Award No. 10739
Docket No. CL-12741

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerome A. Levinson, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4958) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 6-A-1, when it imposed discipline of dismissal from service upon M. J. Villanti, Trucker, Canton Freight Station, Baltimore, Maryland, Chesapeake Region, December 31, 1959.

(b) The discipline of dismissal from service be removed and that he be reimbursed for all monetary loss sustained.

OPINION OF BOARD: On December 31, 1959 Carrier dismissed from service Dodesto J. Villanti, Trucker, Canton Freight Station, Baltimore, Maryland, after trials held on December 16 which Claimant did not attend and which were the culmination of the following circumstances.

On April 7, 1959, Claimant reported that he became ill while handling fish meal. According to Carrier, it ordered him to report to its Doctor (denied by Employes) but he refused, saying he was on his own time and would go to his own doctor. After investigation held on April 21, Carrier on August 18 notified Claimant to appear on August 26 for trial on the charge:

"Refusing to go to Company Doctor, as directed by Foreman, Baltimore, Canton, April 7, 1959".

In the meanwhile, on July 30 Claimant fell while on duty, injuring his back, head and elbow. Carrier's Surgeon provided medication and ordered Claimant returned to duty. He worked the following day. On August 3 Carrier's Surgeon x-rayed his back and head, taped his back and prescribed medication. Upon his request, the trial set for August 26 was postponed until 10:00 A. M., October 6. Also, Carrier notified him on September 22 that trial would be held at 10:30 A. M., October 6, in connection with the fol-

lowing charges, for some of which investigation had taken place on July 29 and 30:

> "Rejecting assignment, July 22, 1959, Pier 11, Baltimore Canton. Reporting late for assignment, July 22, 1959, Pier 6, Baltimore, Canton. Making derogatory and disrespectful remarks to Freight Agent, Baltimore Canton, July, 30. Refusing to permit examination by Regional Medical Officer, Baltimore, August 3, 1959, in connection with reported personal injury."

On September 24, Claimant requested postponement of the trials, stating he still suffered discomfort and pain from injuries received July 30 and was confined to home and under doctor's care. Carrier's Regional Medical Officer and Surgeon examined him on September 30, and found him qualified to continue to perform work and to attend trial. Carrier thereupon denied his request for postponement, as well as another made October 2. Upon his return to duty, as instructed, on October 1, Carrier held him out of service pending trial.

On October 6, trial on the April charge was commenced at 10:00 A. M., at which time Claimant, accompanied by his Local Chairman, complained of continuing severe headaches from concussion received July 30, stated he had been under the care of his personal physician since October 1, and presented the latter's note dated October 5, as follows:

> "Modesto Villanti is under my care for injuries sustained July 30, 1959. A post concussion syndrome is causing cerebral symptoms which create concentration and memory disturbances. A postponement of any hearing is recommended until he is in better condition".

Claimant agreed to having Carrier's Regional Medical Officer and his personal physician appoint a third doctor for examination, and the trial was recessed until a later unspecified date.

Trial on the July charges was commenced at 10:30 A. M. on October 6 and followed a similar course except that now Claimant referred to severe headaches, concussion and dizzy spells. He agreed, if his personal physician concurred, to examination by a board of three doctors to consist of Carrier's Regional Medical Officer, his personal physician and a third doctor appointed by them. Carrier requested this in view of the difference in opinion between their respective doctors as to his condition and ability to proceed with trial.

According to Carrier, its Regional Medical Officer made an October 30 appointment for Claimant (and so advised him) to see a third doctor. The former first saw and consulted with Claimant's personal physician, and the latter was agreeable to the selection and had no objection to having Claimant examined by this third doctor "for further evaluation of his complaints regarding memory and concentration".

Claimant did not keep the appointment. Carrier notified Claimant to appear on November 10 for investigation on this account. The latter did not appear, but sent Carrier a postcard stating he was still disabled and under his personal physician's care at the time. Carrier made a second appointment for Claimant to see the same third doctor on November 20. Claimant again did not keep the appointment, but by postcard to Carrier dated November 19 he stated he was still disabled.

Finally, by three separate notices dated December 8, Carrier notified Claimant to attend trials on December 16, at 9:30 A. M., 10:30 A. M. and 11:00 A. M., respectively, the first in connection with the July charges, the second in connection with the April charge, and the third on the following charges:

> "Failing to report to Dr. O. R. Langworthy, Johns Hopkins Hospital, Baltimore, Md., for examination October 30, 1959. Failing to report for investigation, Room 315, Pennsylvania Station, Baltimore, Md., November 10, 1959. Failing to report to Dr. O. R. Langworthy, Johns Hopkins Hospital, Baltimore, Md., for examination November 20, 1959."

