



Award No. 4751
Docket No. 4690
2-NYNH&H-MA-'65

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO 17, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Machinists)
THE NEW YORK, NEW HAVEN and HARTFORD
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement, Machinist. Terito has been improperly held out of service from June 1, 1963.

2. That the Carrier be ordered to compensate Machinist A. Terito for all time lost from July 11, 1963.

EMPLOYEES STATEMENT OF FACTS: Machinist A. Terito, hereinafter referred to as the claimant was employed by the New York, New Haven and Hartford Railroad Company hereafter referred to as the carrier, on May 3, 1934. Claimant continued an employment relationship with the Carrier, withstanding furloughs and military service until his permanent disqualification by the carrier on or about June 1, 1963.

On the morning of February 19, 1963, claimant became ill during his tour of duty as a machinist at the New Haven Maintenance of Equipment Shop, and with the permission of his foreman checked out and went home.

On February 20, 1963, claimant was admitted to Connecticut Valley Hospital, Middletown, Connecticut, and was discharged on May 5, 1963. Following his discharge from the hospital, the claimant was treated at the Meriden Hospital Clinic, Meriden, Connecticut. This treatment was discontinued by the doctors and claimant was considered able and fit to resume work. Since the claimant had greater seniority rights than other machinists who were working, he reported on May 16, 1963 for work and was advised by Shop Superintendent J. A. Croke to report to carrier's doctor Fisher for an examination before being allowed to return to work. Claimant reported to Doctor Fisher on the same date and was requested to sign a release allowing the carrier permission to obtain claimant's medical records from the Connecticut Valley Hospital. Claimant complied with this request and was told by Doctor Fisher that he could not work until the hospital records had been reviewed. Claimant contacted Doctor Fisher on at least two occasions following his initial visit, requesting a decision regarding his desire to return to work. On May 28, 1963, in a telephone conversation, claimant was notified by Doctor Fisher that he could not return to work as he was permanently disqualified for further service.

Nor was the carrier unjust or arbitrary with Mr. Terito by not allowing him to resume duty after his discharge from the mental hospital with the diagnosis of schizophrenic reaction, paranoid type. Since the establishment of the policy set forth there have been two other employees who were not permitted to resume duty after having been confined to mental hospitals, and with the diagnosis of schizophrenic reaction, paranoid type. One was a baggagemaster, and one a locomotive fireman. In neither of these cases was claim progressed on the property when the labor organizations involved became aware of their own responsibilities to the other members of their organizations.

Again, in Third Division Award 6753 it is stated:

"No rule of this jurisdiction is more firmly established than the one that a Carrier is possessed with certain discretionary powers in determining the fitness of an employe for service and that its exercise of those powers in respect to such matters will not be disturbed in the absence of a clear affirmative showing they have been exercised in an unreasonable, arbitrary or capricious manner."

And in Second Division Award 3137 (Ferguson) involving a question of a car inspector who had lost one eye in an automobile accident the board held:

". . . Considering the salient facts we are of the opinion that the carrier was acting in good faith and was not being hypercritical of the claimant in its pursuit of safety for all concerned. Its action here stands the test of reasonableness and was not arbitrary."

We respectfully submit that carrier's action in not permitting Mr. Terito to resume duty was fully justified by the facts. The medical evidence furnished by the Connecticut Valley Mental Hospital states that his mental illness was "improved," not cured, at the time of his discharge in care of his wife, and that he must continue treatment indefinitely at the Meriden Hospital Psychiatric Clinic. This evidence has not been refuted by the psychiatrists who are presently treating him, nor have the Employees produced a contrary opinion from any other doctor. The court testimony of Dr. Prins in the case of the freight conductor cited shows that the type of mental illness from which Mr. Terito suffers is the most dangerous type, not only in relation to his own safety but, more importantly, to the safety of other persons with whom he may come in contact, and that the percentage of recurring violent seizures in this type of mental illness is very high. The court has determined that the railroad was negligent in permitting the freight conductor to resume duty when it had knowledge that he suffered from this same type of mental illness and, therefore, bore sole responsibility for the unfortunate event that followed. Also, this board has found, conclusively, that ". . . management has the right to protect its own property . . . because it is charged with certain responsibilities where injury results from negligent or unwarranted conduct on the part of its selected employees." (Third Division Award 6753 (Parker)).

Mr. Terito has been treated no differently than other employees who have suffered similar mental illness and who were not permitted to return to service.

For all of the reasons set forth herein, we respectfully submit that this claim must be denied.

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.

Parties to said dispute were given due notice of hearing thereon.

In 1957 the Company returned an employe to service, who had been a patient in a state mental hospital, on the basis of a report from that hospital which diagnosed his illness as schizophrenic reaction, paranoid type, and stated that he was fit to return to employment. Four months later he shot two employes, killing one and injuring the other. The courts found the Company negligent and it paid damages in excess of \$140,000. Consequently it issued instructions that "any employe who has a mental illness diagnosed as a schizophrenic reaction, paranoid type (chronic) shall not be approved for service."

There is no question that a carrier has the right, and probably the responsibility, to establish reasonable mental and physical standards of employability in fulfilling its responsibilities for safety to other employes and the public, unless such right is restricted by agreement. Here there is no such restriction except such as may be found in Rule 44 and, in view of the Company's prior experience, there can be no doubt as to the reasonableness of this standard. Rule 44 is as follows:

"Employes in service covered by this agreement and those temporarily furloughed shall not be required to submit to periodical physical examination. In the event a question arises as to the physical condition of an employe, he may be examined by a physician designated by the carrier at its expense.

"Before an employe is definitely and permanently disqualified for further service (except for retirement purposes) such employe individually or through his duly authorized local committee may request a reexamination by competent medical authority to be promptly selected between the parties who will jointly participate in the expense).

"Employes whose duties require it will be subject to examination and periodical reexaminations for vision, color perception and hearing."

The claimant had been a patient in the same mental hospital while off work from February 19, 1963 until he reported for return to duty on May 16, 1963. The hospital report on him showed:

"Diagnosis: Schizophrenic reaction, paranoid type. Condition on Discharge: Improved."

The carrier declined to reemploy him. On June 1, 1963 the Machinists Committee advised the carrier of its desire to exercise the provisions of Rule 44 for reexamination of claimant by a neutral physician before he was permanently disqualified from service. This request was declined June 10th on the basis of the Company policy in such cases and the fact that there was no dispute as to claimant's condition.

It is clear that the examination provided for in the first paragraph and the reexamination provided for in the second paragraph of Rule 44 are intended to determine the physical condition of an employe, not to modify the reasonable standards for employability established by the carrier. The evidence shows that the employes hoped to achieve the latter result by such a reexamination and it is clear that the real

dispute between the parties was the validity of the standard adopted by the carrier, whereby the claimant was disqualified for further service.

The finding here that such standard was reasonable under the circumstances negates the claim that "Terito has been improperly held out of service", even though it appears that under Rule 44 he was entitled to a reexamination for the purpose stated herein. This matter is not part of the claim before us, so we have no authority to act thereon.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 24th day of September, 1965.