PUBLIC LAW BOARD NO. 1981

Award No. 1(a)
Case No. 1(a)

PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers

and

Southern Pacific Transportation Co. (Pacific Lines)

STATEMENT OF CLAIM:

Claim of Engineer M. Dolyniuk, Sparks District, for a three-doctor panel to determine his physical ability to work as an engineer unrestricted.

FINDINGS:

Claimant had an electronic "pacemaker" implanted in August 1975 because of a heart condition. In December 1975 he was restricted by Carrier to perform yard service only as a result of the heart condition and pacemaker as well as a diagnosis of diabetes.

In response to a request by Carrier's Chief Medical Officer, Claimant was examined by a Doctor Gerow in January 1975. By letter dated January 8, 1976 Dr. Gerow advised the Chief Medical Officer that Claimant was not suffering from diabetes and that "he does have a well functioning demand pacemaker." Despite this examination Claimant was continued on restricted yard service.

On his own accord, Claimant was later examined by a Dr. McHenry, a cardiac specialist. (The record is not clear whether Dr. McHenry implanted the pacemaker). By letter dated

May 10, 1976 Dr. McHenry wrote to Claimant in pertinent part:

> "[A]s I have told you before, it is absolutely ridiculous that you should be restricted because of the presence of a pacemaker, and this infers total ignorance on the part of medical and/or administrative authorities of the nature of a pacemaker, its function, its hazards, etc...
>
> I think it should also be clearly identified that you do <u>not</u> have disease of the arteries of the heart and, therefore, the requirements for engineers referring to coronary artery disease are totally irrelevant to you. Also, diesel engines have absolutely no effect on pacemakers, nor does speed or any of the other items which you have mentioned." (Underscoring provided)

By letter dated May 26, 1976 Carrier was notified by the Organization that Claimant desired to invoke the provisions of Article 32, Section 3(b) and to be examined by a three-doctor panel.

On June 14, 1976 Carrier's Manager of Personnel denied the request to invoke the provisions of Article 32, Section 3 (b), and stated:

> "As you know, Mr. Dolyniuk has a heart problem which has required installation of a pacemaker. It has been, and will continue to be, Company policy that Engineers with heart problems, including those requiring pacemakers, must be restricted to yard service only. Article 32, Section 3 (b) of the current agreement calls for a three-doctor board solely to decide whether the employe has the physical ability "...to conform to prescribed standards..."
>
> Mr. Dolyniuk's medical problem is already diagnosed, and he has been cleared for and is working within the prescribed standards set by the Company. Appointment of a third doctor to confirm the heart condition about which there is no dispute would serve no purpose."

Article 32 of the Agreement, to which the parties have referred, states:

> "<u>Section 3(b).</u> When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical fitness and desires the

question of his physical ability to conform to prescribed standards to be determined before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

"A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

"Such a panel of doctors shall fix a time and place for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineers's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the engineer. This does not, however, preclude a re-examination at any subsequent time should the physical condition of the engineer change.

"The doctors selected by the company and the engineer or his representative shall be specialists in the disease or ailment from which the engineer is alleged to be suffering.

"The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel." (Underscoring added).

Essentially Carrier takes the position that (1) it has a unilateral right to establish physical standards; (2) the three-doctor panel rule does not apply where there are no "diagnostic opinions" that are in dispute; and (3) the provisions of Article 32 were not intended to override Carrier's standards, but rather to resolve disagreements between doctors as to whether or not a "defect exists."

As part of its submission before this Board, Carrier presented its "Policy in Regard to Article 32, Section 3(b) of Agreement Governing Engineers" stating in pertinent part:

"The first paragraph of this section describes

the provision in broad terms, and the following paragraphs provide for implementation of the rule. It is Carrier's policy that if the findings of the doctors indicate that a defect exists, invoking of Section 3(b) is denied. Where the doctors disagree on medical findings, for example, Doctor "A" finds that a defect exists and Doctor "B" finds that no defect exists, then the matter is submitted to a panel of doctors for determination.

This has been an established practice on Carrier's property under collective bargaining agreements that provide for a panel of doctors, and to now reverse that generally-accepted practice would have the following results.

