

Award No. 2428
Docket No. 2430-I
2-RF&P-I-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

JOSEPH M. CODY, Petitioner

**RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD
COMPANY**

DISPUTE: CLAIM OF EMPLOYEE: The petitioner, Joseph M. Cody, submits to the Honorable Board that he was unjustly deprived of his earnings as an oiler for the Richmond, Fredericksburg and Potomac Railroad Company, by being denied permission to return to work for the Company on or about June 12, 1950, and on several occasions thereafter when petitioner requested that he be permitted to return to work. This action on the part of the Company was taken after petitioner had filed suit against the Company for damages suffered by the petitioner resulting from an accident in which petitioner was struck by a locomotive of the Company while pursuing his employment as an oiler. This action on the part of the Company is discriminatory, and was taken only to prevent petitioner earning his livelihood as an oiler, because petitioner saw fit to bring suit against the Company. The Company is thereby attempting to prevent and discourage suits by employees to recover damages for personal injuries sustained while they are at work for the Company.

EMPLOYEE'S STATEMENT OF FACTS: Petitioner began his employment with Richmond, Fredericksburg and Potomac Railroad Company as an oiler in or about February 1944. At that time he was examined by the company physician before entering into the duties of his employment, was found physically fit and entered into the duties of his employment. Petitioner continued to perform the regular duties of his employment until on or about March 17, 1948. On that date, petitioner, while engaged in the regular duties of his employment as an oiler, was struck by a locomotive, and suffered injuries, which disabled petitioner for several weeks. Subsequently thereto, petitioner filed suit against the company for the injuries sustained by him in the accident in the United States District Court for the District of Columbia. The case was tried before a jury on or about June 6, 1950, and the jury returned a verdict for the defendant, Richmond, Fredericksburg and Potomac Railroad Company. Thereafter petitioner returned to his place of employment for the purpose of returning to work on or about June 12, 1950, at which time he was requested to undergo an examination by the company physician prior to being admitted to the yard to return to work. Thereafter petitioner was advised that the company doctor had not passed him as physically fit to return to work. Petitioner made repeated efforts to return to active duty with the company, but each time was refused, the refusal allegedly being based upon the company doctor's recommendation.

condition has so changed as to make it probable that his retention or resumption of work would constitute a serious hazard it is but reasonable to assume that the Carrier has the right to protect itself and fellow employes."

In Second Division Award 1478, with Referee Carter, the Board said in part—

"The right of the Carrier to disqualify an employe for physical or mental incompetencies to perform the work of his position cannot be questioned. Such disqualification should be based on something more than supposition or possibility. Certainly an adequate examination would reveal whether claimant was mentally and physically qualified and if not the basis for the disqualification."

There are other awards of this and other divisions of the National Railroad Adjustment Board in which management prerogatives have been recognized in physical examinations under similar circumstances but since the carrier is confident that your Board is thoroughly familiar and cognizant of the contents of those awards and in the interest of brevity, no further reference is considered necessary to such additional awards.

CONCLUSION

In dealing with the petitioner in this case the carrier has relied upon the opinions of competent medical men with due consideration of the responsibility of management for the safety of its employes and property. In view of the medical reports herein referred to from the carrier's own doctors and the medical board of review, consisting of one physician selected by the carrier, one selected by the petitioner and the third selected as a neutral by the other two, it is contended that the carrier is justified in not permitting the petitioner to return to his former position until some possible change in his physical status in the future whereby he might be found to be physically qualified by the carrier's own doctors, or, in event of proven difference in medical opinion, by a neutral physician or another medical board of review.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the existing agreement covering the petitioner. The Railway Labor Act in Section 3, First, sub section (i) confers upon the National Railroad Adjustment Board the authority to hear and determine disputes growing out of grievances or out of the application of existing agreements. The Adjustment Board is empowered only to decide such disputes in accordance with the agreement between the parties involved. To grant a claim of the petitioner in this case, if such is considered to exist, would require the Board to disregard the agreement between the parties thereto and impose upon the carrier obligations not agreed upon in negotiation. The carrier reiterates that the Board has no jurisdiction or authority to take such action.

The carrier has established that the case has not been handled in accordance with the provisions and requirements of the Railway Labor Act and thus no recognized dispute exists, and that the case was not handled in accordance with the requirements of the existing agreement between the parties (copies of which are on file with your Board and are made a part of this submission by reference), and that it is also barred by the time limit rule adopted under Article V of the August 21, 1954 agreement.

In view of the foregoing the carrier respectfully requests that the Board dismiss or, in the alternative, deny the claim of the petitioner in this matter.

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.

The parties to said dispute were given due notice of hearing thereon.

Hearing was afforded the parties on March 6, 1957. Claimant Joseph M. Cody presented his grievance to this Division through counsel (Wm. C. Darden, Attorney) without first progressing same up to and including the highest operating officer of the carrier designated to handle such disputes, as required by Section 3(i) of the Railway Labor Act.

The highest handling given the matter on the property was an inquiry of the Master Mechanic at Potomac Yard by claimant's counsel on March 1, 1955, requesting a summary of the facts, which was furnished him by carrier's local officer, Manager at Potomac Yard, March 18, 1955. Then followed notice to this Division on July 9, 1956, of claimant's intent to file submission *ex parte*.

Carrier stated in the hearing that it has not dismissed claimant from service, but has not permitted him to return to work on the advice of its Medical Department and that if and when claimant should present statement by a qualified physician differing materially from carrier's previous medical advice, it would be agreeable to again having claimant examined, and if there is difference of opinion as between claimant's physician and carrier's physician, it would be willing again to resolve the matter by reference to a three-man medical board, the neutral physician to be selected by claimant's physician and carrier's physician, the expense to be equally divided.

AWARD

The Second Division of the National Railroad Adjustment Board having no jurisdiction over the petition in this case, the petition is dismissed without prejudice to the claimant's right per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April, 1957.