Award No. 4174
Docket No. 4078
2-CRI&P-FO-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Firemen & Oilers)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Laborer Manuel Estrada, was unjustly deprived of his service rights when he was arbitrarily removed from service April 21, 1961, and his record posted as superannuated on April 22, 1961.

2. That accordingly the carrier be ordered to restore the aforesaid employe to service and compensate him for all time lost since April 21, 1961.

EMPLOYES' STATEMENT OF FACTS: Manuel Estrada, hereinafter referred to as the claimant, entered the service of the carrier as a laborer on February 21, 1925, continuing in that capacity to and including April 21, 1961.

On March 30, 1960, the claimant suffered severe scalding burns to both lower limbs in the performance of his regular duties, requiring hospitalization and absence from work, returning to service on June 28, 1960.

During this period of injury, the claimant was under the care of a company physician and was subsequently released to return to service on June 28, 1960 by such company physician.

The claimant remained in active service to and including Nov. 30, 1960 at which time his position was abolished. He later was recalled to service on December 14, 1960 and continued in active service to April 16, 1961 when his position was again abolished and he exercised his seniority on a position held by a junior employe, working that position from April 17 - 21st.

On or about this latter date, the claimant was ordered to the Company Doctor, Dr. J. M. Jensen, Chief Surgeon, for a physical re-examination by the Master Mechanic, J. E. Bergstrom.

Provisions (2) and (3) pertain to employes returning to service after injury or severe illness and returning after furlough, neither situation having application in the instant case.

In the case before this Board the observance of Laborer Estrada detected certain basic deficiencies in the work performance of that employe. These deficiencies could not go by without inquiry since they posed a hazard to the man himself and his fellow employes. Therefore, on April 21, 1961, he was requested to and did secure a physical examination. On that date Mr. Estrada was 4 months shy of 65 years of age. It was obvious his age was catching up with him — and this is no discredit by any means, it catches up with us all — his faltering work performance showed beyond the observance of his supervisors. It showed in the fact that early in 1960 he had a freakish boiler accident, which should have been avoided, and it showed in his record of absenteeism the past several years.

The examination revealed that what the carrier had observed and suspected was true. The examination revealed that the coordination of Mr. Estrada was only "fair". The examination revealed that Mr. Estrada also was functioning with badly "impaired vision," and the examination revealed Mr. Estrada's blood pressure to be 40 points above the maximum permissible before disqualification.

This is not a discipline case. Mr. Estrada has been a good employe. His years have just simply produced the to be expected natural and ordinary changes which serve to disqualify him physically. Should he be able to correct or overcome the disqualifying defect then he can again return to active service. It should also be remembered that physical disqualification of an employe is just as much for the good of the employe himself as anyone else and there has been no agreement made to prohibit such action or any agreement signed which is in conflict therewith.

It is notable that nowhere — in correspondence or conference — has Mr. Estrada or the organization even slightly contended that Mr. Estrada was not physically disqualified. Nor has any evidence of such a fact been produced even though it was promised.

In return for enforcement of sane rules designed to protect the best interests of the involved employe, his co-workers and the Carrier, the Carrier has received a time claim based on an agreement that by its express terms clearly has no application.

The carrier respectfully submits that the Board must deny the claim.

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.

The claimant, Laborer Manuel Estrada, went to work for carrier in the year 1925. In March 1960, during the course of his work, he was severely burned which resulted in his hospitalization and absence from work until the end of June of that year. He was then released by the carrier's physician for return to service, wherein he continued, aside from short lay-offs not caused by him, until April 21, 1961. On that date, Estrada, at the request of Master Mechanic, submitted to a complete physical examination by the Carrier's Examining Surgeon. As a result of that examination, a letter from the Master Mechanic was sent to Manuel Estrada removing him from service as a laborer and posting his record as "superannuated" effective April 22, 1961.

The employes claim that for carrier to proceed in this fashion unilaterally, with an order to Estrada to undergo a physical examination, was a violation of the Memorandum of Understanding regarding Physical Re-examination of Employes, effective May 1, 1941, which was adopted by the parties for application to laborers of Estrada's classification on April 20, 1959. They contend that any question regarding the state of Estrada's physical well-being, in other words his capability to perform his work, should have been investigated and progressed in accordance with above-mentioned "Understanding", with particular reference to paragraph designated "(1)".

As against this contention of the employes, the carrier maintains that its action as to Estrada was not a violation of said "Understanding" but was fully authorized by the last sentence thereof, reading:

> "This agreement does not apply to the natural and ordinary changes incident to advancement in age."

A review of the record does not permit us to agree with carrier's position. Sending claimant Estrada to the company surgeon's office for physical examination was a decision based on the Master Mechanic's individual judgment. We are given his conclusion that such action should be taken, but we are not given the facts upon which that opinion and decision were based. Again, from the "Surgical Department" we do not receive any of the facts upon which the doctor concluded: "I feel it advisable for him (the claimant) to consider his retirement at once, and have so advised him. I am disqualifying him for his position as Laborer."

Up to this point, we can only speculate as to claimant's mental and physical fitness to perform his work. There is nothing thus far in the record to show what, if any, "natural and ordinary changes" had taken place in claimant's health and general physical condition which could be called "incidents to advancement in age". All that we know is — using words of paragraph marked "(1)" of the "Understanding" — it had become apparent "to the representative of the Carrier that an employe was becoming unsafe and liable to cause injury to himself or fellow employes or cause liability to the carrier."

And it should be noted that it was at that particular stage of the episode being dealt with that a decision was called for under the express provisions of the Memorandum of Understanding. In such circumstances, the Memorandum specified that a carrier representative should confer with the employe's Local Committee advising of carrier's desire that a certain employe be re-examined.

This was the very situation the parties must have had in mind when the Memorandum was adopted. It follows that there was a violation thereof when the carrier did not abide by its provisions in the case before us. Among authorities cited we find nothing at variance with our findings in the instant case. Award 3749, an entirely different fact situation, is clearly distinguishable. We are of the opinion that the claim now before us should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1963.