

The Second Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Brotherhood Railway Carmen/Division of TCU
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

1. That the service rights of Carman Welder Paul V. Jenkins and the provisions of Rules 37 and 38 of the Shop Crafts Agreement were violated when on or about September 4, 1987 the Carrier capriciously and arbitrarily medically disqualified Carman Jenkins from service pending a medical examination without "good and sufficient cause" and without the benefit of incident or reasonable suspicion.

2. Accordingly, Mr. Jenkins is entitled to be compensated for eight (8) hours pay at the applicable Carmen Welder's rate for every work day, five (5) days per week, commencing Monday, September 7, 1987 and continuing until the date of January 21, 1988, plus any and all benefits accruing to other employes as a condition of employment, including, but not limited to, vacation rights, qualifying time and credit to the Railroad Retirement Board for unemployment and sick benefits and reimbursement for all losses sustained account of loss of coverage under Health and Welfare and Life Insurance Agreements during the time he was held out of service.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On September 4, 1987, Claimant received written notification he was removed from service upon direction of the Carrier's Chief Medical Officer. Claimant was further advised the Chief Medical Officer would secure an appointment for a medical examination and notify him at his home as to the time and place. Claimant was informed by letter dated September 6, 1987, and by phone on September 9, 1987, that an appointment was scheduled with Dr. Larry Smith, a psychiatrist, for September 29, 1987.

An employee in the Medical Department phoned Claimant on September 25, 1987, regarding the appointment. According to the Carrier, Claimant stated he would not see Dr. Smith on September 29 or any other time. While the Organization does not dispute this, it states Claimant called Dr. Smith's office three days prior to the appointment to inform the doctor he would not be able to keep the appointment. The Organization further states Dr. Smith's office did not arrange for another appointment.

Claimant was examined by his personal physician on November 23, 1987, and was found to be physically and emotionally healthy. Claimant was subsequently rescheduled for an appointment with Dr. Smith and was seen by him on December 18, 1987. The results of this examination were received by the Carrier's Medical Department on January 5, 1988. Based upon this examination, Claimant was found to be medically qualified to return to service on January 20, 1988. He commenced work the following day.

When Claimant was first removed from service, the Organization requested he be afforded a hearing to determine the reasons for the Carrier's action. Carrier denied this request on the basis the Rules cited by the Organization referred only to discipline, and were, therefore, inapplicable in these circumstances. The Organization maintains the Carrier never informed it or Claimant as to the reasons he was originally disqualified. While Carrier explained its reasons in its Submission before this Board, the Organization objects to the Board's consideration of the Carrier's statement as it was not presented during the handling of this dispute on the property. Our review of the record indicates the Organization's argument on this point has merit.

It has been generally recognized the Carrier may remove an employee from service under a medical disqualification if the Carrier has reason to believe the employee's continued service may jeopardize his health or safety, or that of his fellow workers. See Second Division Award 7863. It should be noted we do not consider this to be a disciplinary matter which would require a hearing under the applicable Rules governing suspension and dismissal. Nevertheless, this Board has consistently held the Carrier must exercise its discretion in a way which is neither arbitrary nor unreasonable. See Second Division Awards 9961, 11612 and 12121. The Carrier's action disqualifying the Claimant must, if challenged, be supported by proof that it acted reasonably and not arbitrarily, discriminatorily, or in bad faith; the burden being on the Carrier to establish the legitimacy of its action in accordance with those standards. See Third Division Award 28506, citing Third Division Awards 22379 and 26056.

In the dispute before us, the Carrier offered no explanation for Claimant's removal from service, save the statement in its Submission, which comes too late for us to consider. Furthermore, the medical evaluation by the doctor of Carrier's choosing gives no hint as to why this action was taken. Claimant was found to have no disabling emotional disorder. Based upon the evidence properly in the record before us, we cannot conclude the Carrier's action in removing Claimant from service was reasonable. The Agreement, therefore, was violated.


Claimant, however, must bear some responsibility for the amount of time he lost. He was first offered an appointment with Dr. Smith on September 29, 1987, but he refused to accept it. There is no indication why it took until December 18, 1987, to finally schedule an appointment acceptable to Claimant, but there is also no indication he requested an appointment any earlier than that date. For this reason, we direct that Claimant be compensated for all time lost as a result of being withheld from service, except for the period from September 29 through December 18, 1987.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 6th day of November 1991.