

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it withheld Section Foreman Francis C. Duquette from service from February 8, 1954 to May 18, 1954.

(2) Section Foreman Francis C. Duquette now be allowed pay at the applicable Agreement rates for a number of total man hours equal to what he was improperly deprived of working from February 8, 1954 to May 18, 1954.

EMPLOYEES STATEMENT OF FACTS: During the year of 1940, and while employed by the Carrier in the capacity of a Track Laborer, Mr. F. C. Duquette sustained what he then assumed to be a minor injury as result of a fall. Sometime later, Mr. Duquette was promoted by the Carrier to a position of Section Foreman.

Following Mr. Duquette's injury and as result of recurring backaches, Section Foreman Duquette underwent surgery on July 20, 1953, for removal of a disc and cracked vertebrae. He was examined by three (3) Physicians after his release from the Hospital and was pronounced able to return to the service of the Carrier, but it was suggested that he not do heavy physical labor for a period of at least thirty (30) days.

On or about February 5, 1954, Section Foreman Duquette notified the Carrier as to the results of his physical examinations and informed the Carrier that he desired to return to his former position as Section Foreman effective February 8, 1954. On February 6, 1954, the Carrier's agents informed Section Foreman Duquette that he was physically unable to return to work at that time.

All data contained herein has been presented to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Francis C. Duquette, a section foreman, underwent spinal surgery July 20, 1953.

Sometime early in 1954, Claimant notified Carrier he had recovered and would like to resume his position on February 8, 1954. Organization states he had been examined by his own doctors and advised he was able to return to work.

Claimant submitted to an examination on February 5, 1954 by Carrier's physician, Dr. Donald S. Thatcher. Doctor Thatcher reported to Carrier the same day that Duquette had been "sent in by Mr. Mintter, Division Engineer, for reemployment examination." Mr. Thatcher's "recommendation" to Carrier was:

"He may be allowed to return to work, but should not do any heavy physical labor or any lifting or pushing."

Carrier as it states,

"* * * knowing there would be no day or occasion on which the claimant would not be required to do heavy physical labor or lifting or pushing or to assist in the performance of such duties, decided the safety of the claimant was involved and as a precautionary measure and in the interests of all concerned notified the claimant on February 5, 1954 (same date as Doctor Thatcher's examination of claimant) that this physical examination disclosed he was physically unqualified to meet the physical requirements of the service at the present time."

Claimant revisited his own physician, John J. Van Driest and J. F. Mueller on February 11 and 26, respectively. Their reports are a part of this record. He also again visited Carrier's physician, Doctor Thatcher, on February 26. Dr. Thatcher gave him this "To Whom It May Concern" statement:

"This man was examined on February 5, 1954, and report was sent through that he could return to light work because his condition is satisfactory. His return to work date is Feb. 8, 1954. He should, however, not do heavy physical labor."

Claimant was not returned to service until May 18, 1954.

Formal protest was filed with the Carrier on February 24, 1954. Organization states, without Carrier denial, that:

"The Carrier failed to make reply to the employee's letter of complaint until May 25, 1954 even though the General Chairman called this matter to their attention, by letter upon three different occasions subsequent to February 24, 1954. Under date of May 25, 1954, the Carrier replied in part to the General Chairman as follows:

" 'Please be advised that Roadmaster Weiland was instructed to allow Mr. Duquette to return to service on May 18, 1954.' "

So far as the record is concerned there was a long period of silence on Carrier's part extending from February 24 to May 25, 1954 when it advised the Organization that claimant had been restored to work on May 18.

Carrier states it notified claimant "to report to Dr. Thatcher on May 7, 1954, for further examination and on May 13, 1954 Dr. Thatcher wrote the Carrier's division engineer" advising claimant "may be returned to his regular full employment without restrictions as of this date." Carrier says it received the report on May 17 and returned claimant to duty the following day.

If claimant were a section laborer we would immediately deny this claim because there can be no doubt that a laborer is required to engage in heavy manual labor.

Claimant, however, was a section foreman. Rule 46(a) describes a foreman in this language:

"An employe who, in addition to his other duties, directs the work of men and reports to officials of the Railroad will be designated as a foreman."

Organization asserts that

"Carrier's position is wholly based on the proposition that because the claimant was not permitted to engage in the heavy physical labor (Carrier's physician on February 5, in saying claimant may be allowed to return to work, added he "should not do any heavy physical labor or any lifting or pushing") that occurs to a position of section laborer, he was thereby automatically disqualified to properly and safely perform all the duties and responsibilities of a section foreman—a supervisory employe."