1. Physical standards established by the Carrier would be rendered useless, depriving Carrier of its rights to establish such standards.
2. Rather than having consistent handling on the property, each case concerning physical standards would be decided by a third party, in many cases unknowledgeable in the requirements of the craft which would lead to many injustices in cases of similar severity.
3. Carrier would be subjected to untold liability in the event of accidents.
4. It will create on the property a new rule overriding established precedent and practice on the property to gain by a new Board a decision not heretofore gained through collective bargaining.
5. Each case on this property where a medical restriction has been imposed will be reopened to further determination by a third party."

The salient issues to be determined in this dispute are: (1) whether a "heart condition" and the subsequent implantation of an electric pacemaker are occurrences that preclude the invocation of a three-doctor panel as provided in Article 32, Section 3(b) of the Agreement; and (2) if not, is the three-doctor panel empowered to determine whether an employe is fit to perform unrestricted service.

In an effort to resolve these issues, we shall examine

other relevant awards and court decisions.

In First Division Award No. 17646 the Board ordered a three-doctor panel to be convened, stating in part:

> "Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.
>
> It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. <u>Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service."</u> (Underscoring added)

The medical panel found that the Claimant (F. G. Gunther) was physically qualified to act as an engineer and the Board, in an Interpretation, held that Claimant was entitled to back pay. Carrier refused to comply. Claimant then proceeded through the federal courts eventually reaching the Supreme Court of the United States. In December 1965 the Supreme Court rendered its decision in the now-famous <u>Gunther</u> case (<u>Gunther vs. San Diego and Arizona Eastern Railway</u>, 382 U. S. 257.). The Court held that the National Railroad Adjustment Board had authority to appoint a medical panel to determine "the health of the petitioner, and his physical ability to operate an engine." In reversing the lower courts on this question, the Court held:

> "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, of course, is not limited to common-law rules of evidence in obtaining

information. The medical board was composed of three doctors, one of whom was appointed by the company, one by petitioner, and the third by these two doctors. This not only seems an eminently fair method of selecting doctors to perform this medical task but it appears from the record that it is commonly used in the railroad world for the very purpose it was used here. In fact the record shows that under respondent's present collective bargaining agreement with its engineers provision is made for determining a dispute precisely like the one before us by the appointment of a board of doctors in precisely the manner the Board used here. This Court has said that the Railway Labor Act's provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, a better method for arriving at the truth than by the use of doctors selected as these doctors were. We reject the idea that the Adjustment Board in some way breached its duty or went beyond its power relying as it did upon the finding of this board of doctors."

First Division Award No. 22868 involved a Claimant who sustained an "acute posterior myocardial infarction" (a severe heart attack) for which he was hospitalized. After a period of convalescence Claimant returned to work as a fireman. He was not allowed to work as an engineer or hostler, and sought to establish a three-doctor panel to determine whether he was "capable of operating a locomotive in road service without hazard to himself or others." Carrier had a long standing policy of not allowing engineers to operate in road service after they had suffered a heart attack, and since there was no dispute with his doctor that Claimant did in fact suffer an acute myocardial infarction Claimant was not entiled to a three-doctor panel examination. The First Division rejected Carrier's contention and held:

"1. To the extent that it precludes the establishment of a medical panel to determine physical capability, Carrier's policy of not permitting an engineer to return to road service simply by reason of the occur-

rence of a myocardial infarction is unreasonable and arbitrary.

2. Even though Carrier agreed with Claimant's doctor that Claimant suffered an acute myocardial infarction, there is a dispute as to whether or not Claimant is capable of performing road service. The Gunther case and Awards 16 729 and 17 646 all recognize that a medical panel may properly determine physical capability of performing service.

3. The Organization's request for a three doctor panel to determine whether Claimant is "capable of operating a locomotive in road service without hazard to himself or other(s)" is granted, and both parties shall be bound by the decision of the majority of such panel."

In First Division Award No. 22973 the Claimant was a fireman whose leg had been amputated above the knee in an off-duty accident. After rehabilitation and prostheses, Claimant attempted to return to work after his personal physician said he was able to return. Carrier refused to select a third and neutral physician contending, as it does in this dispute, that it (1) has the right to set reasonable physical standards for its employes, and it was not arbitrary or unreasonable to prohibit an employe with an above the knee amputation from working on an engine; (2) there is no dispute that Claimant suffered the amputation, and therefore no necessity to select a neutral physician; and (3) a neutral physician has no right to set physical standards nor does he have any competence to determine whether an employe with an above the knee amputation can perform work on an engine. The Board again rejected Carrier's contentions and, after quoting at length from First Division Award No. 22868, stated:

"Thus it is shown that even where there is no special agreement for a medical review panel, it is allowed with the approval of the U. S. Supreme Court; and such panel is empowered to determine not only an employe's physical condition but also whether the employe is capable of performing service.

