

Award No. 13879
Docket No. MW-13615

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned Mr. T. A. Geary to temporarily fill the first trick position of Drawbridge Tender at Smallhaus, Kentucky, pending award by bulletin, instead of assigning Mr. W. H. Stevenson thereto.

(2) The Carrier further violated the Agreement when aforesaid position was awarded to B&B Carpenter T. W. Moran instead of awarding it to Mr. W. H. Stevenson who was the senior applicant therefor.

(3) The Carrier further violated the Agreement when it failed to post the name of the successful applicant for the position advertised in Bulletin No. 57, dated July 26, 1961, within eight (8) calendar days after "Friday, August 4, 1961."

(4) Claimant W. H. Stevenson now be assigned to the first trick position of Drawbridge Tender at Smallhaus, Kentucky.

(5) Claimant W. H. Stevenson be allowed pay at the first trick Drawbridge Tender's straight-time rate for an equal number of hours as were paid at straight-time rates to junior employes and at the time and one-half rate for an equal number of hours as were paid at said rate to junior employes, beginning with August 14, 1961 and to continue until such time as the claimant's application for the position of Drawbridge Tender, advertised in Bulletin No. 57, is honored and he is assigned to said position.

EMPLOYEES' STATEMENT OF FACTS: Under date of July 26, 1961, the Carrier issued Bulletin No. 57 advertising the position of Drawbridge Tender at Smallhaus, Kentucky.

Claimant Stevenson, who holds seniority as Drawbridge Tender from May 11, 1943, timely placed his application for the aforementioned position.

being held negligent in retaining a clerk in its service who was suffering from epilepsy and who had limited vision, and whose duties required him to traverse hard-surfaced floors, and in permitting packages to lie on the floor where the employe could trip over them due to his limited vision.

In addition, a railroad was held negligent and responsible in damages in the case of *Shepard Admx. v. NYNH&H R. Co.*, 300 F. 2d 129, by the United States Court of Appeals, Second Circuit. In that case the company was held negligent due to having rehired an employe knowing of his prior stay at a mental hospital and without having an allegedly fully adequate report on his condition, and knowing of his conduct after reemployment.

Also, in the case of *Bayles v. L&N R. Co.*, 129 So. 2d 679, the court held that Bayles had alleged a cause of action against this railroad when he charged that his injuries were due to his being assigned work which this railroad knew he was physically unable to perform. In that case the court said:

"But the United States Court of Appeals for the Third Circuit has said that where a plaintiff can prove that management forced a sick employe, of whose illness they knew or should have known, into work for which he was unfitted because of his physical condition, a case is made out for the jury under the Federal Employers' Liability Act. *Dunn v. Black Lick Railroad*, 3 Cir., 267 F. 2d 571; *Nuttall v. Reading Company*, 3 Cir., 235 F. 2d 546. See also *Dunn v. Conemaugh & Black Lick Railroad*, D.C., 162 F. Supp. 324, and *Brown v. Pennsylvania Railroad Co.*, D.C., 179 F. Supp. 858."

In conclusion carrier reiterates that it was entirely justified in disqualifying claimant Stevenson for position as drawbridge tender at Smallhaus, Kentucky, when it had sound basis for concluding that he was unable to safely perform those duties due to his impaired physical condition. Further, that its action in so doing was not arbitrary or unreasonable, and was not in violation of any provision of the MofW agreement. In fact, had the carrier done otherwise it would have been derelict in meeting its responsibility for the safety of its employes and the traveling public.

Carrier reiterates that the claim is improperly before this Board and should be dismissed, but if for any reason it is considered on its merits there is no basis under the agreement or otherwise for an affirmative award and the claim should be denied in its entirety.

OPINION OF BOARD: This claim arose out of the refusal of the Carrier to assign the Claimant to the position of Drawbridge Tender at Smallhaus, Kentucky.

The record discloses the Claimant, who was the senior applicant for the position was denied that position, because in the judgment of the Carrier's Officers, Claimant was physically unable to perform the duties of Drawbridge Tender at Smallhaus. This judgment was confirmed by the Carrier's District Surgeon who made an examination of the Claimant.

The Carrier is charged with the responsibility of maintaining a safe and efficient operation. In this case we find that the Carrier's officers, having knowledge of Claimant's physical infirmities acted prudently when they re-

quired the Claimant to submit to the physical examination above referred to, and in refusing, on the basis of the District Surgeon's findings to appoint the Claimant to the position of Drawbridge Tender at Smallhaus, Kentucky.

There being nothing in the record to contravene the judgment of the Carrier's officers, nor the findings of the District Surgeon, and no evidence produced to support the allegation that Carrier acted in an arbitrary, capricious or discriminatory manner, we must deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.