NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25186

THIRD DIVISION

Docket Number TD-25083

M. David Vaughn, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

(a) The Missouri Pacific Railroad Company unjustly treated Claimant Train Dispatcher W. L. Lewis of the North Little Rock, AR office when it determined on December 31, 1980 that he was not qualified for service.

(b) Because of such unjust treatment we request that Claimant W. L. Lewis be restored to service with full compensation for all time lost as a result of his being suspended from service, and that he have the number of sick leave days he has taken during such period restored to his credit.

OPINION OF BOARD: Claimant W. L. Lewis was employed by the Carrier as a Train Dispatcher in its North Little Rock, Arkansas office. He was 53 years old at the time the claim arose and had 33 years of service with the Carrier. He had been a dispatcher since 1968. It is undisputed that he was considerably overweight and had been so for a number of years. It is also undisputed that he had high blood pressure, although there is disagreement as to its level.

By letter of December 22, 1980, the Carrier advised Claimant to report to the Carrier physician for "an evaluation of [his] physical condition." On December 26, 1980, Claimant reported for and received some sort of evaluation. Based thereon, the Carrier's Chief Medical Officer reported on a short form that he did not recommend "acceptance" of Claimant for his position.

By letter dated December 30, 1980, the Carrier advised Claimant that, "as a result of [his] recent examination", the Carrier had made a medical determination that Claimant was "not qualified for service at present." The letter recited Claimant's weight and blood pressure as the deficiencies giving rise to the decision to withhold him from service and stated that "[o]nce these two things are brought under control the re-examination will determine your future service ability." Claimant was then withheld from service on and after December 31, 1980.

Following the Carrier's action, Claimant filed a claim for unjust treatment under Article 8 (b) of the applicable Agreement, based on Carrier's action withholding him from service. Article 8 (b) states in relevant part:

> "A train dispatcher against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial investigation...within ten (10) days after notice... *** He shall be given reasonable opportunity to secure the presence of necessary witnesses.

"A transcript of the record of the proceedings of the investigation, when taken in writing, will, upon request, after having been attested to by both parties, be furnished to the employe and his representatives.

Decision to the employe, with copy thereof to his representative who assisted him at the investigation will be rendered in writing within ten (10) days after completion of the investigation."

Pursuant to Claimant's request, an 8(b) hearing was held by the Carrier on February 2, 1981. At the hearing, the Organization presented testimony from Claimant, from his immediate supervisor and from a retired chief dispatcher who had worked with Claimant to the effect that Claimant was capable of performing the duties of his position, and did in fact perform them, in a satisfactory manner. Claimant presented evidence that his job was not physically demanding and that his physical condition did not interfere with his ability to perform it.

The lay testimony at the hearing was supported by a letter from Claimant's personal physician which acknowledged that Claimant's blood pressure was high (170/100), but characterized his hypertension as "mild". Claimant's physician stated that Claimant's weight had been essentially unchanged for a period of years. The letter also described certain medical steps which were to be taken to reduce Claimant's weight and control his blood pressure.

The Carrier presented no witnesses or evidence at the hearing. It did not challenge the testimony of Claimant or witnesses testifying on his behalf, not did it challenge the admissibility of the documentary medical evidence submitted.

Claimant requested prior to the hearing that the record of the physical examination performed by the Carrier's physician be made available to him in advance of the hearing. The Carrier failed to do so. Claimant renewed his request at and following the hearing, but the Carrier failed to produce the documentation. The results of the Carrier's examination, other than the above-described form report, did not become a part of the record. Neither did the Carrier make a part of the record the standards against which the results of the examination were measured. The Carrier asserts, however, that the crucial portions of its examination--Claimant's weight of 430 pounds and his blood pressure of 230/110--were transmitted to other Carrier officials, are contained in other Carrier documents, and may properly be considered in determining Claimant's medical condition and employability.

Following the Carrier's final denial of Claimant's appeals, the claim was brought to this Board.

The Carrier argues as an initial matter that the Board lacks jurisdiction over the claim because Claimant applied for and received a disability annuity from the Railroad Retirement Board, which was granted retroactive to January 1, 1981, and that he was not, therefore, covered by any Agreement at the time he filed his claim. The Carrier's position that the NRAB is without jurisdiction over the claim must be rejected. The claim arose during the time Claimant was in the employ of the Carrier and as a direct result of the Carrier's action affecting his employment status. Indeed, the rule that the NRAB would be deprived of jurisdiction because a Claimant is no longer an employee subject to an Agreement would render access to the NRAB meaningless in any dismissal claim.

