Award No. 4158
Docket No. 4042
2-SP(PL)-MA-'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. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Motor Car Mechanic T. M. Anderson (hereinafter referred to as claimant) was unjustly deprived of his service rights and compensation when he was improperly removed from service at close of shift on August 28, 1960, and as result of such action suffered loss of all compensation from August 28, 1960 to November 4, 1960, date on which he was restored to service.

2. That accordingly the Carrier be ordered to compensate claimant for all time lost during the period referred to hereinabove.

EMPLOYES' STATEMENT OF FACTS: The record establishes that claimant was first employed by the carrier as machinist in its Brooklyn Locomotive Shop, Portland Division, on October 26, 1949, and with exception of approximately five months absence in 1953 due to illness, not of a serious nature, claimant remained in continuous service of the carrier in the mechanical department until furloughed on November 5, 1959.

Claimant performed all types of machinists' work without exception as to the nature thereof during this period of service. No question was raised by the carrier concerning his physical qualifications to perform his duties.

On being furloughed from the mechanical department on November 5, 1959 claimant was employed by the carrier as motor car mechanic in its Maintenance of Way Department Shop at Portland, Oregon on January 22, 1960, and continued to be employed in said category performing all duties, without exception, required of motor car mechanics.

There is no dispute in the record that claimant had performed all of the duties required of any normal physically qualified employe of his class and

not have been employed for the unrestricted duties of a motor car mechanic without a determination by the chief surgeon as to his physical condition and a recommendation of his working capacity. Unfortunately, this did not occur and carrier's position would have been untenable had claimant suffered further damage to his heart account required to lift weights in excess of 50 to 75 pounds.

There has been no showing that the claimant's physical condition had deteriorated. There is a showing that he had been under restriction not to lift in excess of 50 to 75 pounds since 1953 and that following an examination by Dr. A. L. Mundal it was the opinion of the chief surgeon on August 17, 1960, that the restrictions should remain in effect. Since a medical problem was involved, the carrier had no alternative but to remove claimant from service as the duties of motor car mechanic did not come within the restrictions placed on his services.

f) It appears that the action of the Carrier was based on information supplied to it in error.

As heretofore noted, the chief surgeon's recommendation of August 17, 1960, that claimant's restriction to not lifting over 50 to 75 pounds should remain in effect, was based on examination July 13, 1960, by Dr. A. L. Mundal, who reported:

> "Mr. Anderson developed a myocardial infarction in 1953 which was a full thickness posterior. He was limited to light bench work with no lifting over 50 to 75 pounds. Since this time, the light bench work has been discontinued and the patient must necessarily go back to his full activities in order to continue working.
>
> His electrocardiogram still shows a full thickness posterior infarction but it has remained stable for seven years, with some improvement; the T-wave having become upright in AVF. Blood pressure has remained normal. The patient has had a good response to therapy but I question unrestricted activity. I feel that the restrictions on extremes of lifting, pushing and pulling would still need to be continued and that he should not lift certainly more than 100 pounds, and this for only a very short time."

In view of claimant's medical history, there is no basis for contention noted above.

The carrier here asserts that there is no basis or merit for petitioner's contentions in this docket and that claim should be denied.

CONCLUSION

The carrier here asserts that the claim in this docket is entirely 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.

Parties to said dispute waived right of appearance at hearing thereon.

After a five months' sick leave in 1953 on account of a serious heart ailment the division surgeon recommended Claimant's return to duty in a position where he would not have to lift more than 50 or 75 pounds. That status continued until November 9, 1959, when he was furloughed.

On January 22, 1960, without the restriction being reported or noted, he was given employment as a motor car mechanic in a different shop. On July 13, 1960, the division surgeon again examined him, reported his condition at length, and stated that the restriction should be continued and Claimant limited to lifting not over 100 pounds and for very short periods. Based on that report the chief surgeon on August 17, 1960, recommended that the lifting restriction of 50 or 75 pounds should remain in effect. Since his position as motor car mechanic did not meet those restrictions, claimant was furloughed on August 28th.

The division surgeon again examined claimant on October 14, 1960, reported his condition, stated that he had been allowed to work without regard to his restrictions "for the past year or two" (although he actually so worked only for a period of seven months and six days), and stated that he had no remarks other than those made in previous reports. In view of this report the chief surgeon on October 31, recommended claimant's return to duty without restriction, and he resumed work accordingly on November 4, 1960.

The question is whether claimant was improperly withheld from work during the period from August 28 to November 4, 1960, and should be paid for time lost.

As stated in the Employes' Submission, the contentions were that his removal from service on August 28, 1960, was arbitrary and unjust because he was not first given a physical examination nor accorded a hearing. But, as noted above, he was given a physical examination; and since this is not a discipline matter, no hearing was prescribed by the Rules.

Claimant's suspension during the two months' period and his subsequent restoration to employment without restriction were both made by the Carrier pursuant to the chief surgeon's recommendations. It seems fair to mention that although he is designated by the Employes as the Carrier's chief surgeon, the appointment of that member of the medical profession, who appoints the division surgeons, is subject to the approval of the Board of Managers of the Southern Pacific Hospital Department, consisting of thirteen members, of whom six are named by the Carrier, six by the railroad brotherhoods, and one by other unions.

This Board has neither the qualifications nor the authority to substitute its medical or surgical opinions for those of physicians or surgeons, and the record discloses no reasons why the chief surgeon should earlier have recommended the removal of the restrictions which had been imposed mainly in the interest of claimant's survival.

No rule, nor established practice having the force of a rule, is shown to have been violated by the Carrier, and we cannot conclude that it acted arbi-

trarily in withholding claimant from service on the basis of the chief surgeon's opinion.

Under those facts this Division must say, as it did in Award 1419:

> "Whatever loss claimant suffered was a consequence of his own misfortune, not of any wrongful act of the carrier."

It is fortunate that the parties have been able to minimize the consequences to the extent shown by the record.

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.