Award No. 1813
Docket No. 1701
2-SP(PL)-MA-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement Machinist Helper L. O. Tubbs was unjustly removed from service depriving him of his seniority rights to work on and since March 23, 1953.

(2) That accordingly the Carrier be ordered to restore the aforesaid Machinist Helper to service with seniority rights unimpaired and compensated for all time lost retroactive to the aforementioned date.

EMPLOYES' STATEMENT OF FACTS: Machinist Helper L. O. Tubbs, hereinafter referred to as the claimant, was employed by the carrier at its Los Angeles, California general shops on October 28, 1942, and he remained in the carrier's service until March 23, 1953 when he was removed from the service by the carrier.

Claimant sustained personal injuries to his left leg on April 12, 1949. He was released by the carrier's chief surgeon and hospital department for return to duty in January, 1951.

Claimant on return to duty assumed the duties of the position held at time he sustained personal injuries which consisted of sorting scrap material. The claimant performed these duties from January, 1951 to March 23, 1953, or for 26 months, without a complaint from the carrier that he was not physically qualified to perform the duties of his assignment. The claimant did not require, nor did he receive medical or professional treatment from the carrier's doctors or hospital department during this 26 months for the personal injuries sustained on April 12, 1949.

On March 4, 1953 the claimant settled his case with the carrier out of court in San Francisco, California for the personal injuries sustained, which is affirmed by copy of settlement submitted herewith and identified as Exhibit A. The claimant, after the settlement, reported for duty as usual and was ordered to report to the carrier's doctor at Los Angeles for a physical examination.

"Claimant asserts that on the basis of competent medical findings he has recovered from the injury sustained, and on which he has received an award of damages, to the extent that he is now qualified to perform his job of brakeman-yardman.

The carrier states that except for a waiver on the left knee, which would be legally void, the claimant, according to the carrier's examining physician, is not now qualified for service.

The claimant was not discharged. As this Division stated in Award 3323, in the words of Referee Swacker:

'We of course do not undertake to pass on his ability to meet operating rules' qualification.'

This is a case of differing medical opinion which should be determined by an examination by competent medical authorities to be selected by the parties. If desired by the claimant he is permitted to have a physician of his choice attend and participate in such examination."

In the case at issue, there was and there is no differing medical opinion The claimant already has had Dr. McReynolds a physician of his own choice and employment to pass upon his physical qualifications and the findings of such physician are in accord with those of hospital department physicians. To now set up another medical board would be a duplicating effort, productive of no new results.

In First Division Award 15547, Referee Dudley E. Whiting, a similar claim was denied, when the employe involved had been found unfit to work in his occupation, by four doctors, one of whom was selected by the employe's representative. Similarly, the claimant's physical condition has been passed upon by four doctors, one of whom was selected by claimant's representative. He therefore is not entitled to a second examination, particularly in view of the findings of his own physician that his heavy physical disabilities are **permanent and stationary,** and the recommendation of hospital department physicians that because thereof he apply for a disability annuity under the provisions of the Railroad Retirement Act.

The carrier here asserts that the claim in this docket is, in its entirety, without basis or merit, and therefore respectfully requests that it be denied.

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.

Claimant was employed as a machinist's helper in carrier's general shops at Los Angeles, California. On April 12, 1949, he suffered injuries to his left hip and leg in the course of his employment. He was permitted to return to work in January, 1951. On or about June 1, 1951, claimant filed suit against the carrier to recover $100,000 damages for the personal injuries

sustained. During the trial of the case, a compromise settlement was reached by which claimant received $6,625.00. The amount was paid on March 4, 1953. Thereafter claimant was ordered to report for a physical examination and on March 23, 1953, he was disqualified for service because of physical disability. It is the contention of the claimant that as he had worked for 26 months immediately prior thereto, he was unjustly removed from service. He seeks restoration to service with payment for all time lost.

Claimant signed a release for the $6,625.00. It was a release of each and every claim, demand and cause of action growing out of the accident suffered in 1949. It did not purport to sever claimant's employment rights with the carrier. The suit for damages and the evidence produced in support thereof did not allege or establish total and permanent disability as a result of the accident. It cannot be said, therefore, that the payment of the $6,625.00 was a payment for claimant's future earning capacity. The release covered payment of damages growing out of the accident and is not a bar to the exercise of seniority rights by the claimant at any time thereafter when he was physically qualified to perform the work of his craft. It appears that this was the position taken by the carrier as the name of the claimant remained on the seniority roster at all times.

Claimant asserts that he was unfairly removed from service because he brought suit against and collected damages from the carrier. This is not a valid reason for the disqualification or dismissal of an employe. This does not appear to be the basis for the disqualification of claimant in the case even though the disqualification followed closely upon the payment of the damages.

The payment of the $6,625.00 was for all damages growing out of the accident, including such temporary and partial permanent disability as he may have sustained. Even though he was permitted to work for 26 months prior to his disqualification, the fact remains that he could be disqualified at any time if he was found physically unfit for any reason to perform the duties of his position. The only question before the Board is: Was claimant physically fit to perform the duties of a machinist's helper on March 23, 1953?

The evidence shows that claimant was examined on March 20, 1953, by Dr. Steele, Assistant to the Chief Surgeon, and Dr. Bidwell, carrier's orthopedic surgeon. They found that claimant had a 50% loss of function of the left hip and some remaining numbness over the peripheral ulna nerve distribution. Both doctors stated that it would be hazardous for claimant to climb off the ground and recommended that he apply for a disability annuity. At the trial of his suit for damages, Dr. C. C. Reynolds, an orthopedic specialist and claimant's personal physician, testified that claimant had permanent and stationary disability of 40% of the function of the left hip and a 10% permanent partial disability of the right hand. He testified further that claimant had developed a weakness of the anterior tibial and toe extensor muscles sufficient to produce a partial drop-foot and dragging of the toe of the right shoe after fatigue. This latter condition was the direct cause of a nerve injury producing partial paralysis and sensory loss of the left leg below the knee level. He also had an injury to his lower back which aggravated a previously existing osteoarthritic degeneration in this area.

This evidence was disputed by the report of Dr. Luc Lewin. This report indicates an examination that bears no relation to the present dispute. The partial disability to the hip, foot and hand is not mentioned nor is an examination thereof indicated. The report indicates good health but does not consider physical disabilities going to the physical qualifications of the claimant to perform the duties of a machinist's helper.

We think the evidence is ample to sustain the carrier's action in disqualifying claimant because of physical disability until such disability is removed. He was clearly unable to perform heavy work or climb off the

ground at the time of his disqualification, things that a machinist's helper is required to do. It involves no question of discipline and Rule 39, current agreement, is without application.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July, 1954.