Nor does the Board draw from the Retirement Board's disposition of the claim any conclusion with respect to Claimant's ability to perform the duties of his position. Claimant's application for annuity was merely his response, virtually required under the circumstances, the Carrier's unilateral determination of disability; and the Retirement Board's decision to grant the annuity was, in turn, also based upon the Carrier's finding of disability. The validity of the Carrier's underlying action is at issue in this proceeding.

The Carrier clearly has the right to make determinations as to the physical qualifications of employees and has a duty to remove from service employees who are physically unqualified for their jobs. It is not the function of the Board to substitute its judgment for that of the Carrier's physician with respect to such medical determinations or the medical standards upon which they are based.

However, an employer's authority to make such determinations, while broad, is not unlimited. The Carrier must have a rational basis for its determination and must make its determination based on some reasonable standard. The Board may reverse a Carrier's determination where it is pretextual, arbitrary, or unreasonable (See, e.g., Second Division Award Number 7303) or where the action taken was violative of a Claimant's right to due process. See Fourth Division Award Number 3825.

The Carrier must be prepared, in response to a proper notice by an employee aggrieved by a Carrier determination of physical disqualification, to meet its burden of evidence by documenting the facts and evidence in support of its determination. See First Division Award Number 22528 ("The carrier has not borne its burden of evidence justifying withholding claimant from service...[where the Carrier submitted into evidence only a conclusory letter from the Carrier's examining physician]"). Due process in accordance with the Agreement further requires that the hearing process must allow the affected employee to question and rebut the Carrier's case. To hold otherwise would render meaningless the investigatory provisions of Article 8(b) of the Agreement and would leave an employee essentially defenseless against baseless or pretextual determinations. Such an evidentiary burden is particularly appropriate where, as here, there is medical evidence contravening that relied on by the Carrier. See Award Number 22285 ("...A Carrier may not arrogate to itself such a decision in the face of conflicting diagnosis by a qualified physician...").

Neither party here has asserted the applicability of any procedure limiting Claimant's appeal to a review of Claimant's condition by an outside physician nor requested such relief. This claim may, therefore, be differentiated from those situations in which the applicable Agreement limits relief for an employee deemed physically disqualified to a third medical opinion.

The Carrier chose not to present testimony or evidence at the investigatory hearing. However, in its subsequent response to Claimant's appeal, the Carrier cited as evidence of Claimant's possible inability to perform the duties of his position several disciplinary actions taken against Claimant over the years and to several incidents (falling asleep on duty, failing to follow written instructions) and has made arguments based on those assertions. The Carrier contends that those statements are properly considered by the Board. For two reasons, the Board disagrees.

First, the hearing process set forth in Article 8(b) clearly contemplates that a full and impartial hearing will be held on any claim of unjust treatment, just as it does with respect to disciplinary claims. The Carrier cites no authority for its position that the post hearing material should be considered, and NRAB precedent is clearly to the contrary. See, e.g., Awards 24425 and 20134. To consider the Carrier's additional factual assertions and arguments would deprive Claimant of full information as to the Carrier's reasons in support of its action and of the opportunity to review and respond to documents, cross-examine witnesses and rebut arguments relied on by the Carrier, all in violation of Claimant's right to due process under the Agreement.

Second, the Board is unwilling to assume the truth of post-hearing factual assertions in the absence of proper support. Therefore, even if the Board were to consider the Carrier's post-hearing factual assertions, they would be of little evidentiary significance. Accordingly, the Board will confine its analysis of the claim to the material contained in the record of hearing.

It is clear from that record that Claimant was very overweight and had high blood pressure. A carrier may require employees to meet certain general physical standards or be subject to being withheld from service so long as the disqualifying condition exists. However, since the standards against which the Carrier judged Claimant are not in the record, it is not possible to determine the reasonableness of the standards or the manner in which they were applied to Claimant.

The Board recognizes that some physical conditions may be so severe and disabling that the existence of the condition would, on its face, allow the Carrier to conclude that an employee was unable to perform the duties of a particular position. Indeed, it is possible that Claimant's weight and/or blood pressure would constitute such conditions had the Carrier documented them and their effect on the Claimant's performance. But here, insofar as appears from the record, Claimant was performing the duties of his job satisfactorily, despite his weight and blood pressure. In addition, the Carrier had been aware of Claimant's weight for a number of years, but had not treated it as a disqualifying condition or otherwise put Claimant on notice as to its concern.

The Board concludes that the Carrier did not sustain the limited burden of evidence on the record which would allow the Board to uphold its determination that Claimant was physically disqualified and should be withheld from service. The Board is unwilling to overturn 33 years of service on the strength of a single weigh-in and blood pressure reading, not otherwise supported or explained, when that reading is contravened by other medical evidence.

