

Award No. 3005
Docket No. 2872
2-NYC&StL-CM-'58

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 57, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the controlling agreement the Carrier is improperly withholding Carman Henry Pignotti from service since January 16, 1957.
2. That, accordingly, the Carrier be ordered to restore Carman Henry D. Pignotti to service with pay for all time lost subsequent to January 16, 1957.

EMPLOYEES' STATEMENT OF FACTS: Carman Henry D. Pignotti, hereinafter referred to as the claimant, was employed by the New York, Chicago & St. Louis Railroad Company, hereinafter referred to as the carrier, at Conneaut, Ohio, on August 25, 1947. Carman Pignotti was injured in the service of the carrier on or about April 6, 1950. Following his injury and a subsequent operation on or about January 28, 1952 to rectify the injury, Carman Pignotti filed a law suit against the carrier. At the conclusion of the law suit the claimant was disqualified from service by the carrier on or about August 1, 1955. Following claimant's disqualification by the carrier he continued to receive such medical treatment as was necessary to improve and restore his health, so that having been declared physically fit by his family physician, the claimant under date of October 24, 1956, was examined by Dr. J. Richard Nolan, who declared the claimant physically fit.

Submitted herewith and identified as Exhibit A, is a copy of Dr. Nolan's report dated October 25, 1956, of the physical condition of the claimant at the time of examination.

Without waiving the position of the carrier as outlined above, the carrier calls attention to the fact that the employes' claim (2) for all time lost is not consistent with Rule 33 of the current agreement reading as follows:

"An employe shall not be discharged for any cause without first being given an investigation.

"If it is found that an employe has been unjustly discharged or dealt with, such employe shall be reinstated and shall be compensated for the wage loss, if any, suffered by him, the compensation earned by him in outside employment in the meantime shall be taken into consideration in determining the wage loss."

Attention is likewise directed to the fact that if in active service, claimant's seniority is such that he would have been furloughed from a regular position during periods April 3, 1957 to June 11, 1957 and from November 8, 1957 to some indefinite date in the future.

The claim is entirely without merit.

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 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 were given due notice of hearing thereon.

Claimant herein having suffered an injury resulting in a herniated disc, sued the carrier alleging the usual extreme damages. Trial resulted in a verdict of \$9,000.00 which was paid. About two years later, after having been employed at hard labor, claimant underwent a complete physical examination at the hands of Dr. Nolan, who estimated his current permanent disability from the herniated disc and surgery at 5%.

Thereafter his reinstatement as a carman was requested and the company rejected the request. Next the organization requested examination by a neutral doctor to which the company would not agree, offering as an alternative, a re-examination by Dr. Duncan who had performed the original surgery and who testified for the claimant at the trial without contradiction.

Dr. Duncan re-examined the claimant July 13, 1957 and reached a conclusion contrary to Dr. Nolan. We thus have the familiar question of a medical deadlock which the laymen of this Board are asked to resolve. In recent years the technique of allowing disputing doctors to select a third disinterested doctor to resolve their differing medical conclusions has become more widespread.

We are of the opinion that the present docket has not sufficient facts upon which we can base an award on this medical question of fact and that the proposed third doctor technique is a proper step before progressing the dispute to this Division.

AWARD

Remanded for further progression as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 10th day of November, 1958.