

Award No. 4663
Docket No. MW-4575

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Charles S. Connell, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier reinstate Trackman Steve Phillips, Section Gang Number 9, Akron Division, and reimburse him for all lost time as a result of the Carriers improper action in removing him from service on May 10, 1947.

JOINT STATEMENT OF FACTS: At about 8:30 A. M. on May 10, 1947, Trackman Steve Phillips was working with section gang No. 9 at Ohio Junction. While the gang was standing in the clear at the north side of the track during the passage of a train, Phillips suddenly became unconscious. He was carried into the yard office where he apparently recovered from this attack but he was not permitted to continue at work and, after being treated by attendants on the Youngstown City Police Ambulance, he was driven home by his foreman. Following subsequent examination by the Company's Medical Examiner, he has been held out of service as an epileptic.

The Agreement in effect between the parties to this dispute dated April 17, 1930, and its subsequent memorandums and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: On August 20, 1947, Mr. Steve Phillips was examined by Dr. C. H. Cronick of Youngstown, Ohio. The doctor's report is as follows:

"August 20, 1947.

TO WHOM IT MAY CONCERN:—

Report of mental and neurological examination of Mr. Steve Phillips, 622 Poland Avenue, Youngstown, Ohio, aged 59, referred by Attorney Ralph R. Thombs.

HISTORY

This man was layed off from work following an episode of what was obviously a hysterical attack, the content and nature of which is quite common in individuals with this sociological background. The fact that he still holds to the contents of what may have appeared to have been a true hallucinatory experience (obviously only hypnogogic) is quite common in individuals with this educational background and is an indication

This does not mean of course that the employe does not have the right to question the truth of such medical opinion, and if found to be untrue the rights of the employe would be the same as in other cases where the carrier acted improperly towards an employe. Here, however, there is no question as to the fact that this employe was suffering from high blood pressure. * * *

The claim for restoration of the employe to active service was denied.

In Award No. 2096 the Division, together with Referee Ernest M. Tipton, denied the claim of an employe for wage loss account being held off a higher rated but somewhat hazardous position due to physical condition. The Division, in its opinion, stated in part:

"* * * The Carrier is entitled to hold an employe out of service on the bona fide advice of a physician that he considers the employe unsafe for service. * * *"

On the basis that is contained herein, the Carrier requests the Division to find this petition as being one without merit and to deny it accordingly.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute and the parties submitted a Joint Statement of Facts. At about 8:30 A. M. on May 10, 1947, the Claimant was working with Section Gang No. 9 and while the gang was standing clear of a passing train, Claimant suddenly fell to the ground unconscious. He was carried to the yard office where he apparently recovered from this attack and, after being treated by attendants on the Youngstown City Police Ambulance, he was driven home by his foreman. Following subsequent examination by the Carrier's Medical Examiner, Claimant was held out of service as an epileptic.

The record does not indicate just when said subsequent examination by the Medical Examiner took place, nor is there in evidence any record of what this examination consisted, whether Claimant's history was taken, and what if any statements were taken at that time from his fellow employes who witnessed the accident. There is no record of Claimant's blood pressure, or whether an electroencephalogram tracing was made. The only evidence of the conditions and facts immediately prior and subsequent to Claimant's accident are statements taken seven months after Claimant was denied work from employes that were witnesses.

The Carrier has filed with the Board as an exhibit an affidavit by Thurston R. Adams, M. D., wherein he states, "There is no way on physical examination to tell whether or not a patient has epilepsy unless he is having a seizure at the time of the examination. The diagnosis is made on the history of epileptic attacks and can very often be confirmed by the electroencephalogram tracing." The Carrier apparently agrees with the statement of Doctor Adams as to the proper method of diagnosis, yet it has failed to give the Board a statement of Claimant's "history of epileptic attacks", blood pressure, or results of "electroencephalogram tracing." We must assume the Carrier did not follow the above method of diagnosis. The Claimant has put into evidence the written statement of C. H. Cronick, M. D., who after examination of Claimant made the diagnosis that the attack on May 10, 1947, was a hysterical attack and not an epileptic fit. It is also a matter of record that during the vacation absence of Carrier's Medical Officer, Doctor Post, in June 1947, a substitute doctor made an examination of Claimant and issued him a return-to-work-card. However, upon his return Doctor Post immediately rescinded the return-to-work-card without further examination of Claimant to determine his physical condition. This Board has always taken the position that it recognized the Carrier's right to remove, upon advice of its Chief Medical Officer, an employe who because of some physical disability or disease, became a hazard. But as is held in Award

728, the Carrier's Medical Officer must make a correct diagnosis after careful consideration and if such medical opinion is in error, the rights of the employe are the same as in other cases where the Carrier acts improperly towards an employe. From the evidence before us it is the opinion of this Board that the Carrier acted improperly in removing Claimant from service.

The Employes ask that the Carrier reinstate Claimant. The Board is of the opinion that it would go beyond its jurisdiction if it made such an award. Much time has elapsed since May 10, 1947, and the Board has no evidence before it of the mental and physical condition of the Claimant as of this date. Therefore, the ruling of this Board will be that the Claimant be reimbursed for all time lost between May 10, 1947, and Sept. 1, 1947, when Claimant secured employment outside the railroad industry. The request that Claimant be reinstated will be withheld until such time as the Carrier can by medical examination ascertain if he is physically fit to be reinstated. The Claimant shall request such examination within thirty days from this date.

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 Employe involved in this dispute are respectively carrier and employe 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 claim will be sustained to extent indicated in the opinion.

AWARD

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1949.