Accordingly, the Board sustains the claim and directs that the Claimant be restored to service, with seniority and all other rights unimpaired, including restoration of any sick days used as a result of the Carrier's action withholding Claimant from service, and with back pay for all time lost.

Claimant may well have the medical conditions earlier described, or others, at the time he is returned to work. Before returning Claimant to service, the Carrier is entitled to subject Claimant to the same physical examination, if any, which it would give any returning employee and to apply its reasonable standards to determine if Claimant is fit for duty.

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 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 14th day of December 1984.

Serial No. 324

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 25186

DOCKET NO. TD-25083

NAME OF ORGANIZATION: American Train Dispatchers Association

NAME OF CARRIER: Missouri Pacific Railroad Company

Upon application of the Carrier involved in the above Award that this Division interpret the Award in the light of the dispute between the parties as to its 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:

The Board concluded in Award No. 25186 that the Carrier had failed to accord Claimant due process in its determination of physical disability. The Board further concluded that the Carrier was estopped from introducing in its submissions additional evidence and arguments which had not been raised on the property. The Carrier requests an interpretation of that part of Award No. 25186 which awards back pay to the Claimant.

The purpose of an interpretation is to clarify the Award. The Board has no authority to alter, change or modify an Award under the guise of making an interpretation thereto.

The Carrier argues that Award No. 25186 should be interpreted to limit the Carrier's obligation to pay back pay to that period of time in which Claimant was or would have been available for service. Since Claimant filed for and received a disability annuity from the Railroad Retirement Board effective immediately following the date he was withheld from service, the Carrier asserts that he is estopped from claiming that he was able to perform the duties of his position during the period he was out of service but receiving the disability annuity.

The Carrier submits in support of its position a blank copy of a Railroad Retirement Board application form which requires, in part, that each applicant state under oath whether he is able to perform his regular job duties or to perform any kind of regular work. The Carrier asks the Board to infer from the Railroad Retirement Board's approval of Claimant's application that he stated to that body under oath that he was unfit for duty. The Carrier asserts that Claimant should not be permitted to maintain an inconsistent position before the Board for purposes of entitlement to back pay.

There is, as a general proposition, merit in the Carrier's position that an employee should not be able to claim to be available for service and unavailable for service during the same time period or to derive income during the same period of time as a result of asserting both conditions. However, the Board declines, for each of two reasons, to hold that its prior Award in this claim should be interpreted so as to limit or eliminate the Carrier's liability for back pay under the applicable Agreement.

First, neither Claimant's application to the Railroad Retirement Board nor the details of the Retirement Board's determination -- including the reasons for its decision, the process by which it was reached, and the medical standards and evidence it applied -- are a part of the record before the Board. Board precedent is clear that issues and evidence not raised on the property and not comprising a part of the record may not be considered by the Board.

Second, to the extent that the Board might consider the Railroad Retirement Board blank application form to be a part of the public record and properly before it, the Board declines to draw from that form the inference that Claimant's statements in his application for the disability annuity are necessarily inconsistent with Claimant's position before the Board that he is and has been fit for service. The procedures and standards of the Railroad Retirement Board are different than those applied by the Board and exist for different purposes. Indeed, it is possible that Claimant, or the Retirement Board, relied solely on the Carrier's determination of his disability, which the Board has previously invalidated in Award No. 25186, and that Claimant made no assertions and the Retirement Board no findings independent of the Carrier's determination. The Board declines to interpret its prior award on the basis of speculation as to Claimant's assertions or the Retirement Board's analysis of his claim for benefits.

Except as otherwise provided herein with respect to the impact on back pay due under the applicable Agreement, the Board lacks jurisdiction to determine the rights of the parties or of the Railroad Retirement Board as a result of the Retirement Board proceeding or Claimant's acceptance of the retirement benefits awarded pursuant thereto. The Board expresses no opinion with regard to those issues.

Referee M. David Vaughn, who sat with the Division as the Neutral member when Award No. 25186 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985.

LABOR MEMBER'S ANSWER TO
CARRIER MEMBERS' DISSENT
TO INTERPRETATION No. 1,
AWARD 25186, DOCKET TD-25083
(Referee Vaughn)

We would be content to let the Carrier Members have the last word in this matter, but for their incomplete representation of the factual material in the record. The Carrier Members wrote, on page 1 of their Dissent:

> "In its presentation to the Board, the Organization raised two issues in opposition to the Carrier's Request. The Organization argued that the Request should be dismissed as it raised issues not handled on the property. It further argued that, on the merits, it saw no validity to the Carrier's position that Claimant should not be entitled to receive backpay and a total disability annuity for the same period of time. . . ."

