

Award No. 2268
Docket No. 1980-I
2-B&O-I-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

CLINTON J. MILLER—CLAIMANT (Carman)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEE: On Feb. 18, 1946, Clinton J. Miller, was injured in the course of his employment and while on duty in the service of the Baltimore and Ohio Railroad Company at the Shops in Washington, Ind. He was working as a carman repairing a box car.

Being unable to make a satisfactory settlement with the Baltimore and Ohio R. R. Company's claim agent, suit was brought and case was tried before Judge William E. Steckler and a jury, in the United States District Court, Southern District of Indiana, Evansville Division, Civil Case No. 401. Decision rendered by court and jury was that Clinton J. Miller was not injured sufficiently to entitle him to compensation from the Baltimore and Ohio Railroad Co. Clinton J. Miller claims that having a total of fifteen years and five months service with the Baltimore and Ohio Railroad Company and since his name is still on the roster of seniority of carmen's helpers, that he should be working at the present time. During the trial Baltimore and Ohio Railroad Company doctors testified that there was nothing wrong with Clinton J. Miller, that there was no injury sufficient to prevent him from working. Yet now Baltimore and Ohio Railroad Company doctors say his condition is such that he is physically unable to perform heavy labor.

EMPLOYEE'S STATEMENT OF FACTS: Clinton J. Miller was injured in the course of employment with the Baltimore and Ohio Railroad Company, while working as carman in shops at Washington, Indiana, on Feb. 18, 1946.

Federal Court Case No. 401, before Judge William E. Steckler and a jury, in the United States District Court, Southern District of Indiana, Evansville Division; decision was rendered that Clinton J. Miller was not injured sufficiently to entitle him to compensation, from the Baltimore and Ohio Railroad Company.

Clinton J. Miller has a total of fifteen years and five months service with the Baltimore and Ohio Railroad Company. His name is still on the seniority roster of carmen's helpers. His seniority is such that he should be working, younger men in seniority are now holding jobs. Baltimore and Ohio medical examiners state that his physical condition is such that it is not considered safe for him to return to work. At the trial, medical examiners testified that he was not injured sufficiently to entitle him to compensation, that he should

The petitioner now petitions this Division with the following:

"I claim that I am entitled to be returned to work and am entitled to compensation for time lost, * * *."

But there was more than adequate evidence furnished by competent medical authority that the petitioner's physical condition was not safe or satisfactory. The carrier asserts that its action in this case was reasonably taken. The carrier asserts that in this case, it acted only as reasonably prudent management on advice of its physicians. There was more than adequate evidence presented and available from medical authorities as to the petitioner's unsafe and unsatisfactory physical condition.

In effect and in fact, petitioner comes before this labor tribunal requesting that it act to substitute its judgment for that of competent medical authority on the question of the petitioner's ability to resume his duties with this carrier. The carrier asserts that this Board has often ruled that it has no such warrant or authority and that it cannot act to substitute its judgment for that of competent and considered medical opinion.

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.

Carman Helper Clinton J. Miller asks that he be reinstated to active service with the carrier and compensated for all time lost because of carrier's refusal to let him return to work.

Claimant, born December 18, 1906, started working for the carrier as a carman helper on March 23, 1923. While on duty repairing a box car in carrier's shop at Washington, Indiana, on February 18, 1946 claimant was apparently injured. He continued to work thereafter until March 18, 1946, since which date he has been off sick, although his name is still carried on carrier's roster of carmen helpers.

In March of 1952, or thereabouts, claimant asked permission to return to work. Since he was being carried as "off sick" he was requested to submit to the customary physical examination before being permitted to resume his duties. This he did on April 3, 1952. Carrier's medical advisers advised it claimant should not be allowed to return to his duties of carpenter because his physical condition would not permit him to do the heavy work thereof and doing so would make him an employment risk. Whereupon carrier advised claimant he would not be permitted to work because of his physical condition.

On December 12, 1951 the local chairman of Lodge 718 of the Carmen's Organization at Washington, Indiana, addressed a letter to F. M. Galloway, a master mechanic of carrier at Washington, Indiana, stating claimant was requesting that he be returned to carrier's service at Washington, Indiana, as a carman helper. On September 4, 1952, the general chairman of the Carmen's Organization addressed a letter to A. K. Galloway, carrier's general superintendent of motive power and equipment, to the same effect. Under date of September 10, 1952 A. K. Galloway advised the general chairman that due to his physical condition claimant would not be permitted to resume service. No appeal was ever taken from this decision to the manager of labor relations, chief operating officer of the carrier designated to handle such dis-

putes. See the requirements of Rule 33 of the parties' effective agreement and the interpretation thereof.

Section 3, First (i) of the Railway Labor Act, as amended, provides, insofar as here material, that:

"The disputes between an employe * * * and a carrier * * * growing out of grievances or out of * * * working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *."

It is self evident that the claimant did not handle the dispute on the property "up to and including the chief operating officer of the carrier designated to handle such disputes." This being a prerequisite to our right to consider the matter on its merits we are without authority to do so. Without such authority we cannot properly enter either an affirmative or negative award but can only dismiss the dispute, thus leaving the claimant to whatever rights he may still have, if any, relating thereto which are not barred. In the latter aspect we call claimant's attention to the fact that he has not complied with Section 2 of Article V of the agreement of August 21, 1954 entered into by the organization and carrier. It requires that an appeal should have been taken within sixty (60) days after January 1, 1955 to the next higher officer from the decision of A. K. Galloway, general superintendent of motive power and equipment, made on September 10, 1952. A failure to do so results in the claim being barred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of October, 1956.