Award No. 4148
Docket No. 3871
2-H&M-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 142, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

HUDSON AND MANHATTAN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman Angelo Minichiello was improperly removed from service on April 8, 1959.

2. That he be restored to service and paid for all time lost since the above mentioned date.

EMPLOYES' STATEMENT OF FACTS: Hereinafter Angelo Minichiello shall be referred to as the Claimant and Hudson and Manhattan Railroad Company shall be referred to as the carrier.

On December 21, 1954, the claimant injured his back while helping other employes. He received treatment for this injury by the carrier's medical director. As a result of this injury he lost 84 days from work.

On January 13, 1955, claimant was x-rayed by the company doctor, George Edson, M.D. and the x-rays disclosed no noticeable injury. Claimant was examined on February 18, 1955 by another company physician, Doctor Irvin Balensewig, who stated in his report:

"It is my opinion that this claimant can again resume occupation."

Subsequent to claimant resuming work, he was called into the claim agent's office to discuss settlement for his injury. The claim agent advised him that the carrier would settle his claim for $2,500 providing the claimant would resign. That proposal was not acceptable.

Because of the arbitrary and unreasonable position of the carrier, the claimant was compelled to seek legal aid and proceeded under the provisions of the existing law. A settlement was reached (out of court) in February 1959.

Following Dr. Balensewig's report the claimant returned to work and worked until April 8, 1959, at which time he was arbitrarily and unilaterally

The claimant contends that the Carrier's refusal to reinstate him is a violation of the agreement, contending that the Carrier has improperly suspended or discharged him without a hearing; . . .

* * * * *

The Carrier would have been derelict in its duty had it reinstated this claimant, thereby against placing him in jeopardy of still another and possibly more serious injury to his back.

The very nature of the railroad business places upon the Carrier a great and grave responsibility to consider the safety of its employes.

The claimant has submitted no evidence reflecting upon the decision of carrier's medical officer. In view of this decision (based upon testimony of Minichiello's own doctor that corrective surgery should be performed), the claimant should not be declared qualified and permitted to work until such surgery is successfully performed.

Indeed, Dr. Post's testimony places the carrier on positive notice of a responsible diagnosis of a serious disability and a means of correcting it. Once on notice the carrier will be charged with any injury caused by claimant's condition, to Minichiello himself, his fellow employes or the public. To impose such a burden upon the carrier — a burden against which it could not protect itself —would be unreasonable.

The organization's claim demands that Minichiello be restored to service, and be paid for all time lost since the date of his disqualification. Carrier can see no justification for compensating claimant in any amount. However, if any payment is to be made claimant, such payment should not exceed the difference between what claimant earned elsewhere and what he would have earned had he remained qualified for railroad service. See Second Division Awards 362, 655, 1185, 1215, 1302, 1308, and 1309.

In any event, the organization has not shown any violation of the agreement and, therefore, the claim should be denied.

CONCLUSION

Carrier submits that the employe's claim is without merit, and should 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.

Parties to said dispute were given due notice of hearing thereon.

In October, 1950, while handling an airbrake part as a helper, claimant injured his back or shoulder; in June 1953, while carrying a battery weighing 52 pounds as a car inspector, claimant injured his back; cash settlement was made for these injuries in March, 1954; in December, 1954, while carrying a 194 pound crate of batteries with three other car inspectors, he again injured his back.

In July, 1957, or earlier, claimant filed suit for damages for the 1954 injury, and a cash settlement was made on February 5, 1959, at the close of plaintiff's evidence, which showed a permanent partial disability because of a herniated spinal disc, which pressed upon spinal cord or nerve, subjected him to almost continuous pain, prevented his getting out of bed without help, and would obviously prevent him from doing much lifting or even bending without pain until cured by an operation to collapse the disc and fuse the adjacent vertebrae.

During all this time from October, 1950, except for numerous absences apparently due to these injuries, he continued work as a helper or inspector until the carrier, upon the advice of its chief surgeon on April 8, 1959, suspended him from service "until successful completion of the operation recommended in testimony under oath by his own personal physician, Dr. Bernard S. Post."

Dr. Post testified that he had treated claimant steadily during the period from February 28, 1955 until February 5, 1959, on 149 different days; he testified that only palliative treatment could be given him except for the recommended operation, the entire surgical and hospital cost of which would be approximately one-half of the amount for which the case was subsequently settled.

In spite of Dr. Post's sworn detailed testimony in court on February 3, 1959, the employes contend that claimant should not have been suspended from work, or at least should have been examined by carrier's chief surgeon or by a disinterested surgeon. This argument is based mainly upon Dr. Post's written statement of April 9, 1959, that on the preceding day he found claimant fit and able to do his regular work with the use of a back support. Dr. Post added:

> "This patient experiences periods of exacerbations and remissions of his back pain. **During the periods of remission, as at present, he feels well and is able to do all work** except very heavy lifting, which, as I understand, is not called for in his job." (Emphasis ours.)

In other words, on that date Dr. Post found claimant in a temporary "period of remission," which in no way modified his sworn testimony in court or showed claimant's recovery without the essential operation. Furthermore, the lifting in question can hardly be called heavy, and admittedly constitutes part of the regular duties of his work; and the conditions explained at length by his physician must make very painful and difficult any lifting or bending at all. Reliance is also placed on Dr. Cohen's statement which shows that he examined claimant only once and actually knew nothing of his real condition or the history of his trouble, but nevertheless concludes that "claimant has now fully recovered," needs no "further observation," and "may resume his regular work."

Claimant's is a very appealing case, and certainly no one deserves any blame for trying to help him; but the record makes it clear that the only real help for claimant is through his physician's advice, which carrier's action tends to second. In view of the nine year history of claimant's employment and disability as disclosed by the record, the carrier cannot fairly be accused of reprisal against him by its action in suspending him under the conditions named. So far as the record discloses, the Carrier has violated no rule and has done claimant no wrong.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February, 1963.

DISSENT OF LABOR MEMBERS TO AWARD 4148

Seemingly the conclusion of the majority is based on conjecture, rather than the significant fact that the claimant worked from April 1955 to April 8, 1959 at his regular position and no exceptions were taken by the Carrier on the performance of his work. It is impossible to reconcile this fact with the conclusion of the majority that ". . . the carrier cannot fairly be accused of reprisal against him (the claimant) by its action in suspending him under the conditions named . . ."

The claimant's personal physician, Dr. Post, in his written statement of April 9, 1958, did not, as stated by the majority, find claimant in a temporary period of remission on that date. Dr. Post stated "During the periods of remission, as at present, he (the claimant) feels well and is able to do all work except very heavy lifting, which, as I understand, is not called for in his job . . . At this time he is fit and able to do his regular work." If the carrier doubted Dr. Post's statement it should have agreed, as requested by the general chairman, to have its own physician and a neutral doctor examine the claimant, but instead it chose to arbitrarily suspend the claimant. In view of the circumstances the carrier should have been ordered to reinstate the claimant and compensate him for all time lost as claimed.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink