Award No. 5682
Docket No. 5619
2-EL-FO-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

ERIE-LACKAWANNA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Laborer David Haggerty was unjustly dealt with when he was denied the right to return to the service on July 14, 1966, and subsequent thereto.

2. That accordingly, the carrier be ordered to restore the aforementioned Laborer to service and compensate him for all time lost since July 14, 1966, with vacation, health and welfare and life insurance rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: Laborer David Haggerty (hereinafter referred to as the claimant), was employed as such at Meadville, Pennsylvania, by the Erie-Lackawanna Railroad (hereinafter referred to as the carrier).

The claimant was taken ill on January 2, 1964. On June 1, 1964, the claimant returned to the service of the carrier, worked for seven days, and was ordered out of service by Dr. Mishler, Chief Surgeon of the carrier, due to his physical condition.

Under date of June 8, 1966, General Chairman Francisco addressed a letter to Dr. Mishler (copy of letter attached as Exhibit A), requesting that the claimant be restored to the service or apply the physical re-examination understanding. Also enclosed with such letter, General Chairman Francisco forwarded a copy of letter from the claimant's physician, Dr. A. G. Deininger (copy of letter attached as Exhibit B), wherein the claimant's doctor indicates that it is his opinion Mr. Haggerty's general health and physical tolerance are very good at present and he can safely return to work.

On June 22, 1966, Dr. Mishler replied (copy of letter attached as Exhibit C), that this was not a case for a neutral doctor. On July 14, 1966, Vice General Chairman Cammerota met with Dr. Mishler to make a final

In Third Division Award 13523 (O'Gallagher) involving this Carrier and the Clerks' Organization, it was held that:

> "We find no reason to substitute our judgment for that of a qualified physician of many years experience."

See also Third Division Awards 14203, 6942, 5815, 6764; First Division Awards 17135 and Fourth Division Award 1468, among others.

That under the Physical Re-Examination letter of understanding dated July 24, 1948, the appointment of a neutral doctor depends entirely on a controversy in medical findings or facts, and that Carrier has the prerogative to set standards of physical acceptability, has been resolved by prior Awards on this property. See Awards 75 (quoted below), 76 and 77 of S.B.A. 424, Award 501 of S.B.A. 197 and Award No. 3 of S.B.A. 541, copies of which are attached as Carrier's Exhibits L through P.

> "Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.
>
> **From the evidence of record, there is no disagreement between the Chief Surgeon of the Carrier and the physician of the Claimant.** The Carrier is not required to provide light work for a physically disqualified employe."

During handling of this case on the property, Petitioner never alleged that the physical restriction and disqualification of claimant was either arbitrary, capricious or discriminatory. The decision of whether claimant is qualified to perform the heavy, strenuous work involved on all positions in his craft, such as climbing on wheel cars, moving wheels to various locations, unloading wheels, and the other duties described in Carrier's Exhibits B and D, falls squarely on the shoulders of the Chief Surgeon, and not a doctor unfamiliar with railroad work, such as Doctor DeKruif and Doctor Deininger. The decision of the Chief Surgeon was carefully weighed based upon all the facts. This Board, in accordance with the many pronouncements cited of the various Divisions of the Board, should not disturb the decision of the Chief Surgeon, which is in the best interests of the claimant, his fellow employes, the public at large, and the Carrier, by a favorable decision to Petitioner.

CONCLUSION

Based upon the facts, reasons and authorities cited, Carrier submits that this claim and case should either be dismissed in its entirety, or denied for lack of merit and rules support.

(Exhibits not reproduced.)

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 record discloses that Claimant requested a leave of absence on the account of illness effective January 3, 1964; he was hospitalized on January 21, 1964, with a diagnosis of coronary heart disease, myocardial infarction; he was again hospitalized on March 21, 1964, with an excision of his left kidney and partial ureterectomy was performed on March 31, 1964. Claimant's leave of absence was extended at his request to May 31, 1964. He requested to return to work on June 1, 1964, and was required to take a physical re-examination by the local company doctor. On June 9, 1964, the Chief Surgeon who had reviewed the local physician's report denied the Claimant the right to return to work until a detailed report was received from the family doctor. On June 16, 1964, the family doctor issued a report, and on June 19, the Chief Surgeon cleared the Claimant for light work only on ground level. The General Foreman, on June 22, 1964, advised that there were no light duty positions available in the department, and on July 7, 1964, the local chairman of the Organization instituted a claim admitting that Claimant was unable to handle heavy work, but that the committee was cooperating to place Claimant at such light work as Claimant was able to handle. This claim was progressed through the required officers on the property until December 30, 1964, when a local chairman rejected the denial of the Organization's claim on behalf of this Claimant. Thereafter, the claim was abandoned, and nothing further was heard until July 7, 1965, when the General Chairman wrote the Chief Surgeon stating that there was a difference in the medical findings of the family physician and the Chief Surgeon, and requesting a neutral physician under the physical re-examination letter of understanding between the Organization and Carrier dated July 24, 1948, which is included in the record as Claimant's Exhibit E.

Carrier has contended that this claim has not been properly and timely handled by the Organization under the provision of the Time Limit Rule of the Agreement (Article V of the August 21, 1954 National Agreement), and, therefore, this claim is not properly before this Board for consideration.

The record discloses that the first monetary claim was based on the allegation that Claimant was "unjustly suspended or dismissed" and was commenced by the Organization on July 7, 1964. This claim was denied, and was properly progressed on appeal up to and including the Master Mechanic, who denied the same on December 12, 1964. The claim was abandoned on that date. No further action was taken by the petitioner until July 7, 1965, a period of almost 7 months later, when the request was made to appoint a neutral physician.

On August 9, 1966, more than two years after the original claim was instituted, and more than one year after petitioner demanded re-examination by a neutral physician. This claim was filed on behalf of Claimant that he "be returned to service of the Carrier with full seniority, vacation privileges, health and welfare and life insurance rights unimpaired, and that he be compensated for all wages lost since July 14, 1966."

In view of the above facts included in the record, this Board finds that the petitioner abandoned the July 7, 1964 claim on December 12, 1964, and

did not institute a timely claim alleging a difference of opinion concerning the medical findings and requesting a neutral physician. Therefore, this case is procedurally defective in that it was not properly filed under Article V of the August 21, 1954 National Agreement.

This Board further finds that under Second Division Awards No. 3777, 4848, 2177 and 4924; and Third Division Awards No. 9447, 10251, 10329 and 12851, the original claim of July 7, 1964 cannot be resubmitted as has been attempted in the instant claim. Since this Board finds that it lacks jurisdiction because of violation of the time limit rule, the merits will not be considered, and this claim will be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1969.

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