Award No. 5204
Docket No. 4907
2-NYNH&H-FO-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harry Abrahams when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Laborer Michael DiElsi was unjustly dealt with when he was denied seniority and the right to return to service on December 1, 1964, and subsequent thereto.

2. That, accordingly, the Carrier be ordered to return the aforementioned Laborer's name to the seniority roster, restore him to service, and compensate him for all time lost since December 1, 1964, with seniority, vacation, health and welfare and life insurance rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: Laborer Michael DiElsi (hereinafter referred to as the Claimant) was employed by the New York, New Haven & Hartford Railroad (hereinafter referred to as the Carrier) as such at New Haven, Connecticut. The Claimant was injured on May 21, 1959. On March 30, 1964, the Claimant reported to Dr. Stanley R. Roth (company physician) for examination prior to returning to work. Dr. Roth stated "he (the Claimant) may do light work only." Under date of April 7, 1964, Vice General Chairman George J. Francisco addressed a letter to General Mechanical Superintendent R. H. Davis, requesting that a neutral doctor be selected by the parties to examine the Claimant (copy of letter hereto attached as Exhibit A). A letter addressed to Vice General Chairman Francisco under date of April 13, 1964, signed by J. J. Duffy, Director of Labor Relations and Personnel, stated that there was no difference of opinion between the doctors and no further examination was necessary (copy of letter attached as Exhibit B).

On April 27, 1964, Vice General Chairman Francisco met with Director of Labor Relations and Personnel J. J. Duffy regarding the Claimant, at which time it was understood between both parties that if the Claimant showed improvement within five or six months he would be given further considera-

The claimant's situation is anomalous in view of the medical testimony of his permanent disability to continue in his occupation and later representations made for and by the claimant of startling and full recovery, not once but twice, the second time within five months after the payment of $20,000 — no part of which, nor of the first settlement of $50,000 — has been refunded or tendered back to the carrier.

Claimant's purpose and all testimony in his behalf was to obtain a large award, and he succeeded twice. Following the first settlement of $50,000, which was paid on July 13, 1956, he experienced a miraculous recovery and was able to resume duty two months later. Following the second settlement of $20,000, which was paid on October 25, 1963, he again comes forth five months later asserting another miraculous recovery.

We submit that it would be extremely unjust and unconscionable for him to make a triple recovery for permanent loss of working opportunity, yet this is precisely the result he seeks.

For all of the reasons stated herein the claim should be denied.

All of the facts and argument contained herein have been affirmatively presented to the Employes and all citations of Board and Court Awards are available to them.

Oral hearing is not requested except that if Employes request an oral hearing, then carrier reserves opportunity to appear.

(Exhibits not reproduced.)

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 waived right of appearance at hearing thereon.

The referee finds from all the statements and the record that the claimant Michael DiElsi in his law suits against the carrier for various injuries received could do only light work for the carrier. The Claimant wanted to go back to work for the carrier. The carrier in checking what work it had available found that it had only heavy work to be done and did not have any light work available. The claimant was therefore not given any work to be done by the carrier.

The claimant in his prior cases, one of February 27, 1954 in which he received the sum of $50,000 — and the other case on May 21, 1959 in which he received an additional sum of $20,000 — received a total of $70,000 — alleged in the said cases that he sustained permanent injuries and that he has lost and will lose his wages at his usual vocation, and has been and will be unable

to work, and his earning capacity has been permanently impaired and/or destroyed, and that he was totally and permanently incapacitated for further employment.

The Company Doctor and the claimant's Doctor, Dr. Rogowski, agreed that claimant should have a Psychiatric examination by Dr. Rodemacher.

Claimant saw a Doctor he personally selected, a Dr. Bassin who issued a statement that the claimant could return to work providing there was no heavy work involved. The claimant refused to submit the said medical reports to the other Doctors involved.

The Claimant was denied the right to return to service on December 1, 1964 and thereafter by the Carrier.

The agreement and the record was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of June, 1967.

