

NATIONAL RAILROAD ADJUSTMENT BOARD  
FOURTH DIVISIONAward Number 3650  
Docket Number 3622

Referee Arthur T. Van Wart

PARTIES American Railway Supervisors Association

TO

DISPUTE: Consolidated Rail Corporation

STATEMENT OF CLAIM: It is the Claim and request of the Petitioning Organization that:

1. Respondent Carrier violated the Agreement and unjustly treated Mr. Peter J. McLean, Engine House Foreman at St. Thomas, Ontario, when it denied him his right to return to Service, following an absence account of Sick Leave.
2. Carrier be required to reinstate Mr. Peter J. McLean to his former Position and compensate him for all Lost Wages sustained by him through Carrier's improper action, including Sick Allowance with all Rights and other Benefits unimpaired.

OPINION OF BOARD: Claimant, while assigned as Engine House Foreman, St. Thomas, Ontario, Canada, reported off sick on September 3, 1975. He was treated by a Dr. Cole who, under date of December 23, 1975, wrote Claimant's Master Mechanic at St. Thomas, as follows:

"Mr. McLean has been on a waiting list for submission to hospital for surgical treatment of his peripheral vascular disease. I have advised him that he may return to work in the meantime, provided he not overdue it right away. Should he experience discomfort or his symptoms increase, he should discontinue working."

Claimant reported to Carrier's local Medical Officer, Dr. Graham, December 28, 1975 and received a return to service examination. He was approved therefor subject to an interview with the Master Mechanic which was held December 29, 1975. It was discovered thereat that Claimant had not fully explained the duties of his Engine House Foreman's position to Dr. Graham. When Dr. Graham was subsequently fully apprised thereof he disapproved Claimant's returning to service.

Claimant was re-examined in Chicago, January 19, 1976, by Carrier's Medical Officer, a Dr. Thornton. He found Claimant to be not qualified to return to service. As a result of Claimant's several inquiries as to when he might be permitted to return to service, Claimant was again re-examined by Dr. Thornton in Chicago, July 28, 1977. Dr. Thornton wrote Claimant August, 1977 requesting that Claimant present a statement from a vascular surgeon or a specialist in vascular disorders indicating that Claimant was medically able to work safely and without harm to himself as an Engine House Foreman. Such a statement does not appear in the record.

The Association requested that the parties mutually select eight (8) physicians who would then select one physician who would make a final determination as to Claimant's ability to work.

Carrier, after conference thereon, replied that the Agreement did not provide for the establishment of a Board of Doctors, or a Neutral Doctor and denied such request. Carrier asked for a current medical status on Claimant, which was furnished in July, 1977. Arrangements were made for a physical examination of Claimant in Chicago, Illinois but he failed to report for same February 28, March 6, 7 or 8, 1978.

The Board finds that the monetary aspects of this claim are procedurally defective. Such was untimely and improperly raised, contra to Rule 14. It is therefore dismissed.

The fundamental problem raised herein is whether Claimant is physically capable of performing his normal duties as an Engine House Foreman at St. Thomas. Claimant presented a medical opinion from his doctor which asserted that Claimant was capable of working his normal job. Carrier's doctor asserted to the contrary. Thus, we have differing medical opinions as to Claimant's physical ability.

It has been somewhat common for other Divisions of the National Railroad Adjustment Board, when the circumstances were appropriate, to conclude that, as lay people, they were not competent to substitute their judgment for that of skilled medical practitioners and would remand the particular case to the parties with directions to appoint a (tri-partite) panel to resolve the differing medical opinions as to an employee's fitness to work.

Whatever misgivings may have existed as to the authority of the National Railroad Adjustment Board to establish a Medical Board as the procedural means to resolve differing medical opinions, such surely should have disappeared with the decision rendered by the United States Supreme Court, in December 1965, in Gunther v San Diego & Arizona Eastern Railway, 382 U. S. 257. There, Carrier had removed Gunther, an engineer for 30 years, after his seventy-first birthday because of the alleged physical disability, "his heart was in such condition that he would likely suffer an acute coronary episode." Gunther went to a recognized specialist who found contra and that he could work as an Engineer. Gunther requested the Carrier to join him in the selection of a three doctor board to re-examine his physical qualifications for return to service. The Carrier refused such request. Gunther then filed claim for reinstatement and back pay. Ultimately, the First Division, in it's Award 17 646, referred to past practice in similar cases and proceeded to appoint a committee of three qualified physicians to examine Engineer Gunther, one chosen by Carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to Claimant's disability and the propriety of his removal from service. Such medical board examined Gunther and, by a majority vote, found that he was physically qualified to act as an engineer. Thereafter, the First Division, based on such findings, sustained Gunther's claim for reinstatement with back pay lost from October 15, 1955. The Railroad refused to comply with the Board's Order. Gunther instituted enforcement proceedings of the Board's Award 17 646, through the Federal Courts. The District Court held the Award erroneous and refused to enforce it. It concluded that there were no express or implied provisions in the collective bargaining contract which "limited in any way what it found to be an absolute right of the railroad, in absence of any such provisions, to remove petitioner from active service whenever its physicians found in good faith that plaintiff was physically disqualified from such service." The Court of Appeals affirmed. However, the Supreme Court granted certiorari because "the holding of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it" and "Congress has established an expert body to settle 'minor' grievances like petitioner's which arise from day to day in the railroad industry. Congress invested the Adjustment Board with the broad power to arbitrate grievances...."

The Court also stated:

"The courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board is not limited to common law rules of evidence in obtaining information.

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"On a question like the one before us here, involving the health of petitioner, and his physical condition to operate an engine, arbitrator's would probably find it difficult to find a better method of arriving at the truth than by the use of doctors selected as those 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 findings of this Board of doctors,....."

Consequently, in light of the above, the instant case is remanded to the parties who are herewith directed to each select a competent and qualified physician, who shall then select a third and neutral doctor, who is a specialist in the field of Claimant's alleged medical deficiency. Such selected tri-partite medical board or panel shall examine Claimant and review his physical condition and determine, in the light of all the duties that his job requires, his capability to work as an Engine House Foreman at St. Thomas. A majority vote of such medical panel shall be determinative of Claimant's capability and such decision shall be a final and binding disposition of this dispute.

#### FINDINGS:

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

The carrier and the employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim disposed of as per opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST: Executive Secretary  
National Railroad Adjustment Board

By:   
Assistant Executive Secretary

Dated at Chicago, Illinois, this 9th day of May 1979.