

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2406

*
NATIONAL RAILROAD PASSENGER CORPORATION *
(AMTRAK) *
*
- and - *
*
BROTHERHOOD OF MAINTENANCE OF WAY *
EMPLOYES *
*

CASE NO. 73

AWARD NO. 73

Public Law Board No. 2406 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the National Railroad Passenger Corporation or Amtrak (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

"1. The Carrier violated the effective Rules Agreement dated May 19, 1976, on January 21, 1980, by suspending David J. Meilhammer from service until March 12, 1980.

2. Because of this violation, the Carrier is required to compensate Claimant Meilhammer for all wages and benefits lost."

Background Facts

David J. Meilhammer (hereinafter the "Claimant") was absent from work between the dates of January 8, 1980 through January 25, 1980. Upon his return to work, Track Supervisor Robert Reininger questioned the Claimant concerning his absence, and the Claimant apparently told Supervisor Reininger that he was undergoing treatment in a veterans hospital for injuries he received in the Vietnam War. The Claimant also advised his supervisor that he was using the drug Elavil, which had been prescribed by his doctor, and that he was taking that medication every four (4) hours.

As a result of this information, Supervisor Reininger required the Claimant to undergo a medical examination. That examination was conducted on January 31, 1980 by Doctor Elliott R. Fishel, who wrote a report which was sent to the Carrier and dated February 1, 1980. The report stated as follows:

"Mr. Meilhammer is a 27 year old employee for the Amtrak Corporation who was seen because of a question as to his ability to work under certain circumstances. Mr. Meilhammer is under treatment at the Veterans Administration Hospital in Fort Howard by Dr. Ahm for a nervous condition. He says he is depressed and has been taking Elavil. He takes 25 mgs., three times a day and then at night before he goes to bed he takes three or four tablets. He has been doing this for nine years. He has been working for three and a half years and says he feels he can do all right. He says he did work on a machine before which does something with the tie-binders. Someone feeds it and he uses the machine to clamp it. He just operates the machine.

Physical examination was negative except for a flat, depressed type of personality. See attached physical examination.

I do not feel that this patient should be subjected to areas of work where there is ongoing activity which could be dangerous to him or others if he were not sufficiently alert. I do not feel that he is able to work under these circumstances and this is particularly true if it becomes quite stressful at times so that he will not be as alert as when he is not under medication. By that I mean that he may go beyond the safeguards of his medication. I think he can work in a job where there is not that much ongoing activity or if he were not as alert he would not be dangerous to himself or to others. Particularly, he should not work in a type of job that is persistently repetitive such as he describes while working on the machine."

By letter dated February 15, 1980 Track Supervisor Reininger advised the Claimant that as a result of the above-quoted doctor's report he found it "inadvisable to permit you to return to work" as the report indicated that the "medication you are presently taking could inhibit your ability to perform your duties in a safe manner". Supervisor Reininger further advised the Claimant that "if your doctor removes you from this medication, you may contact me to arrange for a reevaluation of your ability to perform the required duties".

On February 19, 1980 the Claimant's doctor prescribed that he only take the medication after working hours, and on this basis the Claimant was re-examined by the Carrier's physician on February 27, 1980. As a result of this re-examination, in which the Carrier's physician determined that the Claimant appeared to be more alert and

less depressed, the Claimant resumed employment on March 12, 1980.

The claim in this case seeks compensation for the Claimant between the dates of January 21, 1980 and March 12, 1980, the dates he was held out of service.

Positions of the Parties

The Organization contends that the Claimant was suspended from service on January 21, 1980 by Supervisor Reininger, who took that action without the benefit of any medical advice.

The Organization then points out that the Claimant was not examined until January 31, 1980 and that it was not until February 15, 1980, some twenty-six (26) days after the Claimant was suspended from service, that the Claimant was advised of the alleged reason for his suspension. The Organization submits that the Carrier violated Rule 68 of the agreement which provides that employees shall not be suspended nor dismissed from service without a fair and impartial trial. The Organization argues that Supervisor Reininger suspended the Claimant on January 21, 1980 without a fair and impartial trial, and that the medical examination was arranged, as an afterthought, in an effort to cover-up the injustice.

