

Award No. 6942

Docket No. CL-6782

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Agreement governing hours of service and working conditions between the Louisville & Nashville Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective January 1, 1938, as revised to January 1, 1952, was violated by the Carrier at Knoxville, Tenn., on March 13, 1953, in the treatment accorded Mr. C. P. Irwin, route and check clerk at Knoxville Freight Station, by terminating his service with the Carrier as a result of a report from their District Surgeon, Dr. B. M. Overholt; and,

(b) Employee Irwin shall be restored to the service with all seniority rights and privileges (including Pass and his \$3,000 Group Life Insurance) unimpaired and paid full wages for time lost on March 16th, 1953, and each working day subsequent thereto until restored to service.

EMPLOYEES' STATEMENT OF FACTS: Claimant C. P. Irwin had a seniority date of March 24, 1908, in Seniority District No. 33, Knoxville Freight Station, and at the time of his discharge he was regularly assigned to a position of Route and Check Clerk.

Although claimant had not missed a day's work account of physical condition for fifteen years or more, he was instructed by Agent DeLay on March 2, 1953, without any previous advice or warning, to report to Carrier's District Surgeon, Dr. B. M. Overholt, for a physical examination. Claimant complied with the Agent's instructions and was examined by Dr. Overholt on the same day. Following the examination he returned to service and was not further disturbed until March 13, 1953, when he received a letter from the Agent discharging him from the Carrier's service. At no time was claimant apprised in writing or otherwise of any charge that was being brought against him, nor was he given a fair and impartial hearing or investigation prior to or after his dismissal. The letter of dismissal reads as follows: (See Employees' Exhibit "A")

those dependent upon them for support will be given the same consideration in granting free transportation as is granted other employes in the service.' Obviously this rule does not place any obligation upon the Carrier to grant free transportation to any one; all it requires is that those covered by Telegraphers' schedule will be given the same consideration in this respect as other employes in the service. The burden rests upon one asserting a claim under this rule to establish that he has not received the same consideration as others in the service, and claimant has not only failed but made no attempt to meet this burden. This Board has no authority to make rules relating to the granting of free transportation which would be the effect of a sustaining award under the facts presented."

Also see First Division Award 11727 holding:

"Neither the hospital benefits nor the pass privileges are matters over which this Division has any control; the one is governed by rules of the hospital association, the other by the liberality of the management."

as well as First Division Awards 1123 and 15130.

Carrier submits that it was fully justified in its disqualification of Mr. Irwin because of his poor physical condition, and that the claim of the employes should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The record discloses that C. P. Irwin, hereinafter referred to as Claimant, entered the service of the Carrier on March 24, 1908, as clerk in the Carrier's Knoxville and Atlantic Division. For the past 10 years or more he has been regularly assigned as Rate and Check Clerk in its Knoxville, Tennessee, freight station.

There appears in the record what amounts to a stipulation of facts between the parties, to the effect that the Claimant's seniority dated from March 24, 1908; that he is shown on the current roster as Route and Check Clerk; that on Monday, March 2, 1953, Claimant was sent to the company physician for an examination; that on Friday, March 13, 1953 about 3:30 P. M., the Claimant was given a written notice as follows: "As a result of Dr. Overholt's report of your examination, your service with this company will terminate at the end of your assignment today. (Signed by) Agent J. F. DeLay."

The Claimant protested the Carrier's action and filed a claim for any and all time lost in a letter directed to the freight agent under date of March 14, 1953, protesting his discharge for many reasons which we have taken cognizance of. To this letter, the Claimant received no reply.

The Carrier asserts that the duties the Claimant is required to perform require him to be on his feet during his tour of duty each day, and at times considerable physical exertion obtains in the handling of freight in the warehouse. During the last few months of his active service it became apparent to the officers in charge of Claimant, because of his physical condition the Claimant was not qualified to render the service required of him. This is apparently the reason why he was requested to be examined by the Carrier's physician.

In this connection we make the following observation: This Board does not dispute the Carrier's right to require an employe to submit to physical examination in its own interest or in the interest of its employes. Awards of this Division have held that this does not give the Carrier the exclusive right to make the determination as to the fitness to perform services solely upon the advice of its own physician or physicians. See Awards 4649, 362, 728, 875, 2886, 3212, and 6317.

We have held consistently that where safety of the employe at work was involved or the safety of the public, the company is entitled to take precautionary measures, including physical examination, as indicated in the above awards.