It is correct the Organization argued the Request for Interpretation raised issues not handled on the property, and that argument was addressed in the Interpretation.

As for the second issue, regarding entitlement to backpay and a disability annuity for the same period of time, it is instructive to see exactly what the Organization did argue. The Employees' Reply to Carrier's Request for Interpretation is here quoted in full, less than two pages in double-spaced length, including a footnote:

> "Carrier requests the Board to interpret that part of the OPINION which provides the Carrier shall pay Claimant 'back pay for all time lost,' and takes the position that Claimant lost no time on or after January 1, 1981 because he was awarded a disability annuity under the Railroad Retirement Act.
>
> We disagree with Carrier's statement that:
>
> > 'Claimant requested the Railroad Retirement Board to grant him a disability based upon Claimant's statement that he was unable to perform the duties of a Train Dispatcher....' (p. 1)
>
> Claimant made no statement that he was unable to perform the duties of a Train Dispatcher. He was ready, willing and able to continue his employment at the time Carrier unilaterally disqualified him.
>
> As a result of Carrier's determination that he was not qualified to perform his duties, Claimant was economically forced to apply for a disability annuity under the Railroad Retirement Act (Employees' initial ex parte submission, p. 6, fn). The Railroad Retirement Board's action in granting him a disability annuity was based solely on Carrier's refusal to allow him to continue working because of the alleged disability - the Retirement Board made no independent examination of its own (Employees' Reply, p. 2; Award, p. 3).

Claimant would not have lost any time from his employment or applied for a disability annuity, except for Carrier's unilateral actions which are the subject of the dispute. Under these circumstances, all of the time which Claimant consequently lost is compensable under the terms of the Award.* We request this Board to so interpret Carrier's request.

(*) - Claimant will be required to refund to the Railroad Retirement Board, the amount of the annuity received for the months covered by the back pay under the Award."

This Interpretation is analogous to the Seventh Circuit Court's holding in Brotherhood of Railroad Signalmen v. Louisville & Nashville Railroad Co., cited and quoted in the Carrier Members' Dissent. If we had only the Carrier Members' quotations for reference, the sense of the Court's decision would be difficult of determination. Fortunately, the entire decision is available, and its similarity to the instant dispute is striking. The page references here are from the decision's printing at 111 LRRM 2369.

Page 2370:

". . . we must assume that if the Board wanted the amount paid Choate reduced by his sickness benefits and disability annuity, it would have said so in the award. Moreover, unlike Sweeney, Choate received the payments not 'through his choice,' but 'on account of his dismissal.' Thus, the district court properly enforced the award which gave Choate his 'time lost,' without deducting 'other compensation received by him through his efforts to diminish or minimize the damages suffered by reason of his dismissal.'

Finally, as the Brotherhood conceded and the district court recognized, 'Choate may ultimately be responsible for reimbursement to the Railroad Retirement Board at some point in the future.' After the Railroad complies with the terms of the award, the Retirement Board will have the option of seeking recovery from Choate for the sums it has paid him over the years. 45 U.S.C. Sections 231i(a), 362(o). Upon proper notice, the Retirement Board 'shall have a lien' upon the judgment 'to the extent of the amount [it] is entitled by way of reimbursement.' 45 U.S.C. Sec. 362(o); Atlantic Coast Line Railroad Co., 237 F.2d at 140; United States v. Luquire Funeral Chapel, 199 F.2d 429 (5th Cir. 1952).

The order of the district court is affirmed."

Page 2375:

"11. Although Mr. Choate may ultimately be responsible for reimbursement to the RRB at some point in the future, the L&N's assertion as an affirmative defense to this action that

Mr. Choate has suffered no time lost due to his receipt of benefits from the RRB, is, in fact, irrelevant to the instant proceeding. Upon the L&N's compliance with the terms of Award No. 1 by paying him for time lost as a result of his wrongful dismissal from service, the RRB and not the carrier, will have the option of seeking recovery from Mr. Choate for the sums paid to him under the respective statutes. The L&N is not entitled to a 'set-off' in the back wages award for the amounts thus paid. United States v. Atlantic Coast Line RR Co., 237 F.2d 137 (4th Cir. 1956)."

Page 2376 (Concurring Opinion):

"As I see it, two bottom line conclusions appear. First, the special adjustment board found that under Rule 55, the L&N, having improperly dismissed Choate, is not entitled to have its obligations under the collective bargaining agreement reduced because Choate may have received disability payments, unemployment compensation or other income during the period of his improper discharge. Second, if Choate improperly received disability payments from the RRB, as seems likely, there is a mechanism for the recovery of such amounts by the RRB but not by the L&N. . . ."

