

Award No. 3561

Docket No. 3086

2-SP-SM-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Sheet Metal Workers)**

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYEES:

1. That the ordering of Sheet Metal Worker Helper Vernon Ledbetter to submit to a physical re-examination on or about July 25, 1957, was in violation of the current Motive Power and Car Departments Agreement effective April 16, 1942, subsequently amended between the Southern Pacific Railroad Company and System Federation No. 114.

2. That accordingly the Carrier be ordered to return Mr. Ledbetter to Company service and further that he be compensated at his regular rate of pay for all time lost until such time he is reinstated to work and further that he be compensated for any and all other privileges he would have enjoyed had he not been withheld from service.

EMPLOYEES' STATEMENT OF FACTS: On the morning of July 25, 1957, when Mr. Ledbetter reported for his regular assigned work his Foreman Mr. E. C. Gregg refused him his time card and informed Mr. Ledbetter that he was being withheld from company service on orders of the Southern Pacific Hospital Department's chief surgeon until he reported to the general hospital for a thorough physical examination and was given a proper return to duty certificate.

Since no existing rule or rules in the M. P. & C. Departments agreement has given the company the right to demand that an employe stand a physical examination against his own volition except on entering the service of the company, Mr. Ledbetter saw no reason to comply with such orders.

As his physical condition had not changed from that when he was employed and also that there were no provisions in the current Motive Power & Car Departments agreement requiring employes to take periodic physical examinations or re-examinations he referred the entire matter to his local committee for further handlings.

The committee realizing that the carrier does not have the right to generally or arbitrarily require physical re-examinations progressed a grievance for the violation of the current agreement without success.

The carrier here asserts that the claim in this docket is not properly before this Board, for reasons set forth in "Motion to Dismiss" and therefore respectfully requests that the claim be dismissed. In event the claim is not dismissed, and is considered on its merits, the carrier asserts that the claim is entirely without basis or merit, and therefore respectfully requests that it be denied.

FINDINGS: The Second Division of the Adjustment Board, based 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.

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

Claimant has been withheld from service since July 24, 1957 because of his refusal to submit to a physical examination for the purpose of determining whether he is able to perform his duties as a pipe fitter helper, in which capacity he has been employed by the carrier since 1943.

The employes maintain that the Motive Power and Car Department Agreement does not require periodic physical examinations and that the claimant's physical condition has not changed since his initial employment by the carrier.

Several years prior to 1957 the claimant suffered a paralytic stroke with resulting permanent limitation of speech and locomotion. The exact date of the stroke is disputed but it is clear that the claimant has been regularly working for the carrier for about ten years despite his known physical handicaps.

The carrier's request that claimant submit to a physical examination at the carrier's general hospital was based on a report made by his immediate supervisor in May 1957 that claimant was getting progressively worse and had reached the state where he could no longer perform his work or carry on a conversation.

Rule 44 of the applicable agreement provides for physical examination in the case of a new employe but the agreement is otherwise silent on the subject. The fact that the agreement makes no mention of other examination does not preclude the carrier from requesting a physical examination under proper circumstances. It cannot reasonably be maintained that the carrier cannot require physical examination of an employe under any circumstances after he has entered upon his duties.

Where a change in the employe's condition has occurred which is obvious and likely to subject the employe or his fellow workers to hazard, the carrier, acting in good faith, has a duty to determine if his condition is such as to render his continued employment in that capacity hazardous. This does not, however, justify a fishing expedition based on mere suspicion. See Award No. 482.

We think the carrier's request in this instance was made in good faith and based on reasonable grounds. The claimant's history was such that progressive deterioration in his physical condition was a reasonable probability. The opinions of claimant's co-workers to the effect that his physical condition did not appear to have worsened over the years did not require the carrier to ignore the opinion of claimant's immediate supervisor that claimant's physical condition had become seriously impaired. The final determination could only be made on the basis of

reports of competent medical examiners. This the carrier sought to obtain through the co-operation of the claimant. His refusal to submit to the examination was not justified. We are required to find that the claim lacks merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1960.

LABOR MEMBERS DISSENT TO AWARD NO. 3561

The majority admit in their findings that there is no provision in the effective agreement between the parties to provide for a physical examination other than for a new employe. The claimant was not a new employe, having been in the carrier's service for approximately fourteen years previous to the date of this dispute. Therefore, to order the claimant to submit to a physical examination was in violation of the current and effective agreement between the parties to this dispute.

The majority's reference to the claimants history and physical deterioration is purely an assumption on their part since there is no physical examination record to sustain their position to that effect.

Further, there was no charge made against the claimant that he failed to perform his duties as a sheet metal worker helper.

Therefor Award No. 3561 is in error.

Edward W. Wiesner

R. W. Blake

Charles E. Goodlin

T. E. Losey

James B. Zink