

Award No. 14249
Docket No. MW-14670

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, beginning on November 30, 1962, it unjustly withheld Assistant Section Foreman Dean Merriman from service. (Carrier's File 30-5-84).

(2) Mr. Dean Merriman now be returned to service with seniority, vacation and all other rights unimpaired and he be allowed payment at the Assistant Section Foreman's rate for the assigned working hours actually lost while out of service (Rule 19(f)).

(3) Mr. Dean Merriman also be reimbursed for any monetary loss he may have suffered in connection with the Travelers Insurance Company Group Policy GA 23000 as the result of the change in his employment status.

EMPLOYEES' STATEMENT OF FACTS: Under date of November 30, 1962, the Carrier's Roadmaster advised the claimant:

"Brewster, Ohio
November 30, 1962
File 201

Mr. Dean Merriman:

Confirming my instructions of this date, you are to be held out of service effective Friday, November 30, 1962, 4:30 P.M., pending medical qualifications by Dr. Houk.

/s/ G. D'Anniballe

cc: G. F. High
gda/a"

On December 3, 1962, in compliance with instructions issued by the Carrier, the claimant submitted to a physical examination by Dr. Kare Alfred of Cleveland, Ohio.

ant had "a rather severe degenerative process between L-3 and L-4 and L-5 and sacrum." He noted that "such a back may go along quite well with no discomfort, but it does not take much to make it symptomatic and then incapacitation may be quite severe." The examinations and recommendations of Dr. Alfred and Dr. Dundon confirmed the findings of the claimant's personal physician, who had examined the claimant upon being consulted voluntarily by him in 1961 and 1962 (Carrier's Exhibits A and B). On this basis, the Carrier's Medical Director, on December 5, 1962, disqualified the claimant for all service.

On December 27, 1962, Claimant Merriman initiated a complaint with the roadmaster that he had been "dismissed" from service. Copy of that claim as made in the letter referred to is attached as Carrier's Exhibit E.

On January 4, 1963, Roadmaster G. D'Anniballe made reply advising the claimant that he had "been disqualified for all service by Dr. J. W. Houk, M.D., Medical Director of the Nickel Plate Railroad." Copy of that reply is attached as the Carrier's Exhibit F.

On January 10, 1963, a claim was submitted by the Vice Chairman of the organization to Carrier's Division Engineer. In this letter the Vice Chairman requested that Claimant Merriman "be reinstated immediately" and "reimbursed for time lost to which he is entitled under the provisions of our effective working agreement." Copy of that letter is attached as Carrier's Exhibit G.

Copies of correspondence reflecting the subsequent handling of the claim on the property are attached hereto as Carrier's exhibits and identified as follows:

- Exhibit H — February 25, 1963 — Denial of Claim — Division Engineer to Vice Chairman.
- Exhibit I — February 26, 1963 — Appeal — Vice Chairman to Assistant Chief Engineer.
- Exhibit J — March 1, 1963 — Denial of Appeal — Assistant Chief Engineer to Vice Chairman.
- Exhibit K — March 20, 1963 — Appeal — Vice Chairman to Chief Engineer.
- Exhibit L — April 4, 1963 — Denial of Appeal — Chief Engineer to Vice Chairman.
- Exhibit M — April 11, 1963 — Appeal — Vice Chairman to Director of Personnel.
- Exhibit N — June 7, 1963 — Denial of Appeal — Director of Personnel to Vice Chairman.
- Exhibit O — July 10, 1963 — Letter — Vice Chairman to Director of Personnel.
- Exhibit P — July 17, 1963 — Affirmation of Denial — Director of Personnel to Vice Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this case is whether Carrier, wrongfully, found Claimant to be physically disqualified for all service.

That a wrongful physical disqualification may be found by this Board to be a violation of an agreement, without specific provision therein, has been established in *Gunther v. San Diego & Arizona Eastern Railway Company*, 382 U.S. 257.

THE FACTS

Claimant holds seniority in the Track Department as a laborer with seniority date of October 23, 1950; and, as an assistant section foreman with a seniority date of April 6, 1953.

On June 22, 1961, Claimant alleged that while working as an assistant foreman and while in the process of assisting in lifting a 39-foot rail, he sustained injury to the lower portion of his back. He lost no time as a result of the incident. However, thereafter, he initiated an action against Carrier, for damages, in a United States District Court. The action was settled on November 29, 1962, the amount of settlement being \$3500.

