

Award No. 4649

Docket No. PM-4511

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John M. Carmody, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of Hale Bailey who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the New York Central District.

Because The Pullman Company did, under date of August 16, 1948, deny the claim filed by the Brotherhood of Sleeping Car Porters for and in behalf of Hale Bailey, contending that Mr. Bailey should be returned to active service as a porter in the New York Central District in New York City and allowed to exercise his rights under the rules of the contract and allowed to operate as a porter out of said district on the runs he is qualified to operate on, according to his seniority, fitness, and ability.

And further, for Hale Bailey to be returned to active service as a porter in the New York Central District and to be allowed to exercise his seniority on such runs as are available to him under the rules of the agreement. And further, for Mr. Bailey to be paid for all time lost by him as a result of not being allowed to perform services in the above-mentioned district for the above-mentioned Carrier.

EMPLOYEES' STATEMENT OF FACTS: Your Petitioner, the Brotherhood of Sleeping Car Porters, respectfully submits that it is duly authorized to represent all porters, maids, attendants, and bus boys employed by The Pullman Company for all purposes of the Railway Labor Act.

Your Petitioner further sets forth that in such capacity it is duly authorized to represent Hale Bailey, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the New York Central District of New York, New York.

Your Petitioner further sets forth that for many years Porter Bailey has been employed by the Company in the capacity of a porter on various runs and has continued to operate on these runs during the years.

Your Petitioner further sets forth that on or about the latter part of February or the first of March, 1948, the Company questioned Hale Bailey with reference to his health and ability to perform his work. Porter Bailey was examined by the Company physician as well as his own personal physician. On or about March 12, 1948, in a telephone conversation had with District Superintendent Carroll, it was understood by the Organization that Bailey would continue to work on the job until some definite conclusion was reached regarding his physical condition from further medical examinations.

duties incident to Pullman porter work. The work of a Pullman porter requires the employe, among other things, to climb ladders in order to prepare upper berths, and to possess a physical adaptability in the performance of routine duties such as carrying baggage and discharging passengers. Also, in order to make down berths a porter needs the free use of hand and wrist, a condition which is not present in Bailey's case. Additionally, the employe's chronic nervous condition is aggravated by his excessive weight (Exhibit B).

If the medical history and the present physical symptoms of an employe indicate that the performance of the duties incident to the position entails risk of personal injury to the employe or to the traveling public, Management cannot rightfully permit him to operate. Unquestionably, Porter Bailey's nervous condition as evidenced by tremor of hands and subsequent partial paralysis of right wrist does not permit the porter to perform his duties properly. Additionally, Bailey is handicapped by his excessive weight and the physical disabilities incident thereto; namely, fatigue, shortness of breath, flat feet and dizziness. His high blood pressure makes him susceptible to dizziness and a possible fall; his excess weight renders an accident of this type dangerous to himself and to the traveling public.

The Company's responsibility to the traveling public precludes the operation of an employe with a physical condition which renders him a hazard to public safety and which indicates a risk either to the employe or to passengers. The Company is obligated to act with foresight and not permit such employe to occupy a position of responsibility. That the Company is sincere on this point is indicated by the fact that Management has given Bailey every opportunity to reduce his weight and by this action alleviate his chronic nervous condition.

In a somewhat similar dispute involving the alleged right of a disqualified employe to operate in his former position, the Board held that the Carrier is entitled to be abundantly precautionary where risk is involved. In the case adjudicated under Award 2886, Docket No. CL-2897, with Henry J. Tilford sitting as a Referee, the complainant, C. D. Tyrell, was required along with other duties to operate an electric crane for loading and unloading of heavy shipments. When it became apparent to the Company that Tyrell's vision was impaired, Management had Tyrell's eyes examined. Dr. A. R. Kilgore, the Carrier's chief surgeon, stated that Tyrell's work should be restricted so that he would not endanger others and that it was not safe for Tyrell to handle the crane. In denying the claim, the Board held under **OPINION OF BOARD** as follows:

"Since where the question of personal safety is involved the Carrier is entitled to be 'abundantly precautionary' (See Award 875) the Board is of the opinion that the Carrier was justified in its action."

Also see Awards 489, 592, 728, 772.

