

Award No. 4692

Docket No. 4476

2-B&O-CM-65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. Under the current agreement the Baltimore and Ohio Railroad is improperly depriving Carman George M. Lyons of his rights to service and earnings.

2. That accordingly, the Carrier be order to allow the Claimant returned to service and paid for the time lost since medical evidence was presented to them on March 19, 1962, showing him to be in good physical condition.

EMPLOYES' STATEMENT OF FACTS: Carman George M. Lyons, hereinafter referred to as the claimant was employed by the Baltimore and Ohio Railroad Company, hereinafter referred to as the carrier, in the Carrier's Car Department at DuBois Pennsylvania.

The claimant, while engaged in performing service for the carrier sustained an injury in 1953.

The claimant maintains seniority and is shown on the seniority roster as No. 26, with a date of September 1, 1943. Carmen with less seniority than the claimant have worked each day since March 19, 1962.

Following his injury, efforts were made with the carrier's claim department to arrive at a settlement with the result that the claimant finally secured legal counsel and the case was handled in court with the resulting settlement in July, 1957.

Following settlement of his case, the claimant requested that he be permitted to go back to work. He was rejected by the carrier's doctor for service at that time.

The claimant's condition improved further and on March 9, 1962, he was then examined by E. E. Houck, M.D.

Under date of March 19, 1962, the local chairman wrote Shop Superintendent J. N. Minns and furnished a copy of Dr. Houck's report and requested

treated the petitioner over an extended period, that petitioner was suffering from a conversion hysteria which was the superficial manifestation of underlying and subconscious conflicts, which could only be cured by an extensive course of psycho-therapy, if at all, and that unless such conflicts were removed, he would be subject to conversion hysteria from a trauma of even the mildest degree.

On the basis of the rule of the Scarano decision, as well as the familiar rule of collateral estoppel, the petitioner in this case is not entitled to claim or attempt to prove that he has recovered so as to perform the routine duties of carman. Furthermore, this carrier is entitled as a matter of law to be guided by the notice of petitioner's physical and psychic infirmities as given by the testimony adduced on petitioner's behalf at the prior action in determining the question of petitioner's reemployment at issue in the present action.

The claim in the instant case at both Parts (1) and (2) is without merit and ought to be denied, or, in the alternative, dismissed.

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, Lyons, injured his foot and, after unsuccessful efforts to effect a settlement on the property, brought suit against the carrier. In the course of the court trial Claimant's attorney argued that Lyons was permanently and totally disabled and a verdict was rendered in favor of Lyons for \$25,000.

Thereafter, Lyons reapplied for work now claiming that he was fully recovered. The carrier's physician examined Claimant and reported that he was not physically able to perform his duties as the result of which carrier refused to reemploy him. Lyons then was examined by his own doctor who concluded that he was able to return to work. In the face of these conflicting medical reports claimant requested that the carrier establish a neutral medical board to make a final determination of his physical fitness. There is no contractual requirement for the establishment of a neutral medical board and the carrier refused this request.

The carrier takes the position that having brought suit and having recovered \$25,000, based in part at least on Lyons' contention that he was totally and permanently disabled, he was estopped from now stating that he was well.

The instant case poses two questions:

- 1) All other things being equal, does he have a right under the rules of the agreement to employment?
- 2) If he has, is he physically able to perform the required duties?

This case turns on the second question. In order to sustain the claim the Claimant must sustain the burden of proving that he is physically able to do the job. In the present posture of the case however there is a hopeless conflict in the evidence: the Carrier's doctor says he cannot physically do the work in question; Claimant's doctor says he can do the work. In order to resolve this conflict the Organization requests that the Carrier agree to the establishment of a neutral medical board. The Carrier has no legal obligation to agree to this proposal and refuses to take this action.

This issue has been presented to two U.S. Circuit Courts and they have reached diametrically opposite conclusions. In the case of **Hodges v. Atlantic Coast Line Railroad**, 310 F2d 438, the Fifth Circuit Court of Appeals held that, even in the absence of a contractual obligation to establish a neutral medical board, this seems a fair thing to do and it was so ordered. The Court went on to point out that while the NRAB had no authority under the statute to delegate its authority to a neutral doctor, this problem would not arise if after the receipt of the neutral board's decision the NRAB then decided the case based on the reports of record. In the case of **Gunther v. San Diego & Arizona Eastern Railway Co.**, 336 F2d 543, the Ninth Circuit Court of Appeals decided that it was beyond the authority of the Board to order the establishment of a neutral medical board since the parties had not obligated themselves to do so in their Agreement. Until such time as the U.S. Supreme Court resolves this difference between the circuit courts it is impossible to know what the law is on this point.

Under the circumstances of the instant case it cannot be determined on the merits, since both the evidence and the law of the case are in direct conflict. In our view of the matter it therefore becomes unnecessary to pass on the question as to whether the claim was filed within the proper time limits.

AWARD

Claim dismissed in accordance with the above decision.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.