

Award No. 4434

Docket No. 4381

2-JaxTerm-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 50, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

JACKSONVILLE TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Harry Lovett, Car Cleaner, has been unjustly deprived of his employment rights since May 10, 1961, when he was refused re-employment, after recovery from an off duty accident which occurred on July 27, 1959.

2. That claimant Harry Lovett be restored to service with all employment rights, including Health and Welfare, Vacation allowance, and be compensated for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: On July 27, 1959, Harry Lovett, hereinafter referred to as the claimant, was struck by a produce truck while riding his bicycle home from work, causing injury to his left leg. This required the claimant to be hospitalized for a period of time, including an operation on his left knee which by May 10, 1961, had recovered to the extent he was physically able to resume his duties as a car cleaner, but was denied this right by the carrier.

The claimant entered service of the Jacksonville Terminal Company on January 9, 1941, and has maintained continuous employment relations since that time.

On May 8, 1961, claimant placed a bid on job numbered RC 11.

On May 11, 1961, Master Mechanic, Mr. A. C. Herrington notified claimant by letter of his declining to accept the above bid and refusing to return him to service.

This dispute has been handled with the carrier up to and including the highest officer so designated by the company, with the result that he has declined to adjust it.

erally familiar with the duty involved, he carefully considered all factors and consulted the master mechanic. In this consultation they agreed it would be impossible for claimant to return to his former job. Your Board will agree that the decision of carrier's medical director was based upon a reasonable and proper evaluation of the facts involved.

The burden of proof that carrier has erred in its determination that claimant does not meet its physical requirements is on the claimant and the petitioning organization. All Divisions of the National Railroad Adjustment Board have consistently held that mere assertions cannot take the place of proof. See Third Division Awards 8065, 8206, 8376, 8486 and 9609 and Fourth Division Award 1211.

Carrier has shown that its disqualification of claimant for the duties of a car cleaner was not an abuse of managerial discretion but an exercise of managerial responsibility. Carrier has acted in good faith and has been neither arbitrary nor capricious. To the contrary, carrier has shown that claimant acted in bad faith when he refused to submit himself for a work examination as recommended by his organizational representatives and declined carrier's offer to be considered for employment on the less hazardous position of Red Cap.

By the submission of this claim to your Honorable Board, the organization is asking it to substitute its judgement for that of carrier. Carrier is not willing to accept the responsibility for employing claimant as a car cleaner and does not believe this Board will do so.

Carrier asks that this claim be denied in its entirety.

Carrier affirms that other than its position on the monetary claim, all data herein have been made known to the organization.

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.

The Claimant, Harry Lovett, with a seniority date of January 9, 1941, worked as a car cleaner at the Carrier's facility at Jacksonville, Florida.

On July 27, 1959, the Claimant, after having completed his tour of duty and while riding his bicycle, was struck by a truck and sustained injuries to his left leg, left knee and back which hospitalized him for ten weeks.

The Claimant sued the operator of the truck that struck him and while the trial was in progress a compromise settlement in the amount of \$24,000.00 was agreed to by the parties.

On March 7, 1960, the Claimant gave Master Mechanic A. C. Herrington Dr. James J. Conner's statement—which read:

"TO WHOM IT MAY CONCERN:

"This is to certify that Harry Lovett has been under my care since July 27, 1959 and may now return to work."

and requested that he be returned to work.

The Claimant was sent to Carrier's Chief Medical Director, Dr. Clyde C. Collins, who, after examining the Claimant on March 8, 1960, and learning that the Claimant could not move his left knee more than 10 degrees, conferred with Master Mechanic Herrington and then agreed that "it would be impossible for him to return to his former job."

On June 24, 1960, when the Claimant again called on the Master Mechanic and asked that he be returned to service, he was reportedly told that "he could not be reemployed with a stiff left knee."

On June 27, 1960, when the Claimant and his General Chairman called on the Master Mechanic, the Claimant tried to "squat down" but could not do so. The General Chairman then agreed with the Master Mechanic that the Claimant could not "safely perform duties of a car cleaner".

In the presence of the Master Mechanic, the General Chairman advised the Claimant "to apply for benefits under the Railroad Unemployment Insurance Act."

