

Award No. 591

Docket No. 619

2-L&M-CM-'41

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF AMERICA

LITCHFIELD AND MADISON RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That physical re-examination of employes is a violation of the present agreement between the Litchfield and Madison Railway and its employes and that Mr. Joseph DiCarlo should be paid at carmen's rate of pay from April 30, 1940 until he is returned to work.

EMPLOYEES' STATEMENT OF FACTS: On Saturday, April 27, 1940, DiCarlo was coerced by the strong arm of the law to accompany an officer of the law in the officer's car to a doctor for physical examination, and disqualified April 30, last.

Carman Highlander disqualified same date under identical circumstances.

Carman Massey coerced into resigning same date.

This wholesale bad ordering of carmen and helpers amounted to about 33 1/3 % of the shop force at that point. There is no claim pending at present with reference to Highlander and Massey as their cases have been disposed of, and we wish them considered only inasmuch as they throw light on the behavior of the management and their relationship to the DiCarlo case.

The employes wish to refer to three distinct facts that figure in the decision of the management to get rid of DiCarlo.

Fact 1—Was that while he carried an injury caused by an accident while on company duty, that had not been settled for, he set out to and did help to organize the shop men, helped negotiate an agreement and at the time of his dismissal from service he was a delegated employe representative. (See Exhibits F, M, O, Z9.)

Fact 2—It was necessary for him to and he did employ an attorney who brought about a settlement of his claim for the injury, said claim was settled out of court February 14, 1940, with the understanding that DiCarlo would remain in service. (See Exhibit M.)

Fact 3—DiCarlo ordered his group insurance policy canceled. This being a subject close to the heart of the General Manager Handlon, added to the first two was the final straw that figured in the management's decision to eliminate him and also the refusal to consider his reinstatement. (See Exhibits E, H, I, K, L, Z9.) The management took the position that there was only his physical condition concerned, and that the company had made settlement for their responsibility of the injury and now had the right to discharge him at their discretion.

It is true that Rule 30 of the existing agreement between respondent and DiCarlo's brotherhood provides that "an employe who has been in the service of the railroad thirty (30) days shall not be dismissed for incompetency."

But what kind or degree of "incompetency"? Is it "incompetency" that comprises merely lack of knowledge and training to properly perform the particular work, or is it "incompetency" that comprises physical disability which would jeopardize the safety and perhaps the life of the disabled employe or a fellow workman, if the disabled employe were allowed to continue in the performance of the work? Obviously this rule must be given a reasonable and practical interpretation. By no reasonable or fair construction should the rule be construed to mean that an employe so disabled physically as to be incapacitated to perform his work, or as to constitute a hazard to himself and his fellow workmen in the performance of his work, may not be dismissed from the service. Certainly, it would hardly be contended that under the provisions of this Rule 30 a brakeman who had met with the misfortune of losing one or both legs must be retained on his job.

"Contracts must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language. Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. If one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted." 6 R. C. L., Page 841, Section 230, and numerous cases there cited.

For the reasons given, and since there is no agreement in the instant case which in any way affected respondent's right to examination or re-examination of its employes or its right to discharge Joseph DiCarlo for serious and grave physical disability, respondent respectfully submits that its action in requiring the re-examination in question and in effecting such discharge was justifiable and legal, and that the brotherhood's protest herein should not be sustained under the law. Accordingly, respondent asks that the claim in this proceedings be disallowed.

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.

Joseph DiCarlo sustained injury to his leg February 1, 1938, in performance of his work which incapacitated him until May 31, 1938. He continued thereafter in his usual employment until April 27, 1940, without any question as to his work or performance thereof not being satisfactory. On this date he was ordered to report to a Dr. McCuistion in another city for examination.

The record does not disclose that there was any condition of DiCarlo which would warrant the necessity for this examination. On April 30, he was dismissed from service as a result of the report from Dr. McCuistion, reading:

"The right foot is rotated 10° outward on the leg—Dorsi flexion is limited to 5° and plantar flexion is less. The man walks with a definite limp—and if he must do any climbing I consider this a definite hazard."

DiCarlo was examined by two reputable physicians of his home city, one of whom was the company's doctor who treated DiCarlo at the time of his injury. Both reported that DiCarlo was able to perform his usual duties.

DiCarlo appeared before the Division at the hearing on this case and while he displayed a slight limp he demonstrated usual control and activity with this foot.

On the full record of this case submitted to this Division we find that DiCarlo was unjustly dismissed from service.

AWARD

DiCarlo shall be returned to service and paid for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 14th day of March, 1941.