

Award No. 9509

Docket No. MW-11299

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the effective Agreement when, without just and sufficient cause, and without benefit of hearing, it dismissed and/or held out of service Dockbuilder James J. Cerchio effective as of April 8, 1958.

2. Mr. James J. Cerchio be reinstated to his former position, with seniority, vacation and all other rights unimpaired and that he be reimbursed for all monetary loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant employe has been continuously employed by this Carrier since October 23, 1940.

On July 7, 1956, the claimant was employed as a Dockbuilder at Jersey City, New Jersey and, while assisting in a pile driving operation on that date, he suffered a head injury. As a result of such head injury, the claimant was unable to perform any service for the Carrier for a period of a little over fifty (50) days or until August 29, 1956, at which time he resumed full active service as a Dockbuilder for this Carrier. The claimant was examined by the Carrier's Chief Surgeon (Dr. Mishler) on September 27, 1956 and again on January 3, 1957 and was pronounced physically and mentally fit and qualified to pursue his regular duties as a Dockbuilder.

Because of the claimant's inability to obtain a satisfactory settlement from the Carrier's Claim Department, he engaged the law firm of Pearlman and Pearlman to represent and assist him in effecting and obtaining a satisfactory settlement of his personal injury claim.

The claimant's attorney and the Carrier's attorney subsequently agreed to settle the personal injury claim in favor of the claimant in the amount of \$6,000 and then applied for and were granted a "CONSENT JUDGMENT", a photocopy of which appears as the next page of the Employes' initial submission.

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 19, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period." (Emphasis ours.)

Therefore, should the Board find good and sufficient reason for a sustaining Award within the limitations of its authority the Carrier should be entitled to deduct any and all earnings by the Claimant during the period for which compensation is claimed, including unemployment compensation, if any.

All data herein have been discussed with or are known to either the Claimant or his Representatives.

(Exhibits Not Reproduced)

OPINION OF BOARD: While working as a Dockbuilder at Carrier's Floatbridge #2, Jersey City, New Jersey, on July 7, 1956, Claimant James J. Cerchio was injured when a broken piece of wood piling struck his head. As a result of the injury Claimant was hospitalized until July 14, 1956. On August 15, 1956, Claimant was examined by the Carrier's Chief Surgeon and was found qualified for return to service. Claimant did return to service on August 23, 1956, and continued in service for approximately 19½ months.

On April 3, 1958, Claimant was disqualified for all service by the Carrier's Chief Surgeon; thereupon Claimant was removed from all service effective April 8, 1958. The charging part of the claim herein alleges that "The Carrier violated the effective Agreement when, without just and sufficient cause, and without benefit of hearing, it dismissed and/or held out of service Dockbuilder James J. Cerchio effective as of April 8, 1958." While Claimant's name remained on the seniority roster after April 8, 1958, and while the Carrier states that he "entered the employ of the Carrier on October 23, 1940 and has maintained an employment relationship at all times since that date", Claimant has not been permitted to perform any service with the Carrier since April 8, 1958.

At the outset it is to be noted that one of the Carrier's contentions herein is that the claim was not processed by the General Chairman in strict accordance with the requirements of Article V, Section 1 (b), of the August 21, 1954, National Agreement. In this respect both parties appear to have been somewhat uncertain as to just how this particular claim should be handled procedurally. Also the Carrier's Chief Engineer appeared to concur in the method of handling utilized and he moreover agreed by letter of September 18, 1958, "to extending the time limitation rule until the matter is disposed of by Dr. Misler". Carrier's present objection as to procedure accordingly must be rejected.

Turning to the merits of the case, it is to be emphasized that the Carrier's Chief Surgeon did not disqualify Claimant on the basis of any actual physical examination. Indeed, having found Claimant physically qualified by the August 15, 1956 examination, the Chief Surgeon likewise found him qualified when the Chief Surgeon again examined him on September 27, 1956, and on January 3, 1957. The Carrier candidly recognizes that the disqualification was based upon, or was the immediate result of, assertions of

disability made by Claimant in connection with a court action brought by Claimant against the Carrier under the Federal Employers' Liability Act seeking damages for the aforementioned injury. In the proceedings leading to the settlement of that action for the sum of \$6,000.00 Claimant did strongly assert that the injury left him permanently disabled. He did not assert, however, that he was totally disabled. See Third Division Award 8067. It is significant that nowhere in the Record is there any probative medical testimony or finding based upon actual physical examination of Claimant's person to support the Carrier's conclusion that Claimant was physically disqualified for all service with the Carrier (by disqualification from all service the Carrier ostensibly intended a permanent disqualification, but a Carrier statement quoted hereinbelow suggests that this was not necessarily the Carrier's intent). Nor was there any jury finding regarding the matter, the court's disposition of the action having been based entirely upon the settlement reached by the parties. Moreover, unlike the conclusion of this Board in Award 6740, it cannot reasonably be urged in the present dispute that the court action was settled on the assumption that the employee's disability was total and permanent.

The Carrier contends that Claimant is estopped, by his aforementioned assertions of disability, from now asserting that he is physically qualified for service. However, to the extent that elements of estoppel are actually involved in Claimant's past actions, they are offset in part at least by elements of estoppel growing out of the Carrier's own position, held for a period of over 19 months and based upon three physical examinations given Claimant by the Carrier's Chief Surgeon, that Claimant was physically qualified for service; as noted above, too, the Carrier did permit Claimant to remain in service during said period, his disqualification not occurring until a few days after the court action was settled on March 25, 1958.