We find that the conclusions and findings of that award are sound and have no reason to reach a contrary result.

Additional support for Claimant is found in the January 1, 1968 Memorandum of Agreement. Contrary to the contention of Carrier, a neutral physician's role is not limited to resolving a dispute between the other two physicians as to the physical condition of an injured fireman. In addition to findings of physical condition, the neutral physician is required, under paragraph (b), to render "his opinion as to the employe's fitness to perform service in the class or craft in which he holds seniority." (Underscoring added).

This Board, therefore, in consonance with the Gunther decision and the above cited awards, finds that the undisputed "heart condition" and implanted pacemaker do not preclude the invocation of a three-doctor panel as provided in Article 32, Section 3(b) of the Agreement. The Board is not unmindful that there are awards on this property that appear to reach a contrary result. We refer to Awards 1048, 1079 and 1081 of Special Adjustment Board 180. We have examined these awards with some care, bearing in mind our obligation to give weight to precedent--particularly awards on the same property. We conclude, however, with all due respect to the eminent Neutral of Special Adjustment Board 180, that these awards are contrary to the spirit and intent of Gunther.

We address ourselves next to the question of whether Article 32, Section 3(b) allows a three-doctor panel to determine whether the Claimant was capable of performing road service. Carrier contends that the mandate of Article 32 is limited to a determination of whether Claimant's physical ability conforms to "prescribed standards," and cannot be extended to a determination of Claimant's physical ability to perform road service.

The Board disagrees.

The operative implementing language of Article 32 empowers the three-doctor panel to decide an employe's "physical fitness to remain in service or have restrictions modified." This language clearly empowers the medical panel to determine not only to diagnose his physical condition but also to determine whether a Claimant was physically fit to perform service with or without restriction.

In this connection, two points must be made:

1. The three-doctor panel, particularly the neutral physician, must be thoroughly familiar with the nature and requirements of the work that an employe is required to perform.

2. The physical standards imposed by a Carrier should be given weight by a medical panel in its deliberations as to fitness to perform work. As was stated in First Division Award No. 23080:

> "This Board is of the opinion that absent a showing that the standards were arbitrary, the three-doctor panel could properly consider Carrier's physical standards for employment as a brakeman in its determination of Claimant's fitness for employment as a brakeman. The fact that these standards were not part of Carrier's submission or rebuttal is of no relevance insofar as the medical panel's evaluation is concerned."

The Board, in conclusion, finds that the claim as presented must be sustained. That, Claimant is entitled to have the question of his fitness to perform unrestricted service determined by a three-doctor panel as set forth in Article 32, Section 3(b) of the Agreement. There is no claim for pay for time lost, and that issue need not be considered.

AWARD

Claim, as presented, is sustained. Carrier is ordered

to commence the process of establishing a three-doctor panel within 14 days from the date of this award.

M. Rumas
Neutral Member

L.C. Scherling - Dissent
Carrier Member

W. L. Shist
Organization Member

Date: June 13, 1978

PUBLIC LAW BOARD NO. 1981

Award No. 1(b)
Case No. 1(b)

PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers

and

Southern Pacific Transportation Company (Pacific Lines)

STATEMENT OF CLAIM:

Claim of Engineer E. A. Derrico, Sparks District, for a three-doctor panel to determine his physical ability to work as an engineer unrestricted.

FINDINGS:

The issues to be resolved in this dispute are identical to those in our Award No. 1(a), and the Board is governed accordingly by the Findings and Award of Award No. 1(a).

It is noted in passing that in addition to the Special Adjustment Board No. 180 awards cited in Case No. 1 (a), Carrier in this dispute cites Award Nos. 2860 and 3193 of Special Adjustment Board No. 18. The awards of that Board are directly contrary to the Supreme Court's decision in Gunther decided some six years later.

AWARD

Claim, as presented, is sustained. Carrier is ordered to commence the process of establishing a three-doctor panel within 14 days from the date of this award.

Neutral Member

L. C. Scheeling
Carrier Member

Organization Member

Date: June 13, 1978