Of great evidentiary weight is Carrier's recitation in its Submission as to what occurred during the settlement conference, which stands undisputed in the record:

"At the conference the claimant stated that his back still bothered him at times and he claimed that he had difficulty performing some of the heavier duties usually performed by an assistant section foreman while working with his gang. He said he had been accordingly confining his activities to 'light' work. This, incidentally, was done without the Carrier's knowledge or consent. At this conference the claimant's attorney (Mr. Balzarini) provided the Carrier's representative with copies of two reports from the claimant's personal physician, Dr. Mayer S. DeRoy, an orthopedic specialist of Pittsburgh. In the earlier of these reports, dated September 22, 1961, the claimant's doctor stated that the claimant had an 'osteoarthritis of the lumbar spine of long standing' which had been made 'clinically active and symptomatic.' He advised that the claimant should 'continue to do light work' and that he was not in condition to return to heavy labor and that the question of his physical ability to do so was not clear. The second report made by Dr. DeRoy on October 25, 1962, as a result of a physical examination conducted the same day, concluded that there was no change in the claimant's physical status. . . .

The Carrier's representative, at the conference referred to, informed the claimant and his attorney that the only medical report the Carrier had as to the claimant's alleged back injury was a report from the Carrier's local Company doctor at Dillonvale, Ohio, a general practitioner, such report being dated June 22, 1961. The Carrier's representative further informed the claimant and his attorney that in view of Dr. DeRoy's report and the limited information contained in the Carrier's files, he (the Carrier's representative) questioned the ability of the claimant to perform the laboring duties customarily performed by an assistant section foreman while working with his gang. The Carrier's representative further advised that he felt the claimant's physical qualifications to work should be passed on by the Carrier's Medical Director. Neither the claimant nor his at-

torney objected and the following day, November 30, 1962, the claimant was advised that he was being withheld from service pending physical qualification by the Carrier's Medical Director."

Pursuant to direction of Carrier's Medical Director, Claimant, on December 3, 1962, was examined by Dr. Karl S. Alfred, a specialist in orthopedics. Dr. Alfred also arranged for X-rays of the Claimant's back which were examined by a specialist in that field. On December 4, 1962, Dr. Alfred submitted to Carrier's Medical Director the findings of the examinations and his diagnosis and prognosis in which he concluded:

"This man has a rather severe degenerative process between L-3 and L-4 and L-5 and sacrum. This is of long duration. Such a back may go along quite well with no discomfort, but it does not take much to make it symptomatic and then incapacitation may be quite severe. I would advise caution in this man's activities and I think he is a poor risk for any activity requiring any bending or lifting."

In substance the findings of Dr. Alfred confirmed those of Claimant's own doctor, Dr. DeRoy, also an orthopedic specialist. Dr. DeRoy first examined Claimant on September 22, 1961—three months after the date on which Claimant alleged he was injured. He concluded:

"This man should continue with light work, inasmuch as he has shown his desire to continue working in spite of residual complaints. He is not in condition to return to heavy labor at this time, and the question of physical ability to do so is not clear at present."

On October 25, 1962—a month before the conference during which Claimant's action in damages was settled—Dr. DeRoy re-examined Claimant and concluded:

"This man's present status is similar to that of previous examination, there being apparently no change."

With the reports of Dr. DeRoy and Dr. Alfred before him, Carrier's Medical Director found Claimant physically disqualified for all service. Upon receipt of notice of the disqualification, Claimant caused himself to be examined by three doctors, each a general practitioner, one of whom was his personal physician. The scope of their respective clinical examinations is not revealed. In brief statements of conclusion, not supported by facts, we find the following:

Dr. Martin:

"It would be my opinion that he (Claimant) is physically able to work."

Dr. Brettell:

"He (Claimant) has no complaints and his examination would suggest that he is physically able to work."

Dr. Heeley:

"He (Claimant) has no pain on bending, lifting or walking and he is able to do any kind of work."

Pointing to the afore three statements, the Organization made demand upon Carrier to withdraw its findings of physical disqualification and to make whole Claimant for loss of wages flowing from the finding. Carrier refused.

RESOLUTION

It is the prerogative of Carrier to determine the physical qualifications of its employes so long as its findings are not arbitrary, capricious or exercised in bad faith or for the purpose of circumventing the terms of the Agreement.

It must be conclusively presumed that Claimant was satisfied that the diagnosis and prognosis of Dr. DeRoy, upon which he relied in his action for damages, was correct; otherwise, he would have been perpetrating a fraud on the court. Carrier might well have found him physically disqualified on the basis of Dr. DeRoy's findings and conclusions, alone. But, out of what appears to be an excess of caution in the protection of Claimant's rights, Carrier caused Claimant to be examined by an orthopedic specialist who confirmed the findings of Claimant's own doctor. Only then did Carrier's Medical Director find Claimant to be physically disqualified. We find that Carrier's conclusion of disqualification was predicated upon credible, concurring and expert medical diagnoses and prognoses; and, its action, in classifying Claimant as physically disqualified, did not violate the Agreement.

We attach no probative value to the statements of three doctors who examined Claimant after the disqualification. Claimant had already had his day in court. There must be an end to disputes. The Gunther case does not stand for the proposition that once an employe is fairly found physically disqualified that he can later claim that it was wrongful.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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; 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 18th day of March 1966.

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