While the Carrier would be unreasonable in permanently disqualifying Claimant for all service with the Carrier solely on the basis of his court action assertions of disability, the Carrier might justifiably temporarily disqualify him from service on the basis of those assertions (including his assertion that he had put in the time but had not been able to fully perform the job after his injury) until such time as he should furnish medical evidence of his qualification. In the latter regard, the Carrier states that "a physically disqualified employee continues to retain and accumulate seniority in his respective class or craft and can return to service any time that his physical and mental condition becomes such that he is again able to perform his work in a safe and competent manner". But the Carrier declares that Claimant "by his own admissions is not such an employee and has not to this date furnished any authoritative proof that he is". Certain statements by Claimant in his deposition of October 24 and 29, 1957 (in connection with the court action) leave some doubt as to whether Claimant would have made probative medical evidence available when he was disqualified—in any event, insofar as the Record indicates he did not offer any medical report of his own physician when or after he was disqualified by the Carrier's Chief Surgeon. Nor did Claimant, upon disqualification, request a physical examination by Carrier physicians (although the Carrier did refuse Claimant's request that he "be examined by a third doctor"). In light of these considerations Claimant is not entitled to return to service as a matter of right until his fitness has been affirmatively determined, nor is he entitled to compensation for time lost from service with the Carrier during the period beginning April 8, 1958, and continuing to the time when the Carrier becomes obligated (if it does) to return Claimant to active service pursuant to the procedure specified in the final paragraph of this Opinion.

Various procedures have been utilized by the Adjustment Board to determine the qualification of employees to return to active service in cases of the general type involved herein. Included among these procedures are the following. In the Findings of First Division Award 13605 it is stated, in part:

"* * * Carrier has held him out of service since that date. We find the carrier's action in doing so fully justified for it appears that claimant's condition was such that his legs might fail him at any time. * * * He was at that time not a safe employee to have on duty as a brakeman or flagman.

"However, that fact does not forever preclude the claimant from returning to active service. Restoration to active service of the claimant is of course, conditioned upon his meeting the carrier's requirements as to physical fitness. Claimant should be restored to active service with the carrier whenever he can show he is physically fit and able to perform the work to which he seeks to be actively restored.

"In order to determine that fact he should submit himself to the medical consultants of the carrier who are retained by it for that purpose. If he is not satisfied with their conclusions then an independent examination should be made by a qualified specialist to be selected by agreement between the parties to this dispute. If the findings are that claimant is now physically fit to return to active service then carrier is obligated to restore him thereto; otherwise it is not."

In First Division Award 15888 the Findings state, in part:

"This Division is of the opinion that this claimant is entitled to a physical examination to determine if he is able to do the work that he is entitled to under the current agreement.

"We direct that claimant be afforded a physical examination by carrier's medical staff to determine his ability to perform the service he is entitled to perform under the current agreement within his seniority rights. If the claimant is dissatisfied with the findings of the carrier's medical staff, then claimant should submit to an examination by a board of three competent physicians, selected one by the carrier, one by the claimant, and the third by the two thus selected; their findings to be used as a basis for determining his physical fitness to perform the service his seniority will permit. * * *

The Findings in First Division Award 14761 state, in part:

"This Division on many occasions has refused to make judgments concerning matters where medical opinion was required. In a substantial number of instances the Division has directed that a controversy such as the instant one be submitted to impartial medical authority for determination. Such an action is in order here. The parties shall by agreement select a panel of three impartial physicians to whom the claimant may submit for a physical examination to determine whether he is physically able to resume work as a trainman. * * * Should such panel find that claimant is physically able to resume work as a trainman, the carrier shall restore him to the seniority roster with unimpaired rights."

Findings in First Division Award 19288 state, in part:

"* * * we further find that claimant is entitled to an examination by the carrier's examining physician to determine whether he is physically able to return to work; that if said physician finds he is unable to return to work, claimant may, if he chooses, engage his own physician, and if the latter finds he is able to return to work, he (claimant's physician) and the carrier's physician shall agree upon a third physician to examine claimant, and the decision of a majority of said physicians as to claimant's ability to return to work shall be binding on the parties hereto. * * *"

The Third Division in the Opinion to Award 8724 states, in part:

"* * * Accordingly the Board directs Carrier to have Claimant, if he now wishes to resume employment with Carrier, properly examined by competent expert or experts. If Claimant then is shown to meet Carrier's reasonable rules for physical fitness (including vision), Carrier shall continue him in service after the effective date of this Award. Otherwise, Carrier's obligation to Claimant shall cease as of said date."

In Third Division Award 4816 the case was remanded to the property "for the further consideration of the issue of the fitness of the Claimant to be restored to his position, if he wishes such a determination". In that Award the Board did not specify any specific procedure to be utilized in making the fitness determination, but the Board stated that its disposition of the case would "be without prejudice to the right of the Claimant to again come to this Board should he feel that the Carrier has arbitrarily held him out of service, in the light of the facts that may be further developed by the parties".

In the present case the Board directs that Claimant Cerchio's physical fitness to return to active service with the Carrier be determined forthwith, if Claimant does desire to resume such service. The Board directs that Claimant shall be afforded a physical examination by Carrier's medical staff to determine his ability to perform the service he is entitled to perform under the current Agreement within his seniority rights; if the Claimant is dissatisfied with the findings of the Carrier's medical staff, then Claimant shall submit to an examination by a panel of three competent physicians, to be selected one by the Carrier, one by Claimant, and the third by the two thus selected, and the decision of a majority of said panel as to Claimant's ability to return to service shall be binding on the parties hereto.

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 Employee involved in this dispute are respectively Carrier and Employee 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 claim should be disposed of in accordance with the Opinion.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 21st day of July, 1960.