The Award and its Interpretation are correct and proper. This entire issue need not have arisen but for the Carrier's arbitrary and unwarranted termination of Claimant's services.

R. J. Irvin
Labor Member

August 31, 1985

CARRIER MEMBERS' DISSENT
TO
AWARD 25186, DOCKET TD-25083
(Referee M. David Vaughn)

The Carrier's defense to the claim raised several points to sustain its position. The majority decision rejects each of the points and sustains the claim. The majority decision is erroneous.

1. The first point raised by the Carrier was that the Board was without jurisdiction and/or authority to restore the Claimant to service because he had retired from service when he applied for, and received a disability annuity from the Railroad Retirement Board. The disability annuity became effective January 1, 1981, the day after the Claimant's physical disqualification by the Carrier. In order to receive such an annuity from the government, the Claimant was required to claim that he was physically disabled from performing work for the Carrier. The thrust of the Claimant's taking such action is obvious. First, Claimant's act of requesting and accepting a physical disability annuity from the government shows his agreement with the Carrier that he was physically unfit to work for the Carrier. Second, his request and acceptance of an annuity shows that he had voluntarily removed himself from the coverage of the Agreement and there is no basis for his continued claim for reinstatement, let alone back pay, during the period that he continues to receive the disability annuity. The Carrier argued that the Board was without authority to overrule the findings of the Railroad Retirement Board and to hold, in effect, that notwithstanding the Claimant's own assertion that he was physically unable to work, and notwithstanding the Railroad Retirement Board's agreement with such assertion, the Claimant nonetheless was physically able to work and entitled to backpay. The Carrier's position on this point follows the reasoning and holding of this Division in Award 11517. The Board there stated:

> "In an independent proceeding, the Railroad Retirement Board, an agency of the United States Government, made the adjudication that grievant was permanently disabled to perform work in his regular occupation, i.e., as a signalman. The decision was rendered in the month of October, 1961, granted Claimant a disability annuity retroactively effective as of the 17th day of September, 1960, this being the next day after the abolishment of grievant's position at Columbus, Georgia. Insofar as we know, said adjudication remains in full force and effect.
>
> In reference to the physical condition of the Claimant, we accept the later decision of the Railroad Retirement Board as correct..."

Furthermore, while perhaps not using the term "estoppel," it is obvious that the Carrier's argument on this point was designed to show that having successfully applied to the Railroad Retirement Board for a physical disability annuity, and having continued to accept disability payments, the claimant should not be allowed to claim the right to reinstatement and backpay for the same period of time. See Third Division Awards 13524, 6740 and 6215.

There is doubt from reading the majority opinion whether it fully understood and passed upon these arguments of the Carrier. Thus, the majority opinion treats these issues simply as raising the question of whether the Board has "jurisdiction" over the claim. It concludes that it has jurisdiction because the claim arose during the period of Claimant's employment and that,

> "...to rule that the NRAB would be deprived of jurisdiction because a claimant is no longer an employee subject to an Agreement would render access to the NRAB meaningless in any dismissal claim."

The majority apparently understood the Carrier's position as requesting the Board to dismiss the claim on the grounds it had no jurisdiction to hear and determine it. The Carrier, obviously was not requesting such determination but, rather, a determination that the action of the claimant in requesting a physical disability annuity and the Railroad Retirement Board in granting it, deprived the Board of authority, or "jurisdiction," to find that the Claimant was entitled to reinstatement and backpay for the same period.

Similarly, the majority opinion chooses to ignore the significance of the Claimant's request for an annuity and the granting of the same by the Railroad Retirement Board because both actions, it states, were the result of the Carrier's action in disqualifying the Claimant. Thus, the majority concludes, "The validity of the Carrier's underlying action is at issue in this proceeding."

Assuming, for the sake of argument, that the majority is correct in stating that the actions of the Claimant and the Railroad Retirement Board were the result of the Carrier's determination, and there is absolutely nothing in the record of this case to indicate that either assumption is correct, the majority's reasoning would at best, explain the Railroad Retirement Board's action in granting the annuity. It would in no way explain or justify the Claimant's use of the Carrier's medical findings, with which he totally disagreed, as a basis for seeking a disability annuity. At the least, it would bring into question, to paraphrase the majority opinion, "The validity of the Claimant's underlying action" in asking for reinstatement and backpay for the same period he claimed total physical disability.

2. It likewise is clear that the majority acted erroneously in determining the merits of the dispute. The undisputed facts show that on December 26, 1980, Claimant, aged 53, underwent a physical examination pursuant to Carrier instructions. The examination revealed that the Claimant weighed 430 pounds and had a blood pressure of 230/120. Based upon the report of the examining physician, the Carrier's Chief Medical Officer found Claimant medically disqualified from service until his weight was reduced and his blood pressure brought under control.