Additionally, there is of record Award 3212 in the dispute listed as Third Division Docket No. TE-2965, with Edward F. Carter sitting as Referee, denying the claim of H. Noonburg on account of being held out of service to take physical examinations at the office of the Company's chief surgeon and awaiting permission thereafter to resume work in his regular position. The record shows that claimant on and after October 31, 1943, was suffering from cardio-vascular degeneration and hypertension. The history of two lapses into unconsciousness within a two-day period when considered with Noonburg's age of 63 years clearly indicated a condition of health requiring precaution on the part of the Carrier in the matter of continuing him in his position. The Board held that it was the duty of the Carrier to protect the health of the employe and the traveling public by withholding the employe from service when he is disqualified by Carrier's physician. In denying the claim in part the Board held under **OPINION OF BOARD** as follows:

"The record shows that Claimant on and after October 31, 1943, was suffering from cardio-vascular degeneration and hypertension. The history of two lapses into unconsciousness within a two day period when considered with Claimant's age of 63 years, clearly indicated a condition of health requiring caution on the part of the Carrier in continuing him on his position. It is the duty of the Carrier not only to protect the health of the employee but the safety of the traveling public as well. It is within the rule that when a serious accident has occurred or a serious illness experienced, indicating that his resumption of his employment would constitute a serious hazard to his fellow employees or the public, the Carrier may properly require a physical examination to establish the physical fitness of the employee. The instant case presents a situation in which the Carrier was fully justified in requiring a satisfactory physical examination as a condition precedent to Claimant's return to work."

Finally, in Award 2096 in a somewhat similar case involving the Brotherhood of Maintenance of Way Employees and the Chicago, Burlington & Quincy Railroad, listed as Docket No. NW-2128, with Ernest M. Tipton sitting as Referee, the Board held, under **OPINION OF BOARD**, that the Carrier is entitled to hold an employee out of service on the advice of a physician who considers the employee unsafe for service, as follows:

"On May 13, 1940, claimant was awarded position as painter, working on the Ohio River Bridge at Metropolis, Illinois. Two days later, a physician advised claimant's employing officer that claimant was not a safe employee for painting work on that bridge until he had recovered sufficiently from an injury received on March 16, 1940, which was diagnosed as synovitis of the right knee. The physician advised that he be permitted to remain at work in Aurora as there was no objection to his working on the ground or with only a minimum amount of climbing. Acting on this advice, the Carrier did not permit him to paint the bridge.

The record fails to show the advice given by the physician was given in bad faith. The Carrier is entitled to hold an employee out of service on the bona fide advice of a physician that he considers the employee unsafe for service. (See Award No. 728.)

Under the circumstances involved in this claim, the Board holds there was no violation of the agreement."

On the basis of the above facts and the Awards cited the Company submits that it properly is withholding Bailey from service until he can bring satisfactory medical evidence that he is able to operate in service without risk to himself and members of the traveling public.

The Organization's claim in behalf of Porter Bailey that the Company violated Rule 45 of the Agreement and that Bailey should be returned to active service and paid for all time lost is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The question to be resolved here is whether this Board should order the Company to restore Petitioner, Hale Bailey, to service as a Pullman Porter or sustain the Company in its position. He was held out of service on March 19, 1948, on advice of the Company's medical staff. His employment had begun on May 27, 1926. He has not been dismissed; his name remains on the seniority roster. The Company has said repeatedly that it will restore him to service when he can furnish satisfactory medical evidence that he is competent to perform the duties of a Pullman Porter. Claim is made under Rule 45 of the Agreement,—“Seniority, Fitness and Ability.”

Petitioner's medical history, so far as it appears in the record is shown in the following tabulation, which shows briefly the findings and the recommendations of the Company's medical advisors and his own physician, from April 8, 1940 to August 3, 1948:

Carrier's Doctor	Claimant's Doctor	Weight	Blood Pressure	Remarks
4/ 8/40		259	162-110	Tremor both arms, flat feet.
6/27/44		254	170-120	Tremor right arm, flat feet.
5/21/46		267	152-110	Tremor right hand, flat feet.
	7/ 5/46	247	160-110	Only lightest of runs.
	7/31/46	251		Good condition.
	9/30/46	247	160-110	General condition good.
	10/30/46	237½	140-90	Good condition.
	3/ 4/47	242	140-90	Good general condition.
	3/ 8/48		150-90	Good general condition.
3/ 9/48		282	188-120	Good physical condition.
				Tremor left hand—disuse of
				right wrist. Weight increase
				45 lbs. in past year.
	3/19/48	292	180-90	Tremor of hands.
	4/29/48	252	140-90	In condition to perform porter
				duties.
5/11/48		241	150-118	Two months more rest and care.
7/ 3/48		243	175-105	Should not work.
8/ 3/48		260	198-120	No work, tremor of hands.

