



Award Number 17971

Docket Number TE-18288

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

PENN CENTRAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Penn Central Company, that:

1. Carrier violated the Agreement and the seniority rights of K. M. Day when it removed K. M. Day from service on June 17, 1966 without just cause.
2. Carrier violated the Agreement when it failed to agree to selection of a three-doctor board to reexamine Kenneth M. Day as to physical qualifications to return to service.
3. Carrier shall compensate K. M. Day eight hours' pay for each working day that he is held out of service pending results of a three-doctor board.

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

Claimant K. M. Day was relieved of his duties as leverman in CT Tower, effective March 2, 1963, pending a hearing as to whether he had violated Rule K-1, as a result of an altercation that occurred in the Tower. A hearing was held on March 27, 1963, and on April 5, 1963 the Carrier restored Mr. Day to service, pending a physical examination. On June 18, 1963, the Carrier's transportation supervisor notified Claimant Day that the medical director had disqualified him physically from work. In January, 1964, Claimant Day was returned to work and continued to work without difficulties until the Carrier again took him out of service on June 17, 1966, pending a special examination. In the interim Claimant Day had filed a civil law suit for damages in the District Court of the United States for the Northern District of Ohio. It wasn't until the judgment had been rendered for Mr. Day that the Carrier again took him out of service in 1966.

(b) ISSUES

Has the Carrier violated the Agreement when it removed K. M. Day from service on June 17, 1966, without just cause.

Did the Carrier violate the Agreement when it failed to agree to a selection of a three-doctor board to re-examine Kenneth Day as to his physical qualifications to return to service.

Our position is still as stated in my letter of December 30th, 1966; that if and when Mr. Day can furnish a qualified doctor's report that he has fully recovered from this condition and is not subject to future recurrences of these conditions and problems we will meet with you to review the case with a view towards arranging for an adequate neutral examination."

While this matter has been the subject of subsequent discussions between the Organization's General Chairman and Carrier's representatives the Organization has not submitted any evidence to indicate that there is a medical dispute as to Mr. Day's physical condition.

(Exhibits Not Reproduced)

OPINION OF BOARD: On June 17, 1966 Carrier removed Claimant, an Operator-Leverman, from service pending a special examination by a psychiatrist, Nicholas Demmy, M.D. As a result thereof, Claimant requested a hearing under Article 32(k) of the Agreement governing the parties to this dispute. Carrier advised Claimant by letter dated September 30, 1966 that he was permanently disqualified as physically unfit to work. Claimant appealed Carrier's said decision in regard to his disqualification, requesting the services of a neutral doctor to examine Claimant in regard to his physical fitness to return to work, and also furnished Carrier with a copy of a report of R. R. Gould, M.D. concerning his examination of Claimant. T. C. Robinson, General Chairman, was advised by letter, dated December 30, 1966, from C. L. Stalder, Carrier's Assistant General Manager Labor Relations, as follows; after commenting that there is no medical dispute as to the question of whether Claimant has a schizophrenic condition, went on to state:

"If and when Mr. Day can furnish a qualified doctor's report that he has fully recovered from his condition and is not subject to future recurrences of these conditions and problems we will meet with you to review the case with a view toward arranging for an adequate neutral examination."

The General Chairman requested Benjamin Berger, M.D., Neuropsychiatrist at the Veterans Administration Hospital, Cleveland, Ohio, to answer Carrier's request for such assurance that Claimant's impulsive act will not occur again in the future, and Dr. Berger made a written report to the General Chairman dated March 1, 1967, in which he stated in part:

"MENTAL EXAMINATION:

Veteran is neatly dressed. He is pleasant and cooperative and displays no grossly abnormal behavior. Affect and emotional tone are appropriate. Veteran feels strongly about any psychiatric diagnosis that has been made.

When asked to explain some of his impulsive and apparently aggressive behavior pattern, he tells a rather simple and matter of fact story which is difficult to break down and impossible to determine any pathological thinking. His refusal to accept railroad retirement might be strange by our modern standards, but again for this man who has a very strong idea of right and wrong, it may be perfectly normal. Recent and remote memory is intact. There is no evidence of hallucinations or delusions that could be brought out. Insight and judgment appear adequate. Intelligence is average.

"DIAGNOSIS:

Schizophrenic reaction, paranoid type, in remission. Competent.

"SUMMARY:

This is the type of case that is always extremely difficult to evaluate. This man has always been a conscientious, perhaps over-religious individual, with a strong feeling of right and wrong. Whether this is normal, or whether this represents residuals of a schizophrenic paranoid process is rather difficult to ascertain. The impulsive aggressive behavior that has happened in the past appears to be completely out of keeping with his normal picture. Clinically I feel that there may very well be paranoid problems present in this man that could not be detected during the course of an examination. He is unemployed at the present time because the company refuses to take him back until assurance can be given through medical channels that this impulsive act will not occur again in the future. Under present circumstances and in view of past history, this is certainly impossible."