Claimant thereafter requested an investigation pursuant to Rule 8(b) of the Agreement stating that he had been "unjustly treated" by the Carrier's determination. The Carrier declined to restore Claimant following the investigation. In the course of the subsequent handling of the claim on the property, the Carrier

informed the Organization of the reasons for its concern for the physical ability of the Claimant to perform his duties which culminated in the Carrier's direction that Claimant undergo the physical examination of December 26, 1980. The reasons included his previous discipline record which demonstrated Claimant's failure to perform his duties, as well as the physical characteristics he was then exhibiting on the job, such as shortness of breath even when sitting at his desk, the flushed appearance of his face, head, and arms, his drowsiness on the job, his inability to fit in the office chairs, and his general inattention to duty.

The Carrier also furnished the Organization a letter by its Chief Medical Officer setting forth his reasons for disqualifying Claimant. He stated:

> "The duties of a Train Dispatcher require alertness, responsibility, and effectiveness in decision. Any individual with a blood pressure of 230/120 is liable to immediate incapacitation from stroke, heart attack, or other physical complications, and it is not justifiable to have such liability in an individual who is responsible for multiple lives and equipment. The fact that he is short of breath on any exertion would indicate that his cardiovascular system is already compromised, and his excessive weight of 430 pounds is contributing to all of these difficulties.
>
> From a safety standpoint, for the individual and for the public, employing him in such a responsible position is totally unjustified."

The right of the Carrier to establish and maintain standards of fitness and ability for employment, as well as the duty of the Board to accept the Carrier's established standards of physical fitness absence a showing of abuse of discretion by the Carrier, has always been recognized by the Board. For just a few of the many examples see Third Division Awards 12989, 21896, 22553, 14761, 14249, 15367 13523 and 13984. Indeed, the Supreme Court of the United States has held that Carriers owe a duty to their customers and employees:

> "...to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from service....Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examination." (Minneapolis, St. P. & S. Ste. M. RR. vs. Rock, 279 U.S. 412, at 414 (1929).

In view of all the above, it is shocking, that the majority should find in favor of Claimant.

While the majority appears to set forth several different reasons for its decision, the underpinning flows from one source, the belief that the Carrier's failure to put into the record at the Rule 8(b) "unjust treatment" hearing all the evidence upon which it relied in disqualifying the claimant, precluded the Carrier from presenting it thereafter to the Organization during the handling of the dispute on the property or to the Board. Not one case cited by the majority to support its position deals with the issue, let alone supports it. On the contrary, the cases cited stand for the proposition that the carrier has the right to rely upon its medical officer's determination of physical qualification in the absence of proof of arbitrary or capricious action by the carrier, which improper conduct is certainly not found, nor ever alleged, in this case.

There is absolutely no basis for the position of the majority that the facts must be limited to what was developed at the hearing under Rule 8(b). The hearing was not a disciplinary investigation. The Carrier had not charged the Claimant with improper conduct or rule violation. The Carrier knew the facts of the case upon which it was relying in disqualifying the claimant, as did the Claimant who had undergone the physical examination. There is no requirement under Rule 8(b) that it proceed with any formal fact-finding procedure except to allow the employee to set forth the basis of his contention that he was unjustly treated. The Claimant was given such opportunity and does not contend to the contrary. There is nothing in the Rule that could be construed to limit the facts to those contained in the transcript of the hearing.

The position of the majority would have some basis if the Carrier's action would be considered as a disciplinary proceeding. The Board, however, has long

held that medical disqualification does not constitute discipline. Third Division Awards 18512, 18710 and 18396. At the very least, the majority should have required the establishment of a three-doctor panel to examine the Claimant to determine whether he was physically qualified to return to work. There can be no question that it had the right to do so. Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257 (1965). In this case, at the very least, we feel it had the obligation to do so.

The Carrier devoted careful and considered attention to the matter of determining Claimant's physical fitness and ability. There is no logical or precedental support for the decision of the majority in this case. Accordingly, we dissent and recommend no precedent value be attached to this Award.

M. W. FINGERHUT

W. F. EUKER

T. F. STRUNCK

P. V. VARGA

J. E. YOST

CARRIER MEMBERS' DISSENT
TO INTERPRETATION NO. 1,
AWARD 25186, DOCKET TD-25083
(Referee Vaughn)

Having erred in rendering its initial Award (see Carrier Members Dissent to Award 25186), the Majority compounds its mistake in its Interpretation to the Award.

