Claimant was removed from the seniority roster and hence there was no "severance of the employment relation". While removal from the seniority roster has been an element in some cases, this part of Carrier's case does not seem overly persuasive because the treatment of Claimant was, as the Organization contends, "tantamount" to dismissal under the facts of this case. We need not decide this issue.

The central issue is whether Rule 60 is applicable to an alleged dismissal on other than disciplinary grounds. As long ago as Award 676 (Spencer), involving a provision indistinguishable from Rule 60, it was held:

"It seems clear that this rule was conceived and adopted to protect an employe against arbitrary and capricious conduct on the part of his employer in discipline cases by guaranteeing a fair hearing to him in such cases." (Emphasis ours)

Award 1487 (Thaxter) concerned a dismissal on medical grounds and the same kind of discipline-discharge provision. Again such contract language was held to be "applicable only in cases of discipline".

Award 1485 (Richards is also quite pertinent. There the Claimant was "removed from service" after an unsatisfactory physical examination. He demanded an investigation under a rule (11 B) essentially the same as Rule 60. Thereafter he asked for an investigation under Rule 11 G, an "unjust treatment" provision.

The Board sustained the claim but only on the ground that he was entitled to the hearing the Claimant had demanded under the "unjust treatment" provision and dating back pay from the date of rejection of that request.

A more recent example of the same kind of limited reading of rules such as Rule 60 is found in Award 8186 (Smith). Similar results under somewhat different contract provisions are to be found in Awards 4816 (Shake) and 7283 (Cluster).

Claimant has support only in Awards 1499 and 2144 (both with Referee Thaxter sitting) in which a right to a hearing on physical fitness dismissals was held to be available "regardless of any specific rule". It is noteworthy that the same referee participated in Award 1487 holding a rule such as Rule 60 to be limited to dismissals of a disciplinary nature. These results do not seem wholly harmonious.

Awards 1499 (in which there had been an investgation but an insufficient one) and 2144 seem not to have been followed since, perhaps because of the later spread of "unjust treatment" provisions. Only one recent Award was presented in which a discipline-discharge provision was applied to a medical dismissal case (Award 9229). There the issue seems not to have been litigated actively in the first instance for neither the Award nor the dissent invoke precedential Awards.

We hold that Rule 60 did not require the Carrier to accord Claimant an investigation before disqualifying him from service on medical grounds because the Rule is limited to dismissals of a disciplinary nature.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1960.