Again on February 12, 1968 Dr. Berger made a written report in which he stated in part:

"SUMMARY:

There has been absolutely no change in veteran's condition since last examination here in February, 1967. Once again, clinically, the possibility of an underlying paranoid disturbance cannot be completely eliminated, although by specific questioning, observation, and what information is available, there does not appear to be any adverse adjustment pattern. The answer as to whether he could carry on his former work or not will only be determined if he is given another trial of employment. There does not appear to be any undue risk in this attempt."

On January 16, 1964, at the request of Carrier, J. M. Wittenbrook, M.D. reported of his findings from his examination of Claimant and stated that Claimant had recovered from the psychosis, resulting from a history given to him by Claimant that "it started by being struck by another man at work", and Dr. Wittenbrook recommended Claimant to return to work.

On September 21, 1966, Nicholas Demmy, M.D. at the request of Carrier, submitted a written report, wherein he stated in part:

"REVIEW OF RECORDS: The patient was discharged from the Marine Corp. for psychiatrically medical reasons with a statement that he had aggressive and psychotic outbursts at that time. Subsequently while working for the New York Central Railroad, eight years ago, he was involved in an altercation while working in the tower. The second altercation occurred in March, 1963, which led to the litigation.

He described this that a fellow worker went out of his mind and lost control. 'He slapped me down and my head hit the bottom of my machine.' Mr. Day states he was out for a moment, up and around, and then was taken to Lutheran Hospital. He had a concussion and was sent home. Subsequent to this he was hospitalized at Cleveland Psychiatric Institute for a three months period where a diagnosis of schizophrenic reaction, paranoid type, chronic, in

acute, relapse, was made. The delusional material he expressed at that time was that he talked with the 'Lord'. He entertained suicidal thoughts with religious pre-occupation and grandiosity at that time. Subsequent to discharge from the hospital and with re-establishment of his control, he returned to work and has remained stationary since.

Although Mr. Day denied suspiciousness and distrust during the interview, subsequent behavior proved otherwise. Although I reported to him that the reason for delay of this report was my own delinquency, he insisted to my secretary that he had found out on good authority that I had mailed this report and that the New York Central Railroad was keeping this information from him.

"DIAGNOSIS: Schizophrenic reaction, paranoid type, chronic, in recovered state, fairly well controlled.

"COMMENT: There is no guarantee that Mr. Day will not act out as previously in that he tends to be provocative and behaves in a 'grandois, holier-than-Thou attitude' which tends to make others uncomfortable with him. This certainly would be aggravated now with his concept of conversion and pre-occupation with religiosity. There would be more than average risk in his handling a job which requires responsibility towards others, in that there is no guarantee that he will not lose control."

Claimant submitted a written report of R. R. Gould, M.D., dated October 21, 1966, in which Dr. Gould stated in part:

"Examination reveals a well-developed, somewhat asthenic man of 33. He is nearly dressed, pleasant, and cooperative. He shows no overt manifestations of tension, the palms are dry, there are no tremors. No unusual behavior was noted during the examination. No disturbance in the effect is present. His emotional responses are adequate and appropriate. Attention and concentration are not impaired. Memory is excellent. Ideation is relevant and coherent. He is communicative. At this time there is no disorder of thought content in the form of hallucinations, delusions, or obsessions. Insight is superficial, in keeping with a rather rigid personality structure. There is no discernible impairment of judgment. He is well-motivated. His interpersonal relationships are normal, and his social adjustment is satisfactory.

"No psychotic manifestations are present at the time of this examination. Certainly, there is no impairment in his occupational capacity or in his social adjustment. Basically, he does have a rigid personality structure with perhaps a strong leaning towards religion as well as a tendency to react poorly to the stress of injury. Without the benefit of hospital records, it is my impression that the diagnosis made at the Cleveland Psychiatric Institute was that of a Schizophrenic Reaction. At this time he is in full remission. From a psychiatric point of view, there is no impairment in his occupational and social adjustment, and for this reason there is no contraindication to his return to work at his former job."

Carrier's position is that no rule of the Agreement restricts Carrier's right to withhold an employee from service pending examination to determine whether an employee is physically qualified to remain in service; that

there is no rule in the applicable Agreement providing for selection of a three doctor board to re-examine * * * as to physical qualifications of an employee; that the Organization is seeking to have Carrier relinquish its right to establish and maintain physical standards for its employees to a neutral physician or to a three doctor board; that there is no dispute as to the present physical condition of Claimant.