In the initial handling of the dispute on the property, the Carrier took the position that even if reinstatement was appropriate, no backpay would be due for the period the Claimant was receiving a total disability annuity under the Railroad Retirement Act. While Award 25186 ordered reinstatement and backpay, no reference was made whether backpay would be payable for the period the Claimant was affirming that he was totally disabled. The issue could not be resolved on the property and the Carrier requested the Board for an Interpretation.

In its presentation to the Board, the Organization raised two issues in opposition to the Carrier's Request. The Organization argued that tne Request should be dismissed as it raised issues not handled on the property. It further argued that, on the merits, it saw no validity to the Carrier's position that Claimant should not be entitled to receive backpay and a total disability annuity for the same period of time. The Carrier responded to both contentions.

With respect to the contention that the issue had not been raised on the property, the Carrier pointed out that the argument was unsound for two reasons. First, the Carrier did raise the issue on the property. Thus, in the Carrier's letter to the Organization dated March 9, 1981, the Carrier stated at page 3:

> "With respect to pay for time lost, claimant is not entitled to time lost while physically disqualified to work. The Chief Medical Officer so found, and claimant alleged, he was disqualified in making application for a disability annuity. There is no doubt claimant is physically disqualified to work.
>
> "For the reasons stated, we do not find that claimant was unjustly treated, nor do we find any basis for the claim for time lost and such claim is respectfully declined." (Emphasis added)

In addition, the Carrier letter of April 23, 1981 concluded:

"Without waiving the position set forth herein, we also find the monetary claims are completely without merit because Dispatcher Lewis has been on disability annuity beginning January 1, 1981." (Emphasis added)

Second, the Board, in several Interpretations, has ruled that the damages issue need not be raised on the property. Thus, in Interpretation No. 1 to Award No. 8 of PLB 1844, the Board explained that damage issues can always be raised for the first time before the Board because:

"an Award can give rise to questions regarding its meaning and application which theretofore the parties had not had occasion to raise and discuss. In our judgment, it is not improper or violative of the general prohibition against raising new evidence and arguments at the appellate level to present such questions to the Board for interpretation. Typical of such questions is the instant debate about whether the Award we rendered contemplates the deduction of outside earnings or not."

Similarly, in Interpretation No. 1 to Award 12242, the Board held it proper to consider the question of backpay although not raised on the property stating:

"(s)uch omission, however, is no bar to its being considered here. The agreement alone is controlling on the question of damages and since that Agreement at all times is in evidence before the Board, we retain jurisdiction to consider and interpret all its provisions...."

Finally, the Board's attention was directed to the rationale expressed by the Board in Interpretation No. 1 to Award 25 of PLB 1315. The Board stated:

"Accordingly, if the Board now declines to consider the Carrier's method of computation on the ground the method has not been timely raised, the Board would be compelled to consider the Organization's method of computation on the same ground. Obviously, such a 'non-decision' (i.e. a declination to consider both parties method of computation) would leave the parties in limbo on the application of Award No. 25, and in consequence the Board concludes that it is appropriate to made findings on the method of computation in the consideration of the instant request for Interpretation."

With respect to the merits, the Carrier argued that while the Claimant's application for a total disability annuity submitted to the Railroad Retirement Board was privileged information and not available to the Carrier, Form AA-1d, that must be

completed by any employee seeking a disability annuity, is public information. A copy was furnished to the Board. The Board's attention was directed to paragraph 3 of the form which asks the employee, "Are you able to work in your regular railroad job? If 'No,' when did your disability first prevent you from working in your regula railroad job?" Similarly, paragraph 5 asks "Are you able to do any kind of regular work? If 'No,' when did your disability first prevent you from doing any kind of regular work?" (Emphasis in original.) Inasmuch as the Railroad Retirement Act provides that a disability annuity only be payable to "individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment " (45 USC Sec. 231 (a)), it must be presumed that Claimant's response to the questions posed in paragraphs 3 and 5 were in the negative. Similarly, inasmuch as his disability annuity began on January 1, 1981, it must be presumed that he cited such date as the time from when his disability prevented him from working in his"regular railroad job" and "doing any kind of regular work."

The form concludes with a Certification that anyone who makes any false or fraudulent statement or claim for the purpose of causing an award or payment under Federal law is committing a crime punishable under Federal law. The employee is required to execute the form certifying that the data furnished is correct. It must be presumed that the Claimant executed such certification. The position of the Claimant in this dispute is so diametrically opposed to the position certified to before the Railroad Retirement Board as to be mutually exclusive. The Claimant cannot be both physically able to return to work, as he claimed in this dispute, and at the same time be unable to perform his "regular railroad job" or "any kind of regular work" as he attested before the Retirement Board.

