Award No. 4654
Docket No. 4644
2-UP-MA-'65

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. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That Machinist Earl R. Hurley is being improperly held from service.

2. That accordingly, the Carrier be ordered to return Mr. Hurley to service; and further, that he be compensated at his regular rate of pay for all time lost from October 2, 1962, until such time as he is reinstated to work.

EMPLOYES' STATEMENT OF FACTS: Machinist Earl R. Hurley herein referred to as the claimant, is employed as a Machinist by the Union Pacific Railroad Company, hereinafter referred to as the carrier, at Salt Lake City, Utah. The claimant has a machinist seniority date of January 9, 1956. The claimant's name appeared with the same date, January 9, 1956, on the roster posted in 1963. On October 2, 1962, the Claimant reported for work after being absent due to illness, and presented a release enabling him to return to work, from Louis J. Taufer, M.D., district surgeon of the Union Pacific Hospital Association. The carrier, however, did not allow the claimant to start work and advised him that it would be necessary that he secure a release from the carrier's examining physician, Dr. H. B. Lamb. Dr. Lamb refused to approve the claimant's release. This is confirmed by management's letters to local chairman R. Robinson dated October 18, 1962 and October 24, 1962, which are in reply to Local Chairman Robinson's letters of October 18, 1962 and October 23, 1962. In accordance with the procedure set forth, a medical board of three doctors was agreed upon and the claimant submitted to a physical examination by this medical board. The members of the medical board were Frank J. Winget, M.D., representing the claimant. Harold Lamb, M.D., representing the carrier, and C. B. Powell, M.D., the third, or neutral, doctor.

The carrier continued to refuse to permit the claimant to return to service even though there were machinists' positions occupied by other machinists with less seniority rights than the claimant, working in the carrier's facilities at Salt Lake City, Utah. The claimant could have performed the work on these positions without any difficulty whatsoever. The general chairman then appealed to Mr. D. S. Neuhart on March 6, 1963.

that in any event, the claimant is not entitled to the compensation claimed under the provisions of the applicable agreement.

Under the Railway Labor Act, the National Railroad Adjustment Board is required to give effect to said agreement and to decide the present dispute in accordance therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it.

To grant the claim of the employes in this case would require the board to disregard the agreement between the parties thereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The board has no jurisdiction or authority to take any such action.

CONCLUSION: The carrier has shown that the claimant has been properly withheld from service upon the recommendations of competent medical authority; that no violation of the applicable agreement has occurred; and that the claimant is not entitled to the compensation claimed.

It is respectfully submitted, therefore, that the claim is without foundation under the applicable agreement 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.

After an absence due to illness an agreement was made that Claimant's fitness to resume service should be decided by a panel of three physicians.

The agreement provided:

"3. The findings of the board as to the physical qualification of the employe will be limited to a determination of whether he is qualified to meet the physical requirements of the Company as prescribed in the **Physical Examination Rules, revised May 1, 1958,** copy attached and made a part hereof, and physically able to perform any and all work that may be required of a Machinist.

4. The duties of the occupation of Machinist are set forth in Rule 59 of the working agreement reading as follows:"

The Classification of Work Rule, No. 59, describing all machinists' work, was then set forth in full, after which the agreement continued:

"The assignment of employes to work of their preference is governed by their standing in their respective seniority group. Mr. Hurley's senority is in the Machinists' group at Salt Lake City. Thus, he is subject to the performance of any work described in the above-quoted Rule 59 which is now or may be performed at Salt Lake City, and which may necessitate crawling under and on top of certain equipment, making repairs to locomotives, machinery and other equipment, involving lifting of heavy materials to the extent reasonably expected of any able-bodied man.

* * *.

6. The findings and decision of a majority of this board shall be final and binding upon the Company and the Employe. The Employe shall not be considered eligible for employment by the Company unless a majority of the board shall have rendered decision declaring him physically qualified.

7. If the board sustains the contention of the Employe, they will indicate date as of which in its opinion the Employe had recovered sufficiently to perform the duties of Machinist and the Employe will be reimbursed for time lost from that date."

The physicians made a unanimous report, which concluded as follows:

"**Conclusions:**

1. Regardless of their specific nature, the patient's attacks have been characterized by little or no warning, by an uncontrolled fall, and by complete loss of consciousness.

2. The patient may have early central nervous system disease, type undetermined.

3. Patient's general physical condition and his neurologic status apart from the attacks are good.

4. There is no basis on which the likelihood of further attacks can be predicted except past experience; and they cannot reliably be prevented.

Recommendations:

1. The patient's attacks, by their nature, constitute a serious hazard to the patient and possibly to others in working near or with moving machinery or dangerous equipment or under circumstances of potential danger.

2. Doing mechanic's work at a bench away from moving machinery and equipment would be permissible since it would present no hazard if the patient had an attack that he wouldn't face having an attack on the street or at home.

In summary, the committee feels that the patient's attacks by their nature impose an unreasonable hazard in his performance of

his usual duties as outlined in his job description. It feels that work away from moving equipment and machinery and not requiring the use of potentially dangerous equipment could be performed with reasonable safety if such a position is available."

As above quoted, the agreement limited the panel's authority to the determination whether Claimant was physically able to perform any and all work of a machinist, and that "he is subject to the performance of any work described in the above quoted Rule 59 which is now or may be performed at Salt Lake City, and which may necessitate crawling under and on top of certain equipment, making repairs to locomotives, machinery and other equipment, involving lifting of heavy materials to the extent reasonably expected of any able-bodied man".

Therefore the material conclusions of the panel were as follows:

"The patient's attacks, by their nature, constitute a serious hazard to the patient and possibly to others in working near or with moving machinery or dangerous equipment or under circumstances of potential danger.

* * *.

In summary, the committee feels that the patient's attacks by their nature impose an unreasonable hazard in his performance of his usual duties as outlined in his job descripton."

Since it was agreed that the medical panel's findings and decision should be binding upon the parties, it is obvious that Claimant has not been improperly held from service.

The fact that the medical panel went outside the scope of its authority and found "that work away from moving equipment and machinery and not requiring the use of potentially dangerous equipment could be performed with reasonable safety if such a position is available", does not alter the binding effect of the panel's finding on the issue delegated to it, whether or not such relatively safe position was available or not, as alleged by the Claimant and denied by the Carrier.

Nor is the provision of Rule 23, giving preference for light work to employes of long and faithful service, material in view of the explicit agreement which made final and binding the medical panel's decision on the question submitted to it.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 19th day of February, 1965.