It also appears from the record that the Carrier has a policy of retiring its employes at 70. We need not discuss the merits of this alleged requirement because in no event does it apply to the Claimant in the instant case or the Organization to which he belongs, and is not relevant to a determination of this case. In addition we might state that there is some reference made to group insurance that falls in the same category and bears no relevancy to a determination of this case. We therefore will not discuss it.

The Claimant asserted that he was required to make application to the Railroad Retirement Board for retirement. In doing so he gave notice involving the steps taken in his case and the fact that he was progressing his appeal to the Railroad Adjustment Board having proper jurisdiction of the matter, thereby qualifying his application so no prejudice could result against him in the event he was successful in the prosecution of his claim against the Carrier.

This brings us to the medical examination. We speak first of the medical examination given the Claimant by the Carrier's physician, Dr. Overholt, and the result thereof under date of March 2, 1953, which is in substance as follows: With glasses, both eyes 20/30. Colors normal. Right ear 5/15, left 10/15. Fistula in ano, patient advised to have operation last year by Dr. K. C. Copenhagen. Advanced generalized arteriosclerosis. Multiple fistulas in ano with tight deformed anus. Positive Rhomberg test with poor sense of balance. Varicose veins right leg. Recommended retirement because of generalized arteriosclerosis and poor sense of balance.

There appears in the record reports of the examinations made by Dr. Robert M. Young under date of March 17, 1953, and Dr. W. M. Edington on the same date. There is some variance between these reports and the report of the Carrier's physician. Dr. Young's report was in effect as follows: That the Claimant had an old rectal fistula which he had had for years, a moderate degree of arteriosclerosis and a slightly positive Rhomberg. His mental and physical condition was good, and this doctor could see no reason why the Claimant could not perform his duties with the Carrier until there was a more definite change in his physical condition.

Dr. Edington reported in substance as follows: That the Claimant was 74 years of age, weighed 170 pounds, height 68 inches, pulse 80, lungs clear, blood pressure 150/90, urine color straw, reaction acid, specific gravity 10/10, albumin negative, sugar negative. There was a chronic fistula which had been present for years. There was of course some arteriosclerotic changes. No report of the Rhomberg test. Varicose veins. The recommendation was that the Claimant continue to work. The Claimant has been a patient of Dr. Edington since 1944, his last examination having been on March 16, 1953. He summed up his examination as follows: "As stated I have known Mr. Irwin for years, there is no need to deny there are some definite degenerating changes. He is mentally clear in every respect and his physical condition is better than the average for his age. Therefore I can see no reason why he could not perform his usual duties until such time as there is more definite change in his condition."

The Claimant, upon request, agreed to report to Dr. Overholt. On the second occasion his further examination was made on June 16, 1953. The report of this examination was in substance as follows: This 74 year old man has moderately advanced arteriosclerotic changes and a mild hypertension. His sense of balance was grossly abnormal on March 2, 1953, and not entirely normal at this time. In addition he had multiple draining in ano and tight deformed anal sphincter. He had varicose veins in the left thigh and moderate sized varicosities in both legs. E.G.C. was abnormal and check x-rays showed

arteriosclerotic extasia of the aorta. In view of the fact that this man's job required considerable walking 8 hours a day on his feet, and the handling of large packages of freight in the warehouse, Dr. Overholt recommended retirement because of the following: (1) Age of 74 years; (2) arteriosclerotic heart disease; (3) generalized arteriosclerosis; (4) poor sense of balance; (5) varicose veins in left thigh and both legs; and (6) multiple draining fistulas in ano.

From an analysis of the record the following is applicable to this class of cases. At this time the claim for restoration to service for pay for time lost cannot be allowed. 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 the Claimant's physical fitness to perform the duties that he previously performed for the Carrier. This is in keeping with Awards 5055 and 6764.

Certainly, 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 perform work. This statement appears in many awards of this Division.

Under the circumstances as shown by the record, we remand the case with directions to the parties to each agree upon an impartial, competent physician to examine the Claimant, and in the event the two physicians are unable to agree on the physical condition of the Claimant, then the two physicians shall select a third impartial, competent physician, and if by virtue of the findings of the physicians the Claimant is able to return to work, then the Carrier shall be obligated to return the Claimant to his regular work and restore all rights and compensation of which he has been denied. The award to be in conformity with this Opinion.

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 this dispute be remanded to the parties in accordance with Opinion.

AWARD

Claim remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of March, 1955.