

Award No. 3549

Docket No. MW-3471

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
LEHIGH VALLEY RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that John D. Hascin, section foreman, Lehigh, who was erroneously held out of service from March 1, 1945 to November 28, 1945, inclusive, on account of alleged physical disability, shall be paid for all time lost at the rate of pay applicable as section foreman at Lehigh, from March 1, 1945 to November 28, 1945, inclusive.

EMPLOYEES' STATEMENT OF FACTS: On or about February 15, 1945, while engaged in his regular duties as section foreman at Lehigh, Pa., John D. Hascin tripped and fell, suffering minor injuries to his head. Hascin was treated for those minor injuries by the railroad physician, Dr. C. J. Balliet. On February 28th Dr. Balliet pronounced Hascin fully recovered from his injuries and that he was ready and fit to resume service as section foreman.

On March 1, 1945, following the release by Dr. Balliet, John Hascin reported for duty to Assistant Track Supervisor Carl Richter. Mr. Richter advised John Hascin that he could not resume work as section foreman until his resumption of work was approved by Division Engineer J. E. Crowley.

After being advised by Assistant Track Supervisor Richter that his resumption of duty as section foreman was subject to the approval of the Division Engineer, John Hascin made frequent calls to the offices of division officials to ascertain when he would be permitted to resume work. Neither the Track Supervisor nor any other officer of the Carrier would give Hascin any direct information or advice in that respect. In the early part of April, Hascin was directed to appear before railroad physician, Dr. Dougherty, for physical examination. Following that examination by Dr. Dougherty, Hascin was advised by Superintendent L. P. Zeigler that his physical condition would not warrant his, Hascin's return to the service as section foreman. Mr. Zeigler advised Hascin to make application to the Railroad Retirement Board for annuity under the disability provision of the Railroad Retirement Act.

Acting upon the advice of Superintendent Zeigler, John D. Hascin made application to the Railroad Retirement Board for annuity under the disability provision of the Railroad Retirement Act on or about April 20, 1945. After usual exchange of letters between officers of the Retirement Board and the applicant, inquiries and investigations, John D. Hascin was advised by John W. Callender, Director of Retirement Claims, Railroad Retirement Board, under date of September 14, 1945, "that the medical evidence of record did not warrant a determination of total and permanent disability * *, declining the application for annuity under the disability provision of the Act.

while it is satisfactory to carry on the type of light labor he is doing at the present time, it is not satisfactory for him to act as a track foreman, bearing in mind that his hours might be irregular, working in all kinds of weather, etc., and I am sure it would be detrimental to his health and also I am positive he would not be able to carry on these duties in a satisfactory manner."

It must be considered that one of the most important duties of Management, in order to operate its railroad with safety to the traveling public and its employees, is to take every precaution, of which the physical condition of employees in responsible positions is of major importance. It was the judgment of the responsible officers on this railroad, based on physical examination records, that the condition of Mr. Hascin was such that this Carrier could not assume the responsibility for continuing him in the position of section foreman, where his responsibilities for the safety of himself, the operation of trains, and the safety of others, was dependent on his ability to fully and properly carry out the duties and responsibilities such a position required.

We believe the action taken by the Carrier in this case was justified and consistent with the facts of record as developed, and respectfully ask that the Board sustain our action.

OPINION OF BOARD: On February 15, 1945, the Claimant slipped and fell, causing personal injuries that placed him under the care of a physician. On February 28, 1945, a company physician pronounced him fit for work. He reported for work on March 1, 1945, and was advised by the Track Supervisor that he could not resume service until approval was obtained from the Division Engineer. He was not returned to service until November 28, 1945. The Organization contends that Claimant was wrongfully held out of service and seeks compensation for him for time lost.

The record discloses that Claimant was afflicted with pernicious anemia and a diabetic condition which had required periodical examinations by the company physician for some time before the accident. There is evidence also that another company doctor examined Claimant on February 24, 1945, and advised the Carrier that Claimant was not physically able to work. The Claimant was not advised of his physical disqualification until April 11, 1945. He was advised by the Carrier at that time to apply to the Railroad Retirement Board for an annuity under the disability provision of the Railroad Retirement Act. He did so, but his application was denied on September 14, 1945, because he was not shown to be totally and permanently disabled. He was thereafter examined by Carrier's physician and returned to service on November 29, 1945.

We think Claimant was improperly held out of service from March 1, 1945 until he was notified of his disqualification on April 11, 1945. When he was disqualified on April 11, 1945, he could for the first time invoke the provisions of the Agreement to determine whether he was physically disqualified. He elected not to do this, however, and applied for annuity benefits under the Railroad Retirement Act. The evidence shows that Claimant acquiesced in the finding that he was disqualified until the ruling of the Railroad Retirement Board was obtained on his application for a disability annuity. He was restored to service within a reasonable time after it was determined that he was able to return to work. This is all the Agreement requires.

We conclude that Claimant was improperly held out of service from March 1, 1945 to April 11, 1945 and the claim will be sustained for this period of time.

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 parties waived oral hearing thereon;

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 violated.

AWARD

Claim sustained to the extent shown by the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1947.