

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Dozier A. DeVane, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**WABASH RAILWAY COMPANY**

**STATEMENT OF CLAIM:** "Claim of Don R. Moats, section foreman, Alexander, Ill., that he be paid at section foreman's rate of pay from June 15th to October 10th, 1938, inclusive, during which period he was improperly held out of service."

**EMPLOYEES' STATEMENT OF FACTS:** "In compliance with instructions, Section Foreman Don R. Moats reported at the hospital in Decatur, Nov. 23, 1937, for examination in connection with alleged diabetic condition. On December 10, 1937 Moats was disqualified and removed from service as section foreman on account of allegedly being afflicted with diabetes.

"Acting upon advice of officers of the Carrier, Moats made application to the Railroad Retirement Board for annuity on January 11, 1938 account of total disability. That application was denied May 25, 1938.

"Moats was insured with the Metropolitan Life Insurance Company under the Carrier's Group Insurance Plan. That policy provided for benefit payments when the insured was disabled for service. On January 13, 1938 Moats was examined by a life insurance company doctor and under date of February 8th was advised that that doctor did not find him entitled to receive further benefits.

"On February 20, 1938, Moats was recalled to the hospital in Decatur for further observation, remaining there until the 24th. Some time after being released from the hospital Feb. 24th, Moats was offered a position as crossing watchman. For obvious reasons he declined to accept a crossing watchman's position, maintaining that he was physically able to work as a section foreman.

"On May 28th, 1938, Moats submitted himself to a minute examination by Dr. George H. Fleischli, Springfield, Ill. That doctor gave him a clean bill of health and pronounced him fit for any kind of work.

"On June 11th, 1938, Dr. Fleischli's statement regarding Mr. Moats' physical condition was conveyed to the Carrier with the request that Moats be immediately restored to the position of section foreman. Moats was restored as section foreman on October 10, 1938."

**POSITION OF EMPLOYEES:** "Employees' 'Statement of Facts' presents a fairly good chronology of difficulties experienced by Section Foreman Don R. Moats. Here is a man, who, according to his own statement, was never laid up sick a day in his life, yet on a technicality, was held out of service and deprived of an opportunity to earn a living for exactly ten months.

"(4) Notwithstanding the fact that Mr. Moats had been disqualified from service as a Section Foreman, the Division Officers on March 25 and 29, 1938 offered him a regular position as Crossing Watchman at Jacksonville, Illinois, rate \$81.55 per month, and that Mr. Moats did not reply to the Division Engineer's letter offering him the position in question.

"(5) Mr. Moats was out of service as a Section Foreman from December 12, 1937 until October 8, 1938 on account of his physical condition.

"When consideration is given to these facts and the further fact that the determination of any question with respect to Mr. Moats' physical condition does not come within the province of the National Railroad Adjustment Board, it is obvious that his claim for compensation at Foreman's rate from June 15, 1938 to October 10, 1938 is without basis."

(Exhibits omitted.)

**OPINION OF BOARD:** The claimant in this case, Section Foreman Don R. Moats, was laid off for approximately ten months because of the condition of his health. He was laid off on December 12, 1937 on the recommendation of the Surgeon-in-Charge of the Wabash Employees' Hospital. Claimant was afflicted with diabetes and had been under close observation by the hospital authorities for a number of years, but the occasion in question was the first time it had been necessary to hold him out of service on account of his physical condition.

Claimant was insured with the Metropolitan Life Insurance Company under Carrier's Group Insurance Plan. The policy provided for benefit payments when an employe was disabled from service. On January 13, 1938 claimant was examined by the Insurance Company's physician and on February 8, 1938 notified that as the Company physician did not find him disabled within the terms of the insurance policy, he would not receive any further benefits. Carrier was furnished with a copy of this letter. In the Opinion of the Board this case turns on the question as to whether Carrier fulfilled its obligation to claimant after receipt of copy of this notice from the Insurance Company.

On February 20, 1938 claimant was recalled to the Hospital for further observation, remaining there until the 24th. Sometime later he was offered a position as crossing watchman, which he declined to accept, maintaining that he was physically able to work as a section foreman.

Having heard nothing further from Carrier claimant on May 28, 1938 submitted himself for examination by an independent physician who pronounced him fit for any kind of work. On June 11th Carrier was furnished with a copy of this report, with a request that he be immediately restored to his position as section foreman. He was restored on October 10, 1938.

This Board held in Award No. 728 that "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." The Board also said in that case that "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."

When Carrier removed claimant from service in this case it clearly acted within its rights but no satisfactory reason is shown for the long delay in restoring him to service. Carrier was put on notice early in February, 1938 that the Insurance Company would cease paying benefits to this employe and while the employe was immediately recalled to the Hospital for further observation, the report of this examination was not made a part of the record in this case and all other reports subsequent to December 12, 1937 which were made a part of the record show the employe physically able to work.

In the absence of any showing by Carrier to the contrary, the Board finds that the employe was physically able to return to work on or before June 15, 1938 and that Carrier violated the Agreement when it held him out of service beyond that date.

**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 Carrier violated the current agreement when it held claimant out of service on and after June 15, 1938.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 27th day of September, 1939.