Award No. 2144
Docket No. CL-2170

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhod that Wm. F. DeLong be restored to service with full seniority rights unimpaired and compensated for all wage loss suffered, retroactive to June 17, 1941.

JOINT STATMENT OF FACTS: Mr. William F. DeLong entered the service of the Chesapeake and Ohio Railway Company as clerk in the Mechanical Department at Stevens, Kentucky yard on July 7, 1926, transferring to the Transportation Department on October 21, 1939 as Check Clerk in the Cincinnati Freight Station, Cincinnati, Ohio, his services being continuous until June 17, 1941, on which date he was advised by the Carrier that he was disqualified for any further service with the Railway Company, and directed to make application to the Railroad Retirement Board for annuity. Mr. DeLong thereafter performed no service for the Railway.

POSITION OF EMPLOYES: Shortly prior to June 17, 1941 Mr. DeLong was instructed by his Superior Officer, Agent J. T. Earle, to report to the Chesapeake and Ohio company doctor for an examination, after which he returned to work and continued to perform service until June 17, 1941, on which date he received the following letter from Agent J. T. Earle:

> "Under date of June 7th C. & O. Surgeon advises that your physical examination discloses that you are disqualified for any further service with the Railway Company.
>
> "You are directed to make application to the Railroad Retirement Board for an annuity.
>
> "Please handle direct with the Local Office of the Railroad Retirement Board, Post Office Building, Cincinnati, Ohio, handling either with Mr. Holler or Mr. E. A. Waters of that office."

On receipt of Agent Earle's letter, protest was filed by Mr. DeLong through his Division Chairman with the Superintendent on the grounds that Mr. DeLong had been removed from the service in violation of the rules of the Agreement in that no investigation had been held to show cause for his removal or dismissal. The Superintendent advised that the local Officers of the Railway Company were bound by decisions of the C. & O. doctors and that they could do nothing about the matter.

whatever has been introduced to substantiate that allegation. As a matter of fact Mr. DeLong's efficiency as compared with other check clerks has been about 60% brought about by his feebleness and deafness, but the Carrier took no action with regard to disqualifying Mr. DeLong until his condition had reached the point where his continued employment presented a definite hazard. It is quite evident that Mr. DeLong himself realized the seriousness of his condition because he applied to the Railroad Retirement Board for an annuity at the time of his stroke in 1940. However, when he found out the amount he would receive he did not go through with it.

The employes in handling this case with the Railway also referred to Third Division Award 580 which was submitted to your Board and withdrawn by the parties after being heard.

That case involved the approval of the application of W. C. Arata for employment within the sixty days provided in Rule 25 of the Clerks' Agreement. Arata after being employed did not pass the required physical examination and his application was disapproved within sixty days from the effective date of Rule 25 (November 16, 1936), but more than sixty days from date of his first service with the Railway Company. The employes claimed that Arata was dismissed without proper investigation under Rule 27. That case is not similar to the instant case, but regardless, it was not settled in accordance with the contentions of either party. In the submission to your Board the Carrier stated that Arata had signed Form CJ-17—Application for Employment, containing the following provision:

> "I hereby agree that my application is not complete unless and until I shall have passed a physical examination satisfactory to The Chesapeake and Ohio Railway Company.
>
> "I also agree that if I be put temporarily into service, prior to such physical examination, then and in that event, if said physical examination is not found satisfactory, my continued employment by the said Company shall be terminated."

At the hearing of that case your Board requested a copy of Arata's employment application, and upon a further check on the matter it developed that the local officer had furnished erroneous information and Arata had not signed the form containing the above quoted provisions. The General Chairman was thereupon called in and the case settled, but, as stated above, it was not settled because of any contention of the employes.

It is the Carrier's position—

(1) That there is no rule in the agreement prohibiting the disqualification of employes where shown to be physically unfit to perform service.

(2) Rule 27 applies only to discipline and dismissal and is inapplicable to disqualification.

(3) The Carrier has not been arbitrary in its disqualification of Mr. DeLong. Mr. DeLong was given two examinations, and even his own doctor admits that his hearing is impaired.

