

Award No. 12

Case No. 13

Docket No. MW-78-18

Parties Brotherhood of Maintenance of Way Employes

to and

Dispute Southern Pacific Transportation Company
-Texas and Louisiana Lines-



Statement of Claim 1. Carrier violated the effective Agreement when Lafayette Division Track Laborer Herbert L. Hughes was not allowed to return to work after being released by the doctor.
2. Claimant Herbert L. Hughes be reinstated to his former position, with all seniority, vacation and other rights unimpaired.

Findings The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated May 22, 1978, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Laborer was first employed on the Lafayette Division as a Laborer, January 5, 1970. He was dismissed on January 29, 1973, for violation of Rule 810 (absent without authority). Claimant was reinstated on May 14, 1973, but failed to respond to call.

Claimant sustained an off duty injury in August 1974. He received a gunshot wound to his abdomen. This injury resulted in Claimant's undergoing an 85% pancreatectomy.

Claimant, on his pre-employment physical, reported the gunshot wound and that he had an exploratory operation. However, he did not report the pancreatectomy.

Since Claimant's re-employment he had experienced a severe post-operative course. He has had recurrent abscesses in the drain site of the left upper quadrant.

Claimant had this abscesses excised in November 1976 and again in March 1977. He has had several incisions and drainages of the involved area.

Claimant was released to return to duty on a limited basis by his attending physician, Dr. E. W. Kinchen, Jr., Lafayette, La., on November 8, 1977. This latter letter was Carrier's first knowledge of the nature of Claimant's injury in 1974 and of the severe pancreatectomy performed. Claimant, as a result of the pancreatectomy, had developed diabetes mild mellitus.

Claimant was referred to Carrier's Dr. Henry Voorhies, on November 21, 1977, for a return to duty physical examination. As a result thereof Dr. Voorhies concluded that Claimant could not safely perform the heavy duties of a railroad laborer. Consequently, Carrier declined to return Claimant to his former position in order to prevent Claimant from causing himself further injury.

Claimant's Doctor, E. W. Kinchen, Jr., wrote Carrier's Chief Medical Officer on December 21, 1977 requesting that Claimant be given "work-trial opportunity". The Employees, on January 20, 1978, furnished several letters from various doctors who attested therein that Claimant could return to work without limitation. Carrier sent Claimant's files and findings to a different doctor, Dr. R. B. Crouch. He concluded therefrom that Claimant should not be permitted to work as a Track Laborer as it would be unsafe for him to do so due to his physical condition.

The Board finds that there is no question here as to Claimant's medical condition. Claimant and Carrier's doctors are in mutual agreement thereon. A gunshot wound in Claimant's abdomen required a bowel resection and an 85% pancreatectomy. Claimant has developed therefrom diabetes mellitus, for which he is presently on an oral hypoglycemic agent. Additionally, Claimant suffers a chronic draining sinus tract in a left upper quadrant incision which requires periodic surgical excision.

Carrier's doctors examined and evaluated Claimant's physical history and condition. They concluded therefrom that Claimant could not safely perform the arduous duties of a **Track Laborer**. Claimant's doctors, at least since January 16, 1978, believe to the contrary that Claimant may now work with no limitation.

The Employes General Chairman, in view of such difference of medical opinion, requested, in effect, on May 18, 1978, the establishment of a medical panel, one doctor appointed by the Carrier and one by the employees, the two of whom would then select a neutral third doctor, to determine if Claimant was physically able to return to work as a **Track Laborer**.

The Board, as constituted with laymen, is not competent to substitute its judgment for that of doctors or skilled medical men in determining the question of the physical fitness of an employee to perform his usual duties. Several Division's of the National Adjustment Board in many of their awards have reached the conclusion that this is a sound method to resolve differences in medical opinion as to an employees capability to perform the duties that may be required of him in his occupation. In fact, the Supreme Court in *Gunther vs. San Diego and Arizona Eastern Railway Company* decided in the October term 1965, upheld such a conclusion by the National Railroad Adjustment Board. Thus, it is in effect the policy that is now in the realm of public policy.

The Board therefor will remand the case back to the parties in order that they each may agree upon a competent physician to examine Claimant and review Claimant's medical history. Each are to be supplied with the duties that may be required of a **Track Laborer**. If the two said Doctors cannot agree on the physical capabilities of Claimant Laborer to perform the usual and required duties of a **Track Laborer** they thereupon shall select a third impartial doctor who shall decide such question. Such Board shall also determine at

what point in time could Claimant have commenced working.

This Board shall retain jurisdiction of Case No. 13 until a conclusion is reached, at which time it will pass upon the question of monetary liability, if any.

The Board adds the caveat that it is not here passing upon the question as to medical standards, for that is not the issue raised. Carrier does have the primary, if not sole authority, in making determinations as to such standards for the health and safety of its employees.

The Case is remanded to the Parties for handling as per Findings.

Award Claim disposed of as per findings.

Order Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

M. A. Christie
M. A. Christie, Employee Member

R. W. Hickman
R. W. Hickman, Carrier Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, Delaware, March 31, 1979.