

Award No. 728

Docket No. TE-733

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dozier A. De Vane, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ALTON RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Telegraphers on The Alton Railroad that Telegrapher E. L. Deveson be paid \$89.52, which represents the time lost December 28th, 1936, to January 12th, 1937, account improperly held out of service by the Carrier and not permitted to work his regularly assigned position at Mazonia, Illinois, on the alleged charge 'physical disability'."

EMPLOYEES' STATEMENT OF FACTS: "Mr. E. L. Deveson was employed by The Alton Railroad on August 6th, 1894, and thereafter remained in continuous service until retired on February 15th, 1938, account having arrived at the age of 65, in accordance with the provisions of the Railroad Retirement Act.

"Mr. C. W. Bearden, Superintendent, wrote him a letter which was dated December 22, 1936, to the effect that he would be removed from service as operator-leverman in the Mazonia tower account high blood pressure until such time as his condition improved.

"E. L. Deveson was held out of service from December 28, 1936, to January 12, 1937, inclusive, during which time he received no compensation from the railroad, after which he was permitted to return to service."

CARRIER'S STATEMENT OF FACTS: "Mr. E. L. Deveson, Operator, Eastern Division, had been under observation on account of high blood pressure since October 13th, 1933, and continued under observation up to and including November 30th, 1936, on which date it was found his blood pressure was such that he was deemed unsafe for service by the Carrier's medical staff. He was, therefore, withdrawn from service on December 28th, 1936, but was again restored to service on January 12th, 1937, after an examination had been made by one of the Carrier's physicians, which showed that his blood pressure had improved to such an extent that he was deemed safe to return to service."

POSITION OF EMPLOYEES: "Mr. E. L. Deveson was employed by The Alton Railroad on August 6th, 1894, his name placed on the Telegraphers' Seniority List, and remained thereafter in continuous service for many years. On December 22, 1936, Mr. C. W. Bearden, Superintendent, wrote him the following letter:

Bloomington, Ill., Dec. 22, 1936
File E-636

Mr. E. L. Deveson,
Operator-Leverman,
Mazonia, Ill.

Dear Sir:

I regret exceedingly that on account of your physical condition, it will be necessary for me to relieve you from the service as operator-

112 diastolic. During the interim that he was off he had some infected teeth removed, and it was thought that this probably helped his blood pressure. Mr. Deveson was permitted to resume his duties on January 1st, 1934.

"His physical observation record shows that he was examined at monthly intervals until January 29th, 1934, and after that date and until March 4th, 1935, he was checked up at intervals of two or three months, because his blood pressure seemed to be under better control. On March 4th, 1935, his blood pressure again showed a tendency to rise, and he was thereafter examined at monthly intervals until August 26th, 1935. However, on December 30th, 1935, his blood pressure showed a tendency to rise, and on November 30th, 1936, it was reported 255 systolic, 120 diastolic. On December 11th, 1936, the Carrier was advised by its Medical Department that they considered Mr. Deveson unsafe for service, and he was, therefore, relieved on December 28th, 1936. After another examination on January 11th, 1937, at which time his blood pressure was 190 systolic, 95 diastolic, the Carrier's Medical Department advised that it was safe for him to resume duties, which he did on January 12th, 1937.

"Mr. Deveson was removed from service when his blood pressure was found to have reached dangerous levels, and he was returned to service just as soon as the Carrier's medical staff deemed him safe to perform his duties.

"It is the position of the Carrier that this case is improperly before your Board, because of lack of jurisdiction, as there is no schedule rule or agreement or practice in effect with the Carrier which would require or can be construed as requiring payment for time lost by Mr. Deveson while held out of service on account of his physical condition, which was found to be such that he could not safely perform his regular duties.

"It is the obligation of the Carrier to assure itself that the physical condition of employes is such that they are safe to discharge their duties. It has been the practice of the Carrier to keep men who are not physically up to standard, under observation, and they are permitted to perform their regular duties as long as they are in physical condition to safely do so. This was done in Mr. Deveson's case, as evidenced by the physical observation record, quoted above.

"The Carrier's responsibility to the public, as well as to its employes, imposes upon it the serious obligation of knowing that the employes are in safe physical condition to perform their duties, in the determination of which the Carrier must be governed by the opinion of competent medical authority, familiar with the physical standards required of such employes."