Claimant did not appear for trial, but on December 15 he addressed a postcard to Carrier, received about 9:45 A. M., December 16, as follows:

> "I regret to mention that due to conditions and circumstances arising from injuries sustained on July 30, 1959, on Pier # 6, Canton Station, Baltimore, Maryland, while on tour of duty, assigned by an intoxicated Foreman, it will be impossible for me to attend fabricated trial on December 16, 1959".

Each of the three trials was held as scheduled, with Claimant absent. On appeal Carrier adhered to its action of dismissal. During the progress of the matter on the property, Claimant's personal physician wrote a letter to an undesignated person from which Emloyes quoted in their Ex Parte Submission as follows:

> "I have been attending your client above for an injury sustained at work on July 30, 1959. When seen by me on October 1, 1959, he gave the following.
>
> "**History:** While using a hand truck on the floor caused him to slip, fall backward, striking his head, left elbow and low back against the side of the car. He reported to the Industrial Clinic, was strapped and given medication. X-rays were taken of the skull and back, which was reported to him as being negative. He states that he did not remember anything for a period of a few minutes.
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> "**Symptoms:** At my first examination have persisted to the present time. He has been complaining of backache, headache, nervousness, inability to concentrate or carry out any of the duties of his work.
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> "**Examination:** Blood pressure, heart and lungs normal. The posterior scalp and lumbro-sacral areas are tender. He displays symptoms of nervousness and anxiety. X-ray lateral skull, lumbro-sacral spine and pelvis, negative for bony pathology.
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> "**Diagnosis:** Contusions of the scalp. Concussion of the brain, with post-concussion syndrome. Low back sprain. Contusion of the left elbow.
>
> "**Comment:** He has been visiting this office regularly until the present time, receiving physio-therapy, analgesic and sedative drugs.

I estimate his permanent partial disability at fifteen percent based on his back and head conditions".

Employes maintained that (1) discipline of dismissal from service imposed upon Claimant was not warranted nor justified; and (2) Claimant was not given a fair and impartial trial as required by Rule 6-A-1 of the Agreement between the parties effective May 1, 1942 — in fact, he was not given a trial at all.

As to the latter issue, Carrier maintained that it properly held the trial in Claimant's absence, in view of his failure to appear or provide reason for another postponement.

As to the former issue, Carrier maintained that there was substantial evidence to support each charge as grounds for discipline and that it had not been unreasonable, arbitrary or capricious. Furthermore, Carrier maintained, there were ample grounds for dismissal and this degree of discipline was justified in view of an item in his past record, introduced at the trial, which disclosed a thirty-day suspension in 1957 for failure to report to Carrier's physician for examination, to an agent for interview, and for an investigation.

The grounds for discipline consisted of Claimant's alleged (1) refusal to report for medical examination April 7, October 30 and November 20; (2) rejecting an assignment on July 22; (3) reporting late for an assignment on July 22; (4) making derogatory remarks to the Freight Agent on July 30; (5) refusing to permit examination by Carrier's Regional Medical officer on August 3 in connection with his personal injury reported on July 30; and (6) failing to report for investigation on November 10.

The facts concerning grounds (1) and (6) have been discussed above. As to grounds (2), Claimant reported at Pier 6 and his Foreman assigned him to work at Pier 11 on July 22. Claimant objected, apparently because he felt he was assigned out of turn, also Pier 11 allegedly was poorely ventilated and made him sick. According to the Foreman, "he did not refuse to go but he did not go". At the investigation held on July 30, Claimant's Local Chairman advised him he should have done as ordered by his superior. In any event, apparently Claimant was reassigned to work at Pier 6 but according to testimony taken at the trial Claimant was observed standing in front of the pier and not working as late as an hour after the reassignment (grounds 3).

As to grounds (4), according to the record, after Claimant visited Carrier's Surgeon on July 30 the Freight Agent asked him whether he wanted to go home or go back to work and Claimant remarked that "anyone who asked if I would want to go back to work in this crippled condition was stupid or ignorant", or "the way things are being run by the Agent, are stupid and ignorant". Employes' explanation was that the Carrier's Agent seemed to believe he could treat lightly Claimant's injury without permitting the latter to "counter in the same air".

As to grounds (5), according to Carrier's Regional Medical Officer, Claimant refused to permit him to examine him, and he so testified from his notes, at the trial.

