

Award No. 12410
Docket No. MW-12019

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ERIE RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when it disqualified and withheld Trackman Willard Hackworth from service during the period from June 25, through July 13, 1959.

(2) Trackman Willard Hackworth now be reimbursed for the wage loss suffered account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant entered the Carrier's service as a Trackman as of June 14, 1957 and was regularly employed as such on the Carrier's Marion Division.

On June 24, 1959 the claimant was instructed to and did report to the Carrier's Local Physician, Dr. Thomas James, of Huntington, Indiana for a physical re-examination. Following the completion of the re-examination, the claimant was disqualified and withheld from service by the Local Physician, effective as of June 25, 1959.

Subsequently, the claimant was qualified for service by the Carrier's Chief Surgeon as will be noted from the following:

"August 25, 1959

Mr. T. J. Sanok

I am in receipt of a letter from Mr. Leonard Scrino, General Chairman, Brotherhood of Maintenance of Way Employes, dated August 18, under his file 1083-G, in which he states that he feels Marion Division Trackman Willard Hackworth was unjustly dealt with and should be compensated for loss of 13 days of work resulting from disqualification by Dr. Thomas James of Huntington, Indiana, on June 24, 1959, because of defective color vision.

In accordance with the foregoing provisions of the understanding, Carrier submits that if either claimant or Petitioner is dissatisfied with the results of the reexamination, then any claim for time lost account thereof would have to come by way of the conditions set forth in the understanding. Under agreement rules, the only way that claimant would be entitled to time lost account held out of service or restricted from performing service would be for a "neutral physician" to rule that the "employee's condition was not such as to render him unfit to perform his usual duties." Then, and only then, would the claimant be entitled to be "compensated for wage loss suffered." Thus, Carrier submits that this plea for equity by Petitioner must fail.

V. CONCLUSION

Carrier has heretofore shown that Petitioner's claim is not founded on any rule of agreement and account thereof it is simply a plea for this Board to grant equity. Awards 8057, 7577, 8154, 7480, 7412 and 7068 cited, support the principle that this authority the Board does not have.

Carrier has also heretofore shown that the decision to hold claimant out of service pending final decision of the Chief Surgeon was neither arbitrary, capricious nor unreasonable. It was based upon, and supported by, sound reasoning of learned medical men. This Board has consistently held that it is not competent to substitute its judgment for that of men schooled in the field of medicine. Awards 5815, 6764, 6942.

The Carrier reiterates that the liabilities it is confronted with insofar as the physical condition of its employees is concerned are tremendous. This being as it is Carrier should have the absolute right to insure that every possible precaution is taken to preclude against injury to itself, its employees and the public. Awards 875, 5908, 8049, 8394 and many others.

Finally, Carrier has shown that the "Understanding on Physical Re-examinations" is applicable to the facts and circumstances which gave rise to this dispute. Therefore, any recourse that the claimant or Petitioner might have would have to come by way of explicit provisions of this understanding. Thus, the only possible way that claimant can be entitled to be "compensated for wage loss suffered" is through authoritative proof that he should not have been held or restricted for service.

Based upon the facts and authorities cited, Carrier submits that this claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute. Claimant had been away from work since August 8, 1957. When he returned on June 24, 1959, he was required to submit to a physical examination. On the latter date he was examined by a designated company physician at Huntington, Indiana, who found that Claimant had a vision defect and advised Carrier to hold Claimant out of service until the report was reviewed by Carrier's Chief Surgeon.

On July 7, 1959, the Chief Surgeon wrote to Carrier's Division Engineer as follows:

"ERIE RAILROAD COMPANY"

July 7, 1959

Mr. R. H. Jordan:

Report of physical examination submitted by Dr. James dated June 24, covering Trackman Willard Hackworth shows that he has defective color vision. This means that Mr. Hackworth must not operate a motor car or do any work which includes interpretation of color.

May I have your acknowledgement.

/s/ W. E. Mishler
Chief Surgeon"

The Division Engineer received Dr. Mishler's letter on July 9, 1959 and wrote to the Track Supervisor on the same date who received it on Monday, July 13, 1959. Claimant returned to service on July 14, 1959.

Both parties agree that only the Carrier's Chief Surgeon may disqualify an employee. Carrier contends, however, that the local physician did not disqualify Claimant but only directed that he be held out of service until the Chief Surgeon gives his decision. The issue is whether the local physicians disqualified Claimant. The record does not support Petitioner's position.

The local physician found that Claimant had defective color vision. On the basis of that finding, Claimant was held out of service until the Chief Surgeon made his findings. It is, perhaps, unfortunate that the administrative process moved slowly so that Claimant was deprived of work for about two weeks. But there is no evidence in the record that any agents of the Carrier or the physicians were deliberately dilatory, arbitrary or capricious.

On the basis of the record, we conclude that the local physician did not disqualify Claimant.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of April 1964.