The Organization cites a number of awards of the Third Division of the National Railroad Adjustment Board, which support the principle that employees should not be suspended from service without a fair and impartial trial.

The Organization also cites Rule 69 of the agreement, which provides that employees will not be held out of service except where they are charged with a "major offense". The Organization contends that the Claimant was not guilty of a major offense.

The Organization also argues that the Carrier failed to comply with time limits for response under Rule 74, Discipline.

Finally, the Organization argues that if the Claimant was removed from service under Rule 62, the rule which permits the Carrier to schedule physical examinations, then the Carrier violated the spirit and intent of this rule by unreasonably delaying the Claimant's physical examination.

In light of these arguments, the Organization submits that the Claimant should not have been deprived of pay and benefits for the protracted period of time consumed by the physical examinations, and requests that the Claimant be made whole.

The Carrier argues that the appeal in this case was not handled in the usual manner on the property and that the Organization has acknowledged that it never presented a claim in writing, on behalf of the Claimant, to the Division Engineer as required by Rule 64.

Therefore, the Carrier submits that the Board lacks jurisdiction to consider a claim which has not been progressed in the usual manner, up to and including the Chief Operating Officer designated to handle disputes on the property. The Carrier cites a

number of cases in support of this argument.

In addressing the merits of the claim, the Carrier submits that it has the basic right to require a medical examination when a question arises concerning an employee's physical or mental capability to perform his/her job safely. The Carrier cites a number of awards in support of this contention.

The Carrier maintains that the instant matter was not disciplinary in nature and that there is no evidence to support the Organization's contention that the supervisor's "attitude" was improper.

In light of the above arguments, the Carrier requests that the Board dismiss the claim because of the Organization's failure to comply with the claims handling procedures established by the agreement or, if the merits of the claim are addressed, that the claim be denied because the Claimant's removal from service was effected consistently with the Carrier's managerial rights and responsibilities.

Findings of the Board

The record below would appear to establish that neither party strictly complied with the procedures for handling claims. Therefore, we will reject the Carrier's procedural objection and address the claim on its merits.

The evidence of record clearly establishes that the Claimant

was not subjected to "discipline" as the result of the discovery that he was using prescribed medication while he was on the job.

The Claimant was not charged with a violation of any safety rule, rule of conduct or operating rule. If this incident were to appear on the Claimant's personnel record, it would not be proper to consider the matter as one involving discipline. In these circumstances, the Organization's arguments that the Claimant was deprived of his rights to procedural due process under the terms of the disciplinary provisions in the collective bargaining agreement are found to be lacking in merit.

This case is a clear example of the Carrier properly and judiciously exercising its discretion in determining to remove an employee from service because of discerned physical incapacities to perform a job which required the operation of heavy equipment.

The Claimant readily admitted that he was taking medication, and Supervisor Reininger did not suspend him from service on that basis. Supervisor Reininger required the Claimant to submit to a medical examination, and it was only after receiving the results of that examination, which results raised reasonable doubts regarding the Claimant's ability to safely operate the machine he was regularly assigned, that the Carrier decided to withhold the Claimant from service. Rule 62 of the Schedule Agreement permits the Carrier to require employees to submit to medical evaluations. This Board does not find that the Carrier misapplied that Rule in the instant

case.


Finally, the Organization has contended that the scheduling and conducting of the physical examination of the Claimant was unduly delayed, and therefore the Organization requests that the Claimant be compensated for the unnecessary time he was held out of service. The record does not give this Board any evidence or information as to who was responsible for the delay in completing the Claimant's physical examination; for all this Board knows, the delay may have been due to the Claimant's unavailability or to the crowded schedule of the physician who was designated to examine the Claimant. Therefore, this Board cannot assess blame and penalize the Carrier for the alleged delay.

In view of the foregoing reasons, the claim will be denied.

Award: The claim is denied. This Award was signed this 26th day of February, 1988 in Bryn Mawr, Pennsylvania.



W.E. LaRue, Organization Member



L.C. Hriczak, Carrier Member



Richard R. Kasher, Chairman and Neutral Member