

Award No. 4499

Docket No. 4373

2-C&O-FO-'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. 41, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.—C. I. O. (Firemen & Oilers)**

THE CHESAPEAKE & OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Laborer W. F. Felix was unjustly deprived of his service rights as a truck operator from 7:00 A.M., August 15, 1961.
2. That accordingly the carrier be ordered to restore this employee to his truck operator's position and compensated for the difference between the laborer's and truck operator's rate of pay from August 15, 1961, for as long as this employee is deprived of the position of truck operator.

EMPLOYES' STATEMENT OF FACTS: W. F. Felix, hereinafter referred to as the claimant, was employed by the Chesapeake and Ohio Railway Co., hereinafter referred to as the carrier, as a laborer on December 4, 1934. Subsequent thereto, claimant exercised his seniority rights to secure a position of truck operator in carrier's shops at Huntington, W. Va. and continued to hold such position until August 15, 1961 at which time carrier arbitrarily removed him from his position of truck operator and assigned him as a laborer.

In November of 1959 claimant suffered a coronary occlusion with a myocardial infarct and was off from work approximately three months. Claimant went back to work on his assigned truck operator's position and worked for approximately nine months or until January 1, 1961 when he suffered another infarct.

On January 1, 1961, claimant entered the C. & O. Railway Employees' Hospital at Huntington, W. Va. under the care of Dr. J. F. Otto where he remained until released on March 22, 1961. At the time of his release from the hospital, claimant was sent to carrier's chief medical examiner, Dr. J. J. Brandabur for a physical examination and was disqualified for the position of truck operator.

to the truck operator position after his first attack. After suffering a second attack, claimant was not withdrawn from all service, but was only restricted from performing work on a position requiring heavy lifting, which work he should not perform because of his physical condition, and which position required the transporting of other employes on public thoroughfares, which subjected such employes and the public to additional and unnecessary hazards.

Carrier's action in this respect was certainly in the best interest of the claimant as well as others concerned. Claimant is not the only employe of this Carrier who has been restricted because of physical condition. Carrier submits that at the present time approximately 100 of its employes have restrictions of various kinds placed upon them by reason of their physical condition.

Felix is under constant observation, makes frequent trips to the hospital clinic because of his heart condition, receives frequent reexaminations to determine his physical condition and requires daily medication.

Under these circumstances what basis can there be for any claim that such a person should be turned loose with a motor vehicle to endanger not only his life but that of other employes and the general public. Claimant has had two attacks and the likelihood of a third attack is much increased by physical exertion and stress. Carrier's action in disqualifying claimant as a motor truck operator under the circumstances here present cannot be held to be an abuse of discretion.

The employes have made no claim during the handling on the property to the effect that there has been any discrimination against Felix. The principal argument has been to the effect that Felix has sufficient seniority to hold a truck operator job and he should be placed thereon. If this premise were correct, then there would be no need for any physical standards, physical examinations or qualifications for any person once they established seniority in carrier's employment.

Carrier submits that Claimant Felix has been given every consideration and that carrier has not in any way been arbitrary, capricious or unjust in its handling of the case and that employes cannot make such showing, which they must do if your board is to upset carrier's handling and decision in the case.

It has been clearly shown by the carrier that the claim of the employes is without justification and carrier urges that such claim be denied in its entirety.

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.

This is a supplement to Award 4432 wherein the Board—on February 26, 1964—remanded the case to the property for the following action.

- “A) that the Claimant must be examined by a mutually selected neutral doctor on or before March 31, 1964, and the expenses of this examination be shared by the parties;
- B) that the result of the neutral doctor's examination will solely determine whether or not the Claimant can physically perform all of the duties of his motor truck operator's position;
- C) that the parties furnish the neutral doctor's findings to this Board no later than April 18, 1964;
- D) that within thirty days of receipt of neutral doctor's findings this Board will make final disposition of this claim.”

On March 24, 1964, neutral Doctor Walter C. Swann, Suite 306 Professional Building, Huntington, West Virginia, examined the Claimant, and in his findings—which he sent to Dr. R. R. Brandon, who is now the Carrier's Chief Medical Examiner, on March 25, 1964,—Dr. Swann stated in part “this man is qualified to continue his job as a truck driver”.

The record in Docket 4373—Award 4432—indicates that on October 25, 1961, the Carrier rejected the Organization's request that the Carrier's Chief Medical Examiner examine and determine the Claimant's physical fitness. The record in Docket 4373—Award 4432—further indicates that on December 21, 1961, the Carrier also declined the Organization's request that a neutral doctor determine the Claimant's ability or inability to perform the duties of a Motor Truck Operator.

The Board believes the Carrier's position became untenable on December 21, 1961—when the Carrier, for the second time, declined the Organization's request for a medical examination. Therefore, it is the Board's disposition that retroactive pay should revert to that date. Accordingly, the Board rules that the Carrier must pay the Claimant the difference between the Laborer's pay rate (\$2.2628 per hour) and the Motor Truck Operator's pay rate (\$2.3678 per hour) for all time worked retroactive to December 21, 1961, until the Claimant is returned to his position of motor truck operator.

AWARD

Claim sustained in keeping with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of May, 1964.