(4) It is the Carrier's prerogative to determine the fitness of employes for it must accept full responsibility, and it therefore follows that it should be allowed reasonable discretion in deciding the competency and fitness of its employes.

Under all the facts and circumstances in this case the claim should be declined.

OPINION OF BOARD: This is a joint submission. The facts are not in dispute. The claimant entered the service of the Carrier July 27, 1926 at the age of fifty-three as a Check Clerk, Transportation Department, Cincinnati Freight Station. In April, 1940, he suffered a slight stroke but subsequently returned to service. In May, 1941, the Carrier required him to submit to a physical examination as a result of which on the report of Supervising

Surgeon J. F. Dinnen he was disqualified for all service with the Carrier on June 7, 1941. The claimant then asked for a further examination from the Assistant Supervising Surgeon. This request was declined on the ground that Dr. Dinnen had found him disqualified. The Claimant then was examined on his own initiative by Dr. Schaal of Cincinnati, who found his condition good with the exception of an impairment of hearing which had been corrected. Dr. Schaal recommended that he return to work. The Carrier refused to follow that recommendation.

It is not the function of this Board to determine whether this man is or is not physically qualified. The only question before us is whether the agreement has been violated. The Carrier's view of its power to discharge an employe on the ground of physical unfitness is expressed in its submission in the following language:

> "There is no rule in the agreement that prohibits the Carrier from removing from its service at any time any employe who is found by proper medical authority to be unqualified to perform service with the Railway Company."
>
> * * * *
>
> "As stated above, neither Rule 27 nor any other rule in the agreement between this Carrier and its employes require an investigation for anything other than dismissal or discipline."

The Carrier has misconceived its rights or perhaps it would be more correct to say the rights of its employe. This Board has already ruled, Award 1499, that "regardless of any specific rule in the agreement between the Carrier and its Employes, an employe cannot be lawfully discharged on the ground of physical disability without being given a hearing, if he desires it, to present his evidence as to his physical condition. See Awards 362, 728, 1485, 1487. And the requirement of a hearing is not met, if the Carrier's observance of it is merely perfunctory and if reasonable consideration is not given to the evidence adduced by the employe." The Carrier here involved, as did the Carrier in Award 1499, assumed that it had the right to discharge an employe, solely on the advice of its own surgeon. This right it did not have.

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; and

That the carrier violated the agreement in its discharge of the claimant.

AWARD

Claim sustained. In award of compensation the claimant is to be paid for time lost at the scheduled rate of pay of the position less such wages as he may have received from other sources during such period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.

Serial No. 44

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 2144
DOCKET NO. CL-2170

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: The Chesapeake and Ohio Railway Company

Upon application of the representative of the employe involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The award in this case was based on what this Board found to have been a wrongful discharge of the claimant. It reads as follows:

> "Claim sustained. In award of compensation the claimant is to be paid for time lost at the scheduled rate of pay of the position less such wages as he may have received from other sources during such period."

The Carrier has paid to the employe what he would have received in wages at the regular rate of pay less what he received for unemployment insurance. The employe now claims that in addition he is entitled to what he might have received in overtime and for work on Sundays and holidays, based on the amount that was received for these services by the employe who took his place. The argument is that the claim in the original proceeding sought compensation for all wage loss suffered by the employe, that this claim was sustained by the award, and that what the employe would have received for overtime and Sunday and holiday work is a part of his wage loss.

We cannot accept the interpretation which the employe places on the award. The words "claim sustained" must be read in connection with what immediately follows, which is that compensation shall be paid for time lost "at the scheduled rate of pay of the position." This means the regular rate of pay without regard to overtime. Not only is this the correct interpretation of the language taken by itself, but it is the only construction which leads to a practical solution of the problem. Without clear and specific direction in the award, we should not base one man's wage loss on the amount of overtime and extra work which another man might perform in the same position.

Referee Sidney St. F. Thaxter, who sat with the Division as a member when Award 2144 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of November, 1943.