

Award No. 11029

Docket No. MW-9995

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The dismissal of Crossing Watchman Massimo Prater from service on April 8, 1956 was improper, without just and sufficient cause, and in violation of the effective agreement.

(2) Crossing Watchman Massimo Prater be restored to service with seniority and all other rights unimpaired and that he be reimbursed for all wage loss suffered account of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: Claimant, Massimo Prater, prior to April 8, 1956, the date of his removal from service, occupied the position of Crossing Watchman at Dock Street Crossing, Plattsburgh, New York, from August 12, 1943. He was 79 years of age at the time and had been an employe of the Carrier for 54 years. After having been examined by two Company Doctors as to his physical condition and ability to carry on his work, he was removed from the position on the advice of the Chief Surgeon of the Carrier as unfit for service. After having been examined by two other physicians of his own choosing, a protest was filed on behalf of the Claimant against his wrongful removal or dismissal. The physical findings by these two doctors coincided to a great extent with those of the Company Doctors but they differed in their conclusions, Claimant's Doctors in their opinions finding "he was in good physical condition for his age" and should be able to continue at the work he was doing. After the protest by Claimant that he had been wrongfully dismissed, Carrier conducted another examination of the Claimant by a third Company Doctor who recommended that he not be allowed to work.

In a similar situation, though Award 4663 (Connell) was a sustaining award, it was observed: "This Board has always taken the position that it recognized the Carrier's right to remove upon advice of its Chief Medical Officer an employe who because of some physical disability or disease, became a hazard."

There is a conflict between the Company's Doctors and those engaged by Claimant with respect to Claimant's ability to perform the duties of

a Crossing Watchman because of his physical condition. The medical opinion of his doctors is practically the only evidence Claimant has offered in support of his contention that he was removed from service or dismissed without just and sufficient cause. It is not within the province of this Board, to resolve this conflict or controversy between these physicians, consequently this claim will be dismissed.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.