

Award No. 6014
Docket No. 5876
2-SP(PL)-EW-'70

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. 114, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

SOUTHERN PACIFIC TRANSPORTATION COMPANY (PL)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Electrician Albert Susic was unjustly treated when he was withheld from service beginning August 19, 1968, due to physical restrictions instituted as a result of age, by the Carrier's Medical Department.

2. That accordingly, the Carrier be ordered to:

- (a) Restore the aforesaid employe to service, with all service and seniority rights unimpaired and compensate him for all time lost:
- (b) Reinstate all vacation rights for the aforesaid employe:
- (c) Pay Southern Pacific Employees Hospital contributions, including dependents' hospital, surgical, medical and death benefit premiums for all time that the aforesaid employe is held out of service.

EMPLOYEES' STATEMENT OF FACTS: Electrician Albert Susic, hereinafter referred to as the claimant, was regularly employed by the Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier, and regularly assigned prior to August 19, 1968, as an electrician under the supervision of H. A. Henderson, Master Mechanic, Western Division, with headquarters at Oakland, California.

On August 6, 1968, claimant was instructed by General Foreman E. Hoglund, to report to Dr. Cornelius Doherty at the Harkness Community Hospital and Medical Center, to undergo physical examination due to age. On August 14, 1968 as requested by the carrier, claimant was examined by Cornelius Doherty, M. D.

however, the carrier does not confide in outside doctors the responsibility of passing upon the physical qualifications of its employes but rather upon the chief surgeon of Southern Pacific Employees Association who is familiar with the duties required and performed.

The carrier here asserts that there is no basis or merit for the claim in this docket and respectfully requests that it be denied in its entirety.

The board's attention is further directed to the fact that claimant has relinquished all rights to service with the carrier and has been awarded annuity by the Railroad Retirement Board retroactive to August 19, 1968.

CONCLUSION

The carrier here asserts that the claim in this docket is entirely without basis or merit, and therefore respectfully requests that it 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 employee or employes involved in this dispute are respectively carrier and employee 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.

Claimant was a 75 year old employee of Carrier. He had been in service of Carrier since 1950. After several absences because of illness, he was returned to duty on February 8, 1968. Although he was released to full duty by his attending physician, the Carrier's supervisors limited his activities to light work. During the month of June, 1968, he was absent because of illness all but 4 working days. Carrier states that when he did work, he was unsteady and exhibited pronounced feebleness. Because of unsatisfactory performance, he was instructed on August 6, 1968, to report to the hospital for a further physical examination. Claimant reported for such examination on August 14, 1968, and the Chief Surgeon stated that for his age, he is alert, cooperative, with no manifestations of feebleness. This Chief Surgeon stated further that Claimant's general physical examination was within normal limits for a man of his age. The Chief Surgeon further stated, however, that in the best interests of the patient's safety, it was his judgment that Claimant be restricted from lifting weights over 25 lbs., climbing ladders, or working off the ground. Upon the basis of this report, Claimant was dismissed from service on August 18, 1968. On April 15, 1969, Claimant was awarded annuity effective August 19, 1968. Carrier has presented probative evidence in the form of medical reports and absentee records because of illness, to uphold the dismissal from service of Claimant. Rule 96 of the current Agreement, which outlines Electrician's work, shows conclusively that the work of an Electrician requires an agile employee physically able to lift large weights, and to perform heavy work both on and off the ground. It appears from the record that Carrier has been extremely patient with this Claimant for a long period of time prior to his dismissal in view of his past physical history. In line with this referee's prior

Award 5652, it is the finding of this Board that not only for the safety of Claimant, but for the safety of other employes working with Claimant, Carrier had every right to take the action of dismissing this Claimant from service for the reasons above set out.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of October, 1970.

CARRIER MEMBERS' CONCURRENCE TO AWARD 6014 (Docket No. 5876)

The Carrier Members are in accord with this Award, however, reference to Claimant's "dismissal" from service is incorrect. Claimant was "**withheld from service,**" as indicated in the claim, when it was determined he could not handle all the duties and responsibilities of his position; he was not "dismissed."

H. S. Tansley
H. F. M. Braidwood
W. R. Harris
P. R. Humphreys
J. R. Mathieu

DISSENT OF LABOR MEMBERS TO AWARD NO. 6014 (Docket No. 5876)

The referee, along with the majority, erred in adopting this Award based on their findings which read in part:

"Upon the basis of this report, Claimant was **dismissed** from service on August 18, 1968. On April 15, 1969, Claimant was awarded annuity effective August 19, 1968. Carrier has presented probative evidence in the form of medical reports and absentee records because of illness, to uphold the dismissal from service of Claimant. Rule 96 of the current Agreement, which outlines Electrician's work, shows conclusively that the work of an Electrician require an agile employe physically able to lift large weights, and to perform heavy work both on and off the ground. It appears from the record that Carrier has been extremely patient with this Claimant for a long period of time prior to his **dismissal** in view of his past history. In line with this referee's prior Award 5652, it is the finding of this Board that not only for the safety of Claimant, but for the safety of other employes

working with Claimant, Carrier had every right to take the action of dismissing this Claimant from service for the reasons above set out." (Emphasis ours.)

The emphasis on the above quote is made by us to point out the fact that the majority has ruled on a dismissal of the Claimant. This issue was not before the Board at all. The issue before the Board was that the Carrier unjustly withheld the Claimant from service beginning August 19, 1968, due to physical restrictions, but there is nothing in the record to the effect that the Claimant was dismissed from the Carrier's service. The Carrier, in their Ex Parte Submission page 8, or page 34 of the record, state the following:

"Report indicates that claimant informed Dr. Port that he was notified on August 18, 1968 that his employment was terminated on account of age. This was not true as claimant was not removed from service because of his age but because his physical condition would not permit him to perform the duties assigned to electricians."

Therefore, it appears that the dispute was decided on an issue not before the Board and an Award of this kind should be set aside in keeping with the Railway Labor Act, as amended, as the Board did not confine its decision to the issues in dispute.

D. S. Anderson
E. J. McDermott
R. E. Stenzinger
O. L. Wertz
E. J. Wolfe