In the Board's opinion, Carrier's holding the trials in Claimant's absence was consistent with the requirement of Rule 6-A-1 that an employe "will not be suspended nor dismissed from service without a fair and impartial trial". The Board has sustained discipline after trials held "in absentia", where the employe stayed away willfully or with indifference. Awards 4433 and 4521. Here, Carrier first continued one hearing from August 26 despite finding of its physician that Claimant could return to work following the July 30 accident. Next, hearings on both April and July charges were continued on October 6, despite finding of Carrier's physicians on September 30 that Claimant could both work and attend trial. The latter postponements were mutually arranged precisely to ascertain Claimant's condition and ability to proceed with trial, and thus to resolve differences of medical opinion. Yet Claimant's only attention to the matter thereafter was to write to Carrier immediately before the investigation set for November 10, the second appointment with the third doctor, and the trials (received after they commenced) claiming he could not attend. As in his September 24 postponement request, he stated he was under doctor's care on November 8 — but, similarly, he produced no doctor's certificate after October 6. Furthermore, on March 18, 1960 Claimant's personal physician stated that Claimant had been visiting his office regularly, but expressed no opinion on whether Claimant could work or attend trial at any time since October 5. If so, it would seem that Claimant should have attended the December 16 trials or had a representative there, to have them recessed if for no other reason (as he did on October 6), or at least have provided medical evidence of continuing disability at the time of so important an occasion. Furthermore, Claimant's attitude toward the matter is indicated by his characterization of the trial as "fabricated"; his reference for the first time on December 15 to an allegedly "intoxicated Foreman"; and the claim for the first and only time in the Joint Statement of May 12, 1960 that Carrier was advised "well in advance" (received on the date set) that he could not attend investigation on November 10 and that he did not have sufficient funds for transportation to the hospital for examination. With all due regard for the facts that Claimant suffered an accident in July and this was recognized in October, the record as a whole indicates that Claimant willfully absented himself from the December 16 trials, Referee Robertson's observation in Award 4521 is in point:

> "Were we to hold that an employe could not be disciplined or discharged without his actual presence at a hearing, that would lead to the absurd result that an employe by willfully absenting himself from a hearing could avoid discipline. No such result is contemplated by the rule".

Unlike the fact situations in Awards 4433 and 4521, Claimant (at the last moment) notified Carrier he would not be present on December 16, without requesting postponement. The Board does not consider this as excusing his willful absence. Nor does the Board undertake to evaluate the actual medical factor of Claimant's alleged "concentration and memory disturbances", just as it would not evaluate his condition with respect to ability to perform his job. Award 6942.

The question has arisen whether Carrier properly could demand medical evidence of Claimant's ability or inability to attend hearing. Such a right exists with respect to an employe's physical or mental ability to perform his job — as on April 7, 1959 — in view of Carrier's responsibility to protect its property, the employe and others against results which otherwise might arise.

Awards 362, 4649 and 6753. Awards generally have dealt with an employe's demand for reinstatement following illness; but no appropriate reason has been advanced that the same right should not exist where, as here, the employe is not requesting reinstatement but nevertheless is frustrating Carrier's efforts to determine his fitness for trial upon charges arising out of his service-in fact, the record indicates that the purpose of examination by a third doctor or board was to inquire into his condition, not necessarily to be confined to fitness for trial.

Employes urged that the trials were not fair and impartial, because the Supervisor Stations and Freight Agent alternated as conductors of the hearings and chief witnesses — characterized by Employes as "dual roles". The Board does not believe that this circumstance vitiated the fairness and impartiality of the trials, for neither acted as both judge and chief witness as to any one charge. See Award 2608.

Employes also urged that the technique attempted here of having Claimant examined independently by a third doctor, was improper. However, it did not appear that such a procedure would fail to implement an objective determination of Claimant's condition by a board of three, once reached. In fact, the agreement with respect to one charge was precisely to have a third doctor, not a board, examine Claimant. Also, on neither occasion did Claimant use, as an excuse for not keeping the appointment, the claim that there should be a board of three doctors acting only concurrently. Nor did the evidence sustain the claim that the third doctor selected here was not truly neutral; it merely was alleged that he "had previously handled cases" for Carrier, or that Carrier "frequently refers employes" to him "for treatment or examination". Finally, Employes asserted that the third doctor was selected exclusively by Carrier's Regional Medical Officer, without the concurrence of Claimant's personal physician. The record demonstrates otherwise.

On the merits, the Board determines that there was substantial evidence of insubordination for which the Carrier properly imposed discipline, even apart from the third group of charges; that the discipline of dismissal was justifiable, upon the evidence including the item from Claimant's past record (Award 6171); and that Carrier's action was not unreasonable, arbitrary or capricious. The Board therefore will not disturb the discipline.

Claimant's refusal to see Carrier's physician on April 7, 1959 constituted insubordination. So did his rejection of an assignment on July 22. In the latter situation, although some confusion arose from Claimant's position that he was being assigned to Pier 11 out of turn, yet even his Local Chairman told him he had been wrong to disobey the order. He could have grieved later. See Award 8711. The charge of reporting late upon reassignment to Pier 6 the same day was satisfactorily proven. Finally, the record exhibits insubordination in Claimant's remarks in effect that his superior was "stupid and ignorant". The evidence on Claimant's refusal to permit examination by Carrier's Regional Medical Officer on August 3 was inconclusive, particularly since Claimant had just come from the Chief Surgeon who had treated him.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.