

Award No. 4432

Docket No. 4373

2-C&O-FO-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L. — C. I. O. (Firemen and Oilers)

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement, Laborer W. F. Felix was unjustly deprived of his service rights as a truck operator from 7:00 A. M. August 15, 1961.

2. That accordingly the carrier be ordered to restore this employe to his truck operator's position and compensated for the difference between the laborer's and truck operator's rate of pay from August 15, 1961, for as long as this employe is deprived of the position of truck operator.

EMPLOYEES' STATEMENT OF FACTS: W. F. Felix, hereinafter referred to as the claimant, was employed by the Chesapeake and Ohio Railway Co., hereinafter referred to as the carrier, as a laborer on December 4, 1934. Subsequent thereto, claimant exercised his seniority rights to secure a position of truck operator in carrier's shops at Huntington, W. Va. and continued to hold such position until August 15, 1961 at which time carrier arbitrarily removed him from his position of truck operator and assigned him as a laborer.

In November of 1959 claimant suffered a coronary occlusion with a myocardial infarct and was off from work approximately three months. Claimant went back to work on his assigned truck operator's position and worked for approximately nine months or until January 1, 1961 when he suffered another infarct.

On January 1, 1961, claimant entered the C. & O. Railway Employees' Hospital at Huntington, W. Va. under the care of Dr. J. F. Otto where he remained until released on March 22, 1961. At the time of his release from the hospital claimant was sent to carrier's Chief Medical Examiner, Dr. J. J. Brandabur for a physical examination and was disqualified for the position of truck operator.

claimant as well as others concerned. Claimant is not the only employe of this carrier who has been restricted because of physical condition. Carrier submits that at the present time approximately 100 of its employes have restrictions of various kinds placed upon them by reason of their physical condition.

Felix is under constant observation, makes frequent trips to the hospital clinic because of his heart condition, receives frequent reexaminations to determine his physical condition and requires daily medication.

Under these circumstances what basis can there be for any claim that such a person should be turned loose with a motor vehicle to endanger not only his life but that of other employes and the general public. Claimant has had two attacks and the likelihood of a third attack is much increased by physical exertion and stress. Carrier's action in disqualifying claimant as a motor truck operator under the circumstances here present cannot be held to be an abuse of discretion.

The employes have made no claim during the handling on the property to the effect that there has been any discrimination against Felix. The principal argument has been to the effect that Felix has sufficient seniority to hold a truck operator job and he should be placed thereon. If this premise were correct, then there would be no need for any physical standards, physical examinations or qualifications for any person once they established seniority in carrier's employment.

Carrier submits that Claimant Felix has been given every consideration and that carrier has not in any way been arbitrary, capricious or unjust in its handling of the case and that employes cannot make such showing, which they must do if your Board is to upset carrier's handling and decision in the case.

It has been clearly shown by the carrier that the claim of the employes is without justification and carrier urges that such claim be denied in its entirety.

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.

The Claimant, W. F. Felix, whose seniority date is December 4, 1934, held a regular assignment as a motor truck operator at Carrier's Mechanical Department at Huntington, West Virginia.

On December 10, 1959, while off duty, the claimant had a coronary occlusion, and was absent from work until March 29, 1960, when—following an examination by Carrier's Chief Medical Examiner,—he was permitted to return to his position of motor truck operator.

On January 1, 1961, the claimant had a second coronary occlusion and he entered the C. & O. Railway Employees' Hospital at Huntington, West Virginia, where he remained under the care of Dr. J. F. Otto, until released on March 22, 1961.

On March 28, 1961, Dr. J. J. Brandabur, following a medical examination, disqualified the claimant from his motor truck operator's position.

On July 8, 1961, the claimant was examined by his personal physician, Dr. Walter C. Vest (now deceased) who, in his statement of July 15, 1961, stated in part that the claimant "might undertake again, his work as a truck driver and I would recommend accordingly."

On July 26, 1961, the claimant wrote to Carrier's Assistant General Master Mechanic D. H. Richmond, enclosed a copy of Dr. Vest's statement of July 15, 1961, and requested that he be returned to his position of motor truck operator.

On July 27, 1961, Mr. Richmond wrote the claimant in part as follows:

"You were found not qualified as truck operator by our Chief Medical Examiner Dr. Brandabur."

On July 31, 1961, Dr. Otto released the claimant for service, and on August 15, 1961, the Carrier placed the claimant on a laborer's job.

On August 24, 1961, the claimant filed a claim "for the difference in pay between that of laborer and truck operator commencing August 15, 1961 and continuing as long as he is denied right to operate the truck." On August 25, 1961, Mr. Richmond denied the claim.

In the claim's progress to this Board, the Organization requested that Dr. Brandabur again examine the claimant "to determine if claimant was physically fit to return to his truck operator's position." This request was declined by the Carrier on October 25, 1961.

The Carrier also declined the Organization's request of November 21, 1961 that the claimant be examined by a neutral doctor—who would determine if the claimant was "physically qualified for the position of truck operator and that both parties agree to be governed by the decision of the neutral doctor." The Carrier, on December 21, 1961, declined the Organization's request.

The Agreement dated September 30, 1938 and revised June 16, 1953, is controlling.

"It is the position of the Carrier:

- "1. That there has been no violation of any Agreement Rules.
- "2. That it is the responsibility and prerogative of management to establish and maintain physical standards for its employees.
- "3. That Claimant Felix does not physically meet the requirements for position of truck operator.
- "4. Carrier cannot properly agree to an examination by a neutral doctor on the basis requested by the Employees.

"5. Carrier's action has not been arbitrary, capricious or an abuse of discretion and is in the best interest of all concerned."

The Organization's position is that:

1. under Rule 23 the claimant was contractually entitled to return to his truck operator's position on August 15, 1961 when he returned to service.

2. the claimant has been unjustly dealt with by the Carrier's refusal to have a neutral doctor determine whether he is physically fit to perform the duties of a truck operator.

3. the Carrier was "arbitrary, capricious, and unjust" when it refused "to send claimant back to its Chief Medical Examiner for re-examination to determine if claimant was physically fit to return to his truck operator's position."

It is the Board's conviction that this claim can only be satisfactorily settled in the following manner:

1. by remanding the case to the property for the following action:

A) that the claimant must be examined by a mutually selected neutral doctor on or before March 31, 1964, and the expense of this examination be shared by the parties;

B) that the result of the neutral doctor's examination will solely determine whether or not the claimant can physically perform all of the duties of his motor truck operator's position;

C) that the parties furnish the neutral doctor's findings to this Board no later than April 18, 1964;

D) that within thirty days of receipt of neutral doctor's findings this Board will make final disposition of this claim.

Accordingly, the Board directs the parties to comply with the above instructions.

AWARD

Initial phase of the claim disposed of in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1964.