

Award No. 5815

Docket No. DC-6041

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 495

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees, Local 495, on the property of the Seaboard Air Line Railroad Company, for and in behalf of Mr. Hobart Guthrie, Bar Attendant:

- 1—he be compensated at his pro rata rate for all time lost since October 1, 1949, and that he be returned to his original assignment with seniority unimpaired.

AND

- 2—that he be returned to his assignment with seniority unimpaired, and compensated at his pro rata rate for all time lost since December 1, 1949, until he has been allowed to exercise his seniority in accordance with the current agreement.

EMPLOYEES' STATEMENT OF FACTS: The claim set forth above, while at first glance, seems to be confusing, will become entirely clear by a reading of this statement of facts. On August 25, 1948, Mr. Hobart Guthrie, a Bar Attendant in the employ of the Seaboard Air Line Railroad was injured in an accident while on duty at Miami, Florida. At the time of the accident Mr. Guthrie had nine years of service.

Mr. Guthrie retained an attorney to settle his claim for compensation arising out of the injury under the provisions of the Federal Employers Liability Act. A settlement, out of court, was reached and on October 1, 1949, Mr. Hobart Guthrie reported for his assignment, ready, willing and able to perform all of his normal and usual duties. The Carrier, however, refused to permit Mr. Guthrie to return to his assignment on the alleged grounds that "he was permanently disabled." Mr. Guthrie's representatives thereupon filed Claim No. 1 with the carrier. On October 14, 1949, the Carrier's General Superintendent, Dining Cars denied the claim's without formal conference, stating in part:

"In view of the fact that Walter Guthrie in settling his claim against this company produced irrevocable evidence certifying that he was permanently and totally disabled and would never be able to resume his duties as a dining car waiter, and further that our own doctors' report indicates that he is not in physical condition to return to service, we regret that we are unable to return him to service and must decline your request."

Conclusion: It is my opinion that if this man had a herniated disk in August of 1948, the disk is still present and he is not fit for service at this time. It is also noted that he has a disturbance of pupillary and knee reflexes which would also disqualify him. He also has a dermatitis of the forearms, arms and neck which would disbar him from handling food and as a whole he is not fit for duty.

/s/ H. L. Phillips, M. D.
Medical Examiner"

On the basis of Dr. Phillips' findings, the claimant was not allowed to resume his duties by the General Superintendent of Dining Cars. Such action was justified in view of this report and was in accordance with the controlling agreement. For ready reference, Rule V (a) and (k) are here quoted:

"SENIORITY QUALIFICATIONS. (a). The principle of seniority is recognized, but it will not be applied in such a way as to result in impairing the efficiency of dining service. The exercise of seniority under any provision of this agreement is contingent upon the employees who seek to exercise such rights having fitness and ability for the position sought; the Superintendent Dining Cars to be the judge thereof. The senior applicant who meets these requirements will be permitted to exercise his bidding or displacement rights, in accordance with other sections of Rule 5, as soon as practicable. If and when a qualified and acceptable man bids in or is available for assignment to the resulting vacancy, this shall constitute the test of practicability."

"RETURNING AFTER LEAVE. (k). An employee returning to duty after leave of absence, sickness, disability, or suspension may only return to his former position or exercise seniority to any position bulletined during his absence, subject to Rule V (a) in either instance, but must do so within ten (10) days after reporting ready for duty.

If during the time an employee is off duty account leave of absence, sickness, disability, or suspension, his former position is abolished or filled by a senior employee in the exercise of seniority, he may exercise seniority in accordance with sections (a) and (i) of Rule V.

Employees displaced from their regular positions by the return of an employee from leave of absence, sickness, disability or suspension, may exercise seniority in accordance with sections (a) and (i) of Rule V." (Emphasis added.)

Under the provisions of Rule V quoted the General Superintendent of Dining Cars is the judge of an employee's fitness to return to work after a leave of absence account of sickness or disability. The General Superintendent of Dining Cars was fully justified in determining that the claimant was unfit for service.

This Carrier is unable to affirmatively state that all contained in this submission has been made known to or discussed with the claimant or his representative, this account of no handling or discussion on the property in the usual manner concerning the merits of this claim. The Carrier respectfully requests that claims 1 and 2 be denied.

OPINION OF BOARD: The facts in this case are not in dispute. Following an injury sustained on August 25, 1948 Claimant reported for duty on September 30, 1949 and was not allowed to resume duty, based on report of a company physician.

The record contains evidence of conflicting medical advice, the Carrier's physician reporting Claimant as being unfit for duty, while Claimant's physician reports him physically able to perform, in the main, the duties of his formal position.

This Board is not competent to substitute its judgment for that of skilled medical men in determining the question of the physical fitness of an employe to work.

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. Third Division Awards 4649, 4816 and Awards cited therein.

In view of this the jurisdiction and laches argument presented by Carrier becomes academic and needs no attention here.

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 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 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 Bar Attendant.

AWARD

Claim disposed of as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of June, 1952.