On August 29, 1960, the Claimant presented to the Carrier's Master Mechanic the following letter, dated August 29, 1960, from Dr. James J. Conners:

"TO WHOM IT MAY CONCERN:

"This is to certify that Harry Lovett has been under my care since July 27, 1959 with a diagnosis of fracture of the left tibia and a compression fracture of the first lumbar vertebra.

"He may return to work as of August 29, 1960."

For the third time the Claimant called on the Master Mechanic and requested to be returned to service. A test was given the Claimant and while he "awkwardly performed simulated tasks of a Car Cleaner", the test indicated "Claimant would be a safety hazard".

The record further revealed that the Claimant not only was unable to "move promptly" but had to use an umbrella as a walking cane for balance". Accordingly, the Master Mechanic advised the Claimant that "he had not displayed sufficient physical ability to perform the duties of a Car Cleaner with safety and he could not accept him for re-employment".

The April 10, 1961, request of the General Chairman for another physical examination was declined by the Master Mechanic because it "would serve no useful purpose".

On May 9, 1961, the Claimant and his General Chairman called on the May 11, 1961, the Claimant's bid was declined.

On May 8, 1961, the Claimant and his General Chairman called on the Master Mechanic—presented a letter dated April 29, 1961 from Dr. Conners—

and they requested that he (Claimant) be permitted to return to his Car Cleaner position.

Dr. Conner's letter of April 29, 1961, stated in part that:

"there had been no change in the range of motion of his knee as reported previously".

"This patient—can attempt to do any type of work and his knee should hold up under most conditions."

In the Organization's letter of claim filed on June 19, 1961, it stated in part that the Claimant was examined by "Three competent physicians April 29, May 24, May 30, 1961" and all of them agreed that the Claimant "should encounter no difficulty in the performance of his duties as car cleaner". The Carrier declined the Organization's claim on July 11, 1961—stating that "no supporting evidence that his physical condition has changed had been presented.

When the claim had been progressed to the President and General Manager level, the Organization offered as support for its position the fact "that Claimant was employed as a waiter in one of Jacksonville's most exclusive hotels". The parties, in a conference on January 30, 1962, agreed that the Organization "would arrange for Claimant to take a work examination in the presence of representatives of Carrier and the Organization." If parties agreed he could do Car Cleaner's work safely, he would be promptly re-employed and the claim for time since May 10, 1961, would be withdrawn.

When the January 30, 1962, conference was convened on March 8, 1962, the Organization advised the Carrier that the "Claimant had declined to participate in a work examination unless he first was assigned to duty and was on the payroll of the Carrier as a Car Cleaner at the time of the examination". The Carrier declined the Organization's request on March 16, 1962, and nothing further was heard from the Organization until November 9, 1962, when Grand Lodge Vice President discussed this case with the Carrier. On this occasion, the Carrier offered to consider the Claimant for employment as a Red Cap, but this offer was declined by the Organization on November 30, 1962.

On November 30, 1962, the Organization furnished the Carrier with the following Doctor's statements:

Dr. James J. Conners	April 29, 1961
Dr. Clyde M. Collins	May 24, 1961
Dr. Samuel S. Lombardo	May 30, 1961
Dr. Harry L. Collins	November 13, 1962.

While two of the above named Doctors stated that the Claimant could return to work, all of the Doctors indicated in their medical statements that the Claimant has a stiff left knee and that the range of motion is limited.

An objective study of the above facts not only indisputably establishes the lenient and reasonable position of the Carrier but also exposes the perverse and unreasonable attitude of the Claimant.

So that this claim may be fairly and expeditiously disposed of, the Board rules as follows:

- 1) As proposed by the parties in conference on January 30, 1962, the Claimant must be given a work test, on or before March 31, 1964, in keeping with his duties as a Car Cleaner;
- 2) If it is found that the Claimant satisfactorily passed the work test, Carrier will then immediately return the Claimant to his position with all seniority and other rights restored—but without any compensation for time lost.

In the event the parties cannot agree the case must be returned to this Board for disposition;

- 3) Should Claimant refuse to undergo a work test under the conditions set forth above this claim is then denied.

AWARD

Claim disposed of in accordance with findings set forth above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1964.