With respect to the question that, inasmuch as the Form AA-1d is submitted to the Railroad Retirement Board by Claimant was privileged, how could the Board determine

whether Claimant had categorically attested that he was physically unable to perform any work for the Carrier, the Carrier's response was that while the Board and the Carrier could not obtain such information, the Claimant certainly could. The Carrier suggested that it would be entirely appropriate for the Board to render an Interpretation that would establish guidelines which would be used to determine Claimant's entitlement to backpay. The Board recently took such approach in Interpretation No. 1 to Third Division Award 23541. In that case, the Federal District Court had remanded the dispute to the property for an Interpretation. The Board found it difficult to do so because "the parties respective arguments appear to lack the degree of clarity, specificity and consistency which the Board would prefer to see in such matters." The Board concluded:

> "Rather than belaboring this point any longer, however, and because the record appears not to contain sufficient data and documentation upon which to make a definitive determination regarding this particular aspect of the case, . . . the Board can only direct a limited interpretation on this particular question;..."

The Board thereupon set forth the guidelines to be followed once the facts were ascertained. A similar approach would have been entirely appropriate in this case.

The position of the Carrier was further bolstered by the decision of the Seventh Circuit Court of Appeals in Bhd of RR Signalmen v. Louisville and Nashville RR, 688 F2d 535 (7th Cir. 1982). The Court stated:

> "We find it anomalous that an employee can claim to be permanently and totally disabled, obtain a certification to that effect, and collect sickness and disability payments, and, at the same time, seek to force his employer to reinstate him to his former position with back pay for time lost. Cf Hodges v. Atlantic Coast Line Railroad Co., 363 F.2d 534, 539, (5th Cir. 1966)(court strongly disapproved of practice which permitted employee to sue employer claiming permanent and total disability and at same time force employer to reinstate him to former position with back-pay for time lost.)"

The Court concluded, however:

> "Nonetheless, we recognize that in light of the issues raised by the parties in the district court and the narrow scope of review under the Railway Labor Act, the district court was limited in what it could do."

The inference of the Court's opinion was clear. It believed that it would be improper to grant backpay to an individual who claimed to be permanently and totally disabled and received a certification of the fact from the Railroad Retirement Board but believed that it was only this Board that had the jurisdiction to deal with the anomaly. That is precisely what the Carrier was requesting the Board to do in its Request for Interpretation.

Indeed, if the Dissenting Opinion in the L&N case had its way, the case would have been returned to the Board for a further Interpretation for precisely the same reason an Interpretation was sought in this dispute, namely, to ascertain the intention of the Board's award of "pay for time lost." Thus the Dissent stated:

> "The board has never explained what 'time lost' means, or replied to the railroad's arguments that the term was not intended to include the period during which an employee is receiving disability benefits on the basis of his representation that he is disabled from doing railroad work....
>
> "...Relying on a case that stands for the unrelated proposition that the Railroad Retirement Board would be entitled to recover the disability benefits it had paid Choate if he was awarded backpay for the same period from the railroad,...the district court held that the railroad was not entitled to set off those benefits against the backpay due under the award. But set-off is not the railroad's argument. Its argument is that Choate should be estopped by his representation to the Railroad Retirement Board to deny that he was disabled and to get backpay for the period of alleged disability. This argument calls for a construction of rule 55 of the collective bargaining agreement, which is a task for the adjustment board rather than for the district court or this court."

The Majority states in its Interpretation that there is,

> "...as a general proposition, merit in the Carrier's position that an employee should not be able to claim to be available for service and unavailable for service during the same time period or to derive income during the same period of time as a result of asserting both conditions."

The Majority then concludes that it will nevertheless direct the Carrier to provide the Claimant backpay for the period he was receiving the total disability annuity, i.e., it will allow the Claimant "to claim to be available for service and unavailable

for service during the same time period." Its rationale is, in essence, a repetition of the Organization's position described above. The Carrier's response to such contentions also has been set forth above.

We would close with the final statement that in our view, the majority's Interpretation constitutes a failure to exercise its jurisdiction under Section 3, First (m) of the Railway Labor Act (45 U.S.C. Sec. 153, First (m)). That provision, in pertinent part, provides:

> "In case a dispute arises involving an interpretation of the Award, the division of the Board upon request of either party shall interpret the Award in light of the dispute."

The Act's provision is mandatory, not discretionary. The Majority's refusal to determine the facts underlying Claimant's request for a disability annuity, when such facts were readily ascertainable, does not constitute an Interpretation of the Award, but rather, a refusal to render an Interpretation.

We dissent.

M. W. FINGERHUT

W. F. EUKER

P. V. VARGA

J. E. YOST