

Award No. 4655

Docket No. 4646

2-JT-EW-'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. 50, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Electrical Workers)**

JACKSONVILLE TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Jacksonville Terminal Company violated the provisions of the current agreement by refusing to recall Electrician Helper Brill Hiers to service on June 5, 1962.

2. That accordingly Electrician Helper Brill Hiers be recalled to service with his seniority rights unimpaired and compensated for all wage loss during the time he is withheld from service. He should also be granted vacations due him, or paid in lieu thereof. The Carrier should also pay the Health & Welfare, and death benefit premiums for the time he is held out of service, and all other benefits that he would have received had he been recalled to service.

EMPLOYEES' STATEMENT OF FACTS: Electrician Helper Brill Hiers, hereinafter referred to as the claimant was regularly employed as an electrician helper by the Jacksonville Terminal Company, hereinafter referred to as the carrier, at Jacksonville, Florida, on September 2, 1949.

Previous to claimants employment as electrician helper, he served this carrier in other capacities.

Claimant was recalled to his former position of coach cleaner supervisor on August 23, 1950. He continued in this capacity until November 3, 1952, at which time he was granted a leave of absence to undergo surgery to his back. He returned to his position as car cleaner supervisor on September 24, 1953, following his operation and continued in this capacity until January 16, 1961, at which time he was furloughed and exercised his seniority as electrician helper. He continued in this capacity until June 28, 1961, and was furloughed.

Under date of December 18, 1961, claimant was recalled to service as a car cleaner-ice and waterman, and was disqualified for this position by carrier's medical director.

Under date of June 5, 1962, the carrier posted Bulletin B H-1 position of electrician helper and assigned Electrician Helper M. McDonald to this position with a seniority date of December 31, 1949, which is junior to the

claimant has a back fusion for spondylolisthesis which is highly susceptible to aggravation or injury. Carrier, knowing full well that sooner or later claimant's physical condition is likely to result in some serious accident, cannot be expected to permit him to perform heavy duties which might bring about such an accident. Carrier is not willing to accept responsibility for employing claimant as an electrician helper and does not believe this board will do so.

Carrier submits that this claim should be dismissed as not being filed within the time limits provided in Article V of the August 21, 1954 Agreement.

Carrier further submits that if your board should find it necessary to rule on the issue as filed, it will find the organization's claim without merit or support and will deny it 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.

The claim was that Carrier "violated the provisions of the current agreement by refusing to recall Electrician Helper Brill Hiers on June 5, 1962," and that Claimant should be recalled to service with all rights unimpaired and "compensated for all wage loss during the time he is withheld from service".

The matter was instituted by General Chairman Johnson and duly progressed, first by him and second by General Chairman Kirchain, his successor, in various steps to Carrier's president and general manager, its highest officer designated for the purpose. The latter on January 15, 1963, wrote Mr. Kirchain a letter in which he said:

"We therefore cannot agree that any rule of the agreement was violated, and your request for reinstatement of Mr. Hiers as an Electrician Helper is respectfully declined."

He stated that since Claimant's examination by Carrier's Medical Director in December, 1961, the Carrier had not been shown the opinion of any examining physician that Claimant was physically able to perform safely all duties in question, but added:

"Without prejudice to our aforementioned position, we will agree to submit the question of Mr. Hier's physical fitness for the duties of an Electrician Helper to a medical panel. (Emphasis ours.)

"* * *

"If this arrangement is acceptable and if the decision of the medical panel is that Mr. Hiers can perform all duties of an Electrician Helper with safety to himself and this Company, he will be permitted to return to work as an Electrician Helper promptly."

It is argued that as the first sentence quoted above made no reference to pay for time lost, it did not constitute a complete disposition of the claim. But since it declared that no rule of the agreement had been violated and that the request for Claimant's reinstatement was declined, it clearly disposed of any claim for wages lost while Claimant was "withheld from service", as well as the other items of the claim.

However, clearly outside of this claim and for the purpose of deciding the advisability of Claimant's return to service, the general manager proposed a panel of three doctors to decide his fitness for the safe performance of his work.

That General Chairman Kirchain fully understood the situation is shown by his reply stating that he had further information to present including a letter from Dr. Lovejoy and saying:

"If after reading his letter you cannot agree to put Hiers back to work and pay him for all time lost and seniority rights restored then we hereby agree to your original proposition of a neutral doctor." (Emphasis ours.)

On February 21, Carrier's general manager acknowledged the receipt of this letter and set March 5 for a conference. It was held on that date but did not change the general manager's decision; for on March 27 Mr. Kirchain wrote him:

"In our conference of March 5th we discussed the above case very thoroughly and came to no agreement. I am awaiting your letter confirming this conference and which doctor you are going to choose to do your examining of the above so I can go ahead and notify our doctor so they can get together and select the neutral doctor as per your agreement of Jan. 15, 1963." (Emphasis ours.)

Thus the general chairman definitely knew on March 5th that he had not been able to change the final decision of January 15th, and that any further negotiations would relate to Carrier's offer of that date, despite its denial of the claim, to return Claimant to service if found by a panel of doctors to be physically fit.

On May 3 the general manager wrote the general chairman a letter setting forth a proposed formal agreement for an examination to

"ascertain and determine whether Mr. Hiers is now physically qualified" etc.

"* * *

"if the findings and decision of a majority of this board are that Mr. Hiers meets the physical requirements * * * he will be permitted to exercise seniority promptly after receiving the findings and decision of the majority."

Thus Claimant's seniority would be unimpaired.

General Chairman Kirchain made several attempts to have the proposed panel's decision relate back to the time of the claims; but the Carrier's presi-

dent never altered his position. He terminated his last letter to Mr. Kirchain as follows:

“We are still willing to go through with our agreement; however, we have not previously, and cannot now agree to the doctors’ determination being applicable to any time prior to their examination.

“If you will call on Mr. Brigman, final plans can be concluded for Mr. Hier’s examination as per the above.”

This could not have been understood as reopening the claim or remanding it to Mr. Brigman for further progressing.

Upon succeeding Mr. Kirchain early in June and finding a very voluminous record, General Chairman Babcock at his own request discussed the matter with Mr. Brigman and was told that the proposal of January 15 was still good for a medical panel to consider Mr. Hier’s fitness for return to duty. He renewed his predecessor’s attempts to expand the medical panel offer; but the general manager replied on September 10 that the Carrier would agree to the panel only to “determine Mr. Hier’s qualifications at the time of examination * * * and there can be no basis for monetary claim on behalf of Mr. Hiers prior to the panel’s determination”.

There was still time for an appeal to this Board from the final denial of January 15th; but apparently the general chairman misunderstood the situation, for no notice of intention was given until January 7, 1964.

It is clear that the panel offer did not toll the time limit provision of the Agreement, and that the Carrier cannot be blamed for the default.

This Board has no jurisdiction to order that the Carrier’s medical panel offer be made effective, but it was apparently made in good faith and the record does not show that it has been withdrawn. Presumably therefore, Claimant may still be returned to service if found physically fit.

AWARD

Claim dismissed.

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.