LABOR MEMBERS' DISSENT TO AWARD NO. 5204

In reviewing the findings in Award No. 5204 it becomes abundantly clear that the Majority in arriving at their decision of denial, either ignored or refused to consider the record as a whole, or failed to grasp the issue before the Board.

Specifically, the issue before the Board was whether the Claimant was physically able to resume his regular duties on an unrestricted basis on December 1, 1964, and did the Carrier violate the controlling agreement when they refused the Claimant the right to return to service on that date.

In consideration of the issues we must look to the findings as it pertains to the record, to determine the basis on which the award is founded.

First, we find it reported in the findings and we quote:

> "The referee finds from all statements and the record that the Claimant, Michael DiElsi, in his law suits against the Carrier for various injuries received could do only light work for the Carrier."

It is true the record does reveal that such were the findings of the Claimant's doctor, Dr. Gideon K. de Forest, M. D., and Carrier's doctor, Dr. Roth on **March 30, 1964.**

However, what is more significant, and much more relevant, is the fact, as clearly established in the record, and which seems to have entirely escaped the Majority, is that the Claimant some six or seven months later submitted a lengthy and detailed statement, dated October 28, 1964, by Dr. Marvin A. Stevens, M. D., covering the Claimant's complete medical history from February 27, 1954, including causes, symptoms, x-rays, therapeutics and progress — all attesting to complete recovery summed up in the statement, and we quote:

> "This patient passes an excellent physical and orthopedic examination. It is my opinion that he can go back to any job he had formerly and need not be relegated to light work."

This was later confirmed on November 9, 1964, by Claimant's doctor, Dr. Gideon K. de Forest, in the following statement:

> "I think this negative examination is very reassuring, and probably is as good an indication as any that we can get, that he could take on the old job he had with the railroad."

Thus there was undisputed documentary evidence by competent medical authority before the Board that clearly refutes any allegation that the Claimant could do light work only, or was not physically fit to resume his regular duties on December 1, 1964.

It would appear that the Majority was relying in part on a much earlier examination that ceased to have any relevancy to the issue at hand and entirely disregarded the more timely and relevant examination of a much later date. Continuing in the same vein we find further in the findings this statement by the Majority and we quote:

> "The company doctor and the Claimant's doctor, Dr. Rogowski, agreed that Claimant should have a psychiatric examination by Dr. Rodemocher."

Obviously, by its inclusion, it is intended to justify the findings of the Majority. But, in turning to the record it is found, and we quote:

> "In August, 1958, he requested that he be allowed to return to work, submitting report from Dr. Rogowski that he was now in good physical condition and able to do such labor as the Railroad may offer him. He was sent to the Company Doctor for physical examination and was disqualified. The union representative requested a re-examination by a neutral doctor, whereupon the Company Doctor, Dr. R. E. Jenkins, conferred with Mr. DiElsi's personal physician, Dr. Rogowski, and it was mutually agreed that Mr. DiElsi should have a psychiatric examination and they jointly selected Dr. Rademacher.
>
> On the basis of the report from Dr. Rademacher, Mr. DiElsi was returned to work on September 15, 1958."

Therein we find that this reference to examination dealt with a prior injury occurring on February 27, 1954, that such examination was conducted

in accordance with Rule 46, and as a result thereof the Claimant was returned to work on September 15, 1958.

In any event and as established by the record, neither company doctor, Dr. R. E. Jenkins, Claimant's doctor, Dr. Rogowski, or neutral doctor, Dr. Rademacher, were in any way involved, consulted or rendered an opinion in the instant case, and as such is entirely irrelevant to the case at hand, and it naturally follows that the Majority were mislead, confused, or grossly in error by attaching any significance to that part of the record pertaining to the incident that occurred in August of 1958, which was handled and settled on the property in accordance with Rule 46.

According to the record before the Board and all medical evidence therein, the Claimant was physically fit and capable to resume his regular duties on December 1, 1964. There was no medical evidence to the contrary. The Carrier's refusal to re-examine the Claimant on November 16, 1964 to further determine his physical capability for resumption of service, or establish an avenue of resort to the provisions of Rule 46, it must be concluded that the Carrier violated the agreement, and the claim should have been sustained.

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