OPINION OF BOARD: E. L. Deveson, while employed by the Alton Railroad as operator-leverman in the Mazonia Tower, was held out of service by the carrier from December 28, 1936, to January 12, 1937, inclusive, during which time he received no compensation from the railroad, which is the subject of this claim.

Carrier states that Mr. Deveson was removed from service when his blood pressure was found to have reached dangerous levels, and was returned to service as soon as the carrier's medical staff deemed him safe to perform his duties.

The prevailing agreement is silent on the right of the carrier to hold an employe out of service on account of his physical condition, and upon this ground the carrier questions the jurisdiction of the Board in this case. The Board is of the opinion that it has jurisdiction. Should it be determined that the carrier has the authority to hold an employe out of service on account of his physical condition and that there is no review of such action of the carrier, the employe would be denied a basic right given him under the contract. The Guarantee Rule of the existing agreement provides that employes will receive one day's pay within each twenty-four hours according to loca-

tion occupied, or to which entitled, if ready for service and not used, and the employe has the right under the contract to have reviewed any alleged infraction of this rule. The jurisdiction of this Board to review an alleged infraction of the rule clearly exists, and that is what the Board is called upon to do in this case.

The employe contends that under the prevailing agreement employes cannot be suspended from service without "just cause," meaning misconduct, violation of company rules, etc. The Board does not feel that the agreement is susceptible of such narrow construction. The carrier's liability for the safe operation of its transportation facilities makes it responsible for the fitness of its employes to hold their respective positions. While this liability does not give a carrier a license to hold employes out of service at will, where it acts in good faith and upon facts that justify such action it is clearly within its rights under the prevailing agreement.

In the Medical Standard of the Association of American Railroads, generally adopted by all lines, it is recommended that certain employes, including the class here involved, who upon examination are found to have a blood pressure of 200 or over, be held out of service pending further examination, and should be returned to service only with the approval of the properly designated medical officer.

Mr. Deveson had suffered from high blood pressure for a number of years prior to the date on which he was held out of service. He had been permitted to work for a period of almost two years prior to this date with a blood pressure of more than 200 systolic, during all of which time he was able to work and as far as the record shows performed his duties satisfactorily. This is urged as a ground of estoppel against the carrier's action in this case. Mr. Deveson was removed from service on advice of the Chief Medical Officer of the carrier that he considered Mr. Deveson unsafe for service because of his high blood pressure. It seems to us that where the question of safety to the public is involved the carrier is entitled to hold an employe out of service on advice of its Chief Medical Officer, or other qualified physician, that he considers the employe unsafe for service. This does not mean of course that the employe does not have the right to question the truth of such medical opinion, and if found to be untrue the rights of the employe would be the same as in other cases where the carrier acted improperly towards an employe. Here, however, there is no question as to the fact that this employe was suffering from high blood pressure. His own physician found his blood pressure 220 systolic on December 28, 1936, the day he was held out of service.

The employe also urges as a ground for allowing this claim the fact that the recommendation of the Chief Medical Officer was based upon an examination on November 30, 1936, and Mr. Deveson was not removed from service until December 28, 1936, at which time his blood pressure was considerably lower. The contention is that if it was safe for Mr. Deveson to work from November 30 to December 28, it was safe for him to work from December 28 to January 12, during all of which latter period his blood pressure was considerably lower. As an abstract proposition there is merit to the contention. However, one of the well-known defects of largeness in corporations is slowness of action, and that may have contributed to the delay in this case. But there is another and more controlling reason why this contention is not persuasive in this case. As previously pointed out, Mr. Deveson had suffered from high blood pressure for several years, during a large part of which time he had been permitted to work even with a blood pressure in excess of 200 systolic. Because of the peculiar nature of his case no action was taken to remove him from service until the report of the examination of November 30 was submitted to the Chief Medical Officer of the carrier in Baltimore, Md., and his recommendation as to the action that should be taken had been received. This required time. It also involved a risk for which the carrier was responsible under the law. Under these circumstances, it cannot

be said that the time involved was unreasonable insofar as this employe is concerned. Moreover, the record shows that this employe's case was given most careful consideration by the carrier.

Under the circumstances, in this case, the Division feels that the action of the carrier in temporarily holding Mr. Deveson out of service December 28, 1936, to January 12, 1937, inclusive, was justified.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the facts of record sustain the Carrier in the action taken in this case.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of September, 1938.