First, Carrier's member of this Board in the oral panel discussion before this Board argued that Article 32(f) as relied on by the Organization, does not apply to physical disqualification but applies only to discipline cases, and since this is not a discipline case, the claim should be dismissed. With this contention we do not agree. The Organization is relying on Article 32(k), as shown by the record, and said Article 32(k) does not refer to "discipline" as such, but refers to matters other than discipline. This is seen by the reading of said Article 32(k), which reads as follows:

"(k) An employee who considers himself unjustly treated in matters other than discipline shall have the right of hearing provided he makes written request to his immediate superior within 90 days following date of occurrence on which complaint is based. When such request is made, hearing shall be held within 10 days from date request is received by said immediate supervisor. The employee may bring to the hearing representatives and witnesses of his choosing. Decision shall be given within 10 days from date of completion of the hearing. Paragraph (e) of this article shall be applicable for appeals and decisions."

Second, in regard to Carrier's contention that there is no rule in the Agreement providing for the selection of a three doctor board to re-examine an employee as to his physical qualifications, this Board in Award No. 14249 stated:

"That a wrongful physical disqualification may be found by this Board to be a violation of an agreement, without specific provision therein, has been established in *Gunther v. San Diego Eastern Railway Company*, 382 U.S. 257."

Thus, Carrier's contention in this regard is without merit and must be denied.

Third, Carrier strongly argues that there is no dispute as to the present physical condition of Claimant and thus no need for a three doctor board to evaluate Claimant's physical condition. We do not agree with this contention. Although it is undisputed that Claimant has been examined by a number of doctors who all found him to be suffering from schizophrenic reaction, paranoid type, Dr. Berger and Dr. Gould diagnosed Claimant to be suffering from "schizophrenic reaction, paranoid type, IN REMISSION." (Emphasis ours.) Also they found him to be competent. Both Dr. Berger and Dr. Gould concluded that there is no "contraindication" or "undue risk" in returning Claimant to his former work. Even Carrier's own selected physician, Dr. Nicholas Demmy, M.D. found Claimant to be suffering from schizophrenic reaction, paranoid type, chronic, but in recovered state, fairly well controlled. Thus, we have conflicting medical testimony as to whether Claimant is physically and mentally qualified to return to work so as to be able to perform the duties of his former position.

In view of such a conflict, a three doctor board shall be convened to determine Claimant's physical and mental qualification. Each party shall

name one doctor to the board and the third doctor shall be selected by the two doctors named by the parties herein, and the findings of the three doctor board shall be binding upon the parties. Cost of such examination shall be borne equally by both parties.

In the event such board finds Claimant physically and mentally qualified for reinstatement, Carrier shall restore him to duty with seniority rights unimpaired but without compensation for time lost. In the event that the board finds that Claimant is physically and mentally disqualified for reinstatement to his former position, the claim shall stand denied.

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.

A W A R D

1. Paragraph 3 of the claim is denied.
2. The case is remanded to the property for further handling in accordance with the findings as set forth in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1970.

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION****Interpretation No. 1 to Award No. 17971****Docket No. TE-18288**

Name of Organization:**TRANSPORTATION-COMMUNICATION DIVISION, BRAC****Name of Carrier:****PENN CENTRAL COMPANY**

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

Carrier has applied for interpretation by this Division of its said Award No. 17971.

As was said in this Division's interpretation to Award No. 6760:

"The provisions of Section 3, First (m), supra, neither contemplate nor require interpretation of an Award, unless, appearing from the claim, opinion, findings or award, the Division of the Board to which the request for interpretation is submitted finds some ambiguity in language which renders uncertain the application of the award upon the property."

We have carefully reviewed the record and the Award, and we find no ambiguity in said Award. The Award clearly states that a three doctor board shall be convened to determine Claimant's physical and mental qualification. As was pointed out in the Award, the United States Supreme Court in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, concluded that this Board has jurisdiction in appointing a medical board of three physicians to decide for the Board the question of fact relating to petitioner's physical qualifications to act as an engineer, and the court in said *Gunther* case, supra, stated:

"The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information. The medical board was composed of three doctors, one of whom was appointed by the company, one by petitioner, and the third by these two doctors. This not only seems an eminently fair method of selecting doctors

to perform this medical task but it appears from the record that it is commonly used in the railroad world for the very purpose it was used here."

The court in the Gunther case, supra, went on to say:

"On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were. We reject the idea that the Adjustment Board in some way breached its duty or went beyond its power in relying as it did upon the finding of this board of doctors."

Therefore, the application for interpretation is hereby denied.

Referee Paul C. Dugan, who sat with this Division, as a member, when Award No. 17971 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of October 1970.