The latest report from his physician, April 29, 1948, says—"In condition to perform porter duties." The Company's medical advisors say, a few days later. On May 11, 1948,—“Two months more rest and care.” On July 3, 1948, they say—"Should not work" and, one month later, August 3, 1948,—“No work, tremor of hands.”

Ought this Board of laymen, in the light of these conflicting statements of physicians whose competency has not been challenged in the record, undertake to decide whether or not Petitioner is physically able to perform the duties required of him? We think not. It is not our function to determine whether Petitioner is or is not physically qualified. Awards Nos. 2144 and 4595.

There are aspects of this case, however, that warrant our serious consideration. We have held consistently that where either the safety of the employe at work is involved, or the safety of the public, the Company is entitled to take precautionary measures, including physical examinations, to establish physical fitness. Awards Nos. 362, 728, 875, 2886, 3212.

This case is further complicated, from a medical standpoint, by the action of the Railroad Retirement Board which refused disability benefits on "medical information furnished by The Pullman Company", but thirteen days later—"In view of recent medical information submitted to this office" approved all of Petitioner Bailey's unemployment insurance claims. There is no further clarification in the record of how these conflicting decisions were arrived at. We cite them only because Petitioner argues that the fact that the Railroad Retirement Board took these actions is justification for this Board to order him restored to his position as Porter.

It has been argued for the Petitioner that "the issue * * * turns squarely on the question of the physical fitness of Bailey to perform the duties of a Pullman Porter." We do not know from the record how much Bailey weighed, or what his girth was, or anything about his physical condition when he was employed or during the period from 1926 to 1940.

In the light of our conclusion that we are not competent to pass on his physical fitness for the position, and in the light of the further fact that the Organization, for the Petitioner, refuses to allow him to report for another re-examination by Company physicians, can we do anything to get

the controversy resolved? The Company has said "(it) stands ready and willing to restore Bailey to work at any time his physical condition is such that he can properly perform the duties of his position."

No definite standards or requirements are set forth by the Company as to height, weight, girth, blood pressure or, indeed, any other characteristics. Perhaps it is not desirable or practical to do this definitely. Failure to do it, or to agree upon it, however, leaves a twilight zone where honest differences of opinion may develop.

It cannot be said that the Company has been harsh or lacking in reasonable consideration for Petitioner. Its operating officials appear to have been guided entirely by its own medical advisors. Does the Company, however, have the exclusive right to determine fitness solely on the advice of its own medical advisors? This Board, without disputing the right of Carriers to make medical examinations in their own interest, or in the interest of employees, or even to require employees to submit to them, Awards Numbers supra, has also held that this does not give the Carrier the exclusive right to make the determination as to fitness on the advice of their own physician or physicians. Awards Nos. 1499, 2144, 1485.

Generally, this Division has not followed the practice adopted in several Awards of the First Division or requiring an impartial reexamination. In Third Division Award No. 1021, however, we said—"Claimant should be reinstated to his position * * * unless within that time (40 days) an impartial examination, made by a doctor or doctors so selected as to insure skill and fairness, shall determine that his physical * * * condition is such as to disqualify him."

In First Division Awards Nos. 1213, 1391, 2420, 2456, 4674, 5069, cited in behalf of Petitioner, we find persuasive argument and precedent for an impartial examination by competent medical authority or authorities selected by agreement between the parties to the dispute. This procedure affords opportunity for judicial determination by technically competent authority.

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 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 claim for restoration to service with pay for time lost, as prayed for, is denied. We remand the case to the parties for an impartial examination by competent medical authority, or authorities, selected by agreement between the parties to this dispute to determine claimant's physical fitness to perform the duties of a Pullman porter.

AWARD

Claim disposed of as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of December, 1949.