

Award No. 1398

Docket No. 1320

2-LI-EW-'50

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 156, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

**THE LONG ISLAND RAIL ROAD COMPANY, Debtor
David E. Smucker and Hunter L. Delatour, Trustees**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Electrician Helper William H. Baylis was unjustly dealt with and thereby damaged when the carrier removed him from service on April 15, 1949.

2. That accordingly the carrier be ordered to compensate this employe for all time lost for the period of April 15, 1949, to January 5, 1950, inclusive.

EMPLOYEES' STATEMENT OF FACTS: Electrician Helper William H. Baylis, hereinafter referred to as the claimant, was employed on the trolley lines of the Long Island Rail Road Company on August 15, 1909.

In 1928 he transferred into train service.

On July 11, 1929, he transferred into the sub-station department as an electrician helper, a position he has continuously filled until April 15, 1949, when he was removed from service by the carrier.

On April 15, 1949, he was required to submit to a physical examination by the company doctor at Jamaica, who advised him through his foreman he was out of service immediately, and suggested the claimant take sick leave until he made application for retirement.

On May 9, 1949, Baylis went to his own Doctor, Dr. Irving Yarvin, 139-11 Springfield Blvd., Springfield Gardens, N. Y., who has been treating Baylis for diabetes for about 15 years, and at the completion of the examination wrote a report as follows: "This is to certify that I have examined W. H. Baylis today and find that he is able to continue at his regular occupation as previously", copy of which is submitted and identified as Exhibit A.

On May 16, 1949, he returned to the company doctor at Jamaica, advised him as to his own doctor's findings and requested a return to duty card. He was advised by the doctor that due to his age and physical condition he would not be permitted to return to duty, and again an effort was made by the doctor to have him voluntarily retire.

Although there is no basis for such action, if your Honorable Board should decide that regardless of the fact Mr. Baylis no longer has an employee relationship with this carrier, his physical condition during the period from April 15, 1949, until he voluntarily terminated his service by his retirement on January 23, 1950, should be determined, we submit that in the event a board of doctors would sustain Mr. Baylis' contention with respect to his ability to work during that period, it would be manifestly unfair to subject this carrier to any penalty after September 14, 1949, the date upon which we offered to join the general chairman in creating a joint board of doctors for the purpose of having Mr. Baylis' physical condition finally determined with the understanding that both parties would be bound by the decision of that board.

In view of the foregoing and since it has been established that this carrier committed no breach of any provision of the applicable agreement or the interpretations thereof in withholding the claimant from service when in the judgment of our medical department he was physically unfit to work and as the claimant failed to avail himself of the opportunity of having any doubt concerning his physical ability resolved by a joint board of doctors as suggested by the carrier and since he elected, effective January 23, 1950, to voluntarily terminate his employment status with the carrier by accepting an annuity under the Railroad Retirement Act, there is no basis for this claim and it should be denied.

The Trustees of the Long Island Rail Road Company, Debtor, demand strict proof by competent evidence of all facts relied upon by the claimant, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper hearing of this matter, and the establishment of a proper record of all of the same.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant having voluntarily retired from the service in January, 1950, does not seek restoration to duty, but claims the right to recover for all time lost for the period from April 15, 1949, to January 5, 1950, inclusive.

On April 15, 1949, claimant was held out of employment as an electrician helper. At that time he had served the carrier for approximately forty years, and would be seventy-two years old on October 20, 1949. Altho he had not received a physical examination since October 16, 1930, he was, on September 21, 1948, after approximately eighteen years, required to submit to a re-examination. Concededly his supervisor sent him to the medical examiner because he was "found to be an age where his physical condition was questionable as to being safe to continue his duties."

There is no evidence which would sustain a finding that he had any accidents or injuries, excessive sick leaves or absenteeism, or that he had not satisfactorily performed his work because of any illness. There were then no apparent or obvious outward signs of disability or change of physical condition separate and apart from consideration of age which would make it probable that his continued employment would be a hazard.

In the light of the history of examinations and re-examinations this Division has consistently held that, in the absence of a specific rule, one or more of such elements must be present to justify a re-examination of the type here

required, and that it was in that class of cases where common fairness might require an examination by a neutral physician, if there was good faith disagreement between claimant's physician and the carrier's physician. See Awards 16, 271, 481, 1310. In that connection the general provisions of Rule 39 did not authorize the carrier to require claimant to submit to a re-examination of the type here involved at will, but only for sufficient reasons appearing in precedent heretofore cited. To hold otherwise would require this Division to supplement the rule which it has no authority to do.

The circumstances in this case demonstrate the soundness of the awards heretofore cited. Between September 21, 1948, and April 15, 1949, claimant was re-examined by the carrier five times before it discovered a physical disability. On March 9, 1949, it was first discovered that altho normal in other respects he had a diabetic history, and examination disclosed evidence affirming it. As a matter of fact, claimant had then been under medical treatment by his personal physician for that condition over a period of fifteen years and the condition had been so completely arrested that it had not been previously known or discovered by the carrier and not then until the fifth examination, after which he was held out of service.

In Awards heretofore cited, and others as well, this Division has consistently held that the carrier has no right to require a physical examination on mere suspicion, a fishing expedition designed to find grounds to disqualify an employe, and above all does not have the right to re-examine him with the object of disqualification for mere normal inroads of age, the most objectionable ground of all. The circumstances in this case bring it squarely within that holding.

We find nothing in this record justifying claimant's re-examination or his removal from service on April 15, 1949. Therefore we conclude that he should be paid for all time lost, if any, after deducting all wages earned in any other employment, during the period from and including April 15, 1949, to and including January 5, 1950.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1950.