Organization continues:

"It is significant to note that here—as in the handling of the dispute on the property—the Carrier has been unable and has failed to cite even one duty inherent to a Foreman's position which requires heavy physical exertion. Please bear in mind that the claimant was a Foreman—not an Assistant Foreman or a Lead Sectionman. Rule 46(a) * * * defines a Foreman and it will be noted the Carrier has emphasized the language 'in addition to his other duties'. The Carrier is apparently attempting to leave the inference that the term 'other duties' includes duties historically and traditionally assigned to a trackman's position. Such is not the case, however, because 'other duties' refers to preparing and submitting the required reports; requisitioning material and other supplies; enforcing safety and other rules; obtaining train line-ups in connection with motor car movements and work being performed; operating motor car; inspecting and patrolling track and right-of-way and other similar duties.

"A foreman's duties are such as could permissibly be performed by the claimant beginning on February 8, 1954 in accordance with the findings of three physicians."

The parties here are in dispute as to the meaning of "other duties" mentioned in Rule 46(a), the Carrier's position being that it includes "heavy manual labor."

"We believe," as we said in Award 8276 involving these same parties and referee, "there is a distinction between the positions of foreman and laborer.

"A laborer is responsible for the performance of such work as is assigned to him by the foreman. He works solely under direction, and is responsible to his foreman for the proper performance of the assigned work.

"A foreman, on the other hand, while responsible to the Roadmaster for the condition of his section and such general instructions as the Roadmaster might issue, nevertheless is expected to possess sufficient experience and intelligence as will enable him, on his own initiative, to see to it that the men under his supervision are so directed that their section will at all times be maintained in the best possible operating condition.

"In addition, he must also be able to move in on any emergency situation, analyze it and promptly determine the measures necessary to correct the situation in the most efficient manner possible, consistent with due safety and Carrier's general policies."

Quotation from Award 8276 is not intended to mean that it describes in full the duties of a Section Foreman; it does, however, spell out in a general way the difference between the laborer and the foreman.

Among awards cited on behalf of Carrier are 4892 (Carter) and 6143 (Wenke) upholding Carriers on the right to determine physical fitness of a job claimant. The latter dealt with the handling of office machinery; the former with a section laborer—not a section foreman.

Among other awards cited by or in behalf of Carrier are Awards 6491 (Whiting) and First Division Award 17461 (Stone), both denial awards. The former involved a trackman and this Division, in denying the claim relied heavily on the recommendation of Carrier's physician. The latter case involved a conductor-brakeman who refused Carrier's request to be examined by its physician, or by a board of three physicians chosen for the purpose.

In the case here we have Carrier's own physician, a man of professional stature and one knowledgeable enough in the field of railroading to merit Carrier's confidence, recommending on February 5, 1954 to Carrier "he may be allowed to return to work, but should not do any heavy physical labor or any lifting or pushing."

Three weeks later he again said:

"This man was examined on Feb. 5, 1954, and report was sent through that he could return to light work because his condition is satisfactory."

He then added:

"His return to work date is Feb. 8, 1954. * * *"

On the basis of the record made here, we are willing to accept the word of Carrier's physician that "his return to work date is February 8, 1954." The claim will be sustained.

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 Employee 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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1958.

DISSENT TO AWARD NUMBER 8365, DOCKET NO. MW-7782

On May 17, 1954, the Carrier received a report from its physician that "This man (Francis Duquette, the present Claimant) may be returned to his regular full employment without restriction as of this date." This was the first report from any physician that Claimant could resume the duties of a section foreman without restriction. Accordingly, on the very next day Carrier permitted Claimant to return to work.

The majority say that Claimant should have been returned to work on February 8, 1954, on the basis of a report from Carrier's physician stating "he may be allowed to return to work, but should not do any heavy physical labor or any lifting or pushing." The majority misconstrued this recommendation as authorizing Claimant's return to service. In so doing, they completely missed the issue in this dispute and rendered an erroneous award not supported by any Rule of the applicable Agreement.

Dr. Thatcher, the Carrier's physician; Dr. Van Priest, the surgeon who operated on Claimant's back; and Dr. Mueller, the Claimant's personal physician, indisputably were all in complete agreement that Claimant was not able to resume the full duties of a section foreman on February 8, 1954; otherwise, there was no reason for all of them restricting Claimant to "light work".

The real issue in this dispute was whether or not any rule of the Agreement required the Carrier to rearrange the normal duties of a section foreman position in order to provide light work so that a partially incapacitated employee could return to the job, prior to his complete recovery from a serious operation. There is no such rule, and this claim should have been denied. Absent an Agreement rule making the Carrier liable as an insurer, the majority herein had no right to find that Claimant should have been permitted to convalesce at the Carrier's expense.

The majority performs a disservice when they become so detached from actual railroad operations that they substitute their judgment for that of the Carrier's Division Engineer and find that a section foreman of a three-man gang could have worked, particularly during the middle of a Wisconsin winter, without lifting, shoving and/or performing other physical labor. The record showed that all section foremen performed such work. Whether the Carrier could have relieved Claimant from all physical labor and permitted him to stand idly by while other members of the gang replaced a broken rail, lifted and pushed the track motor car on and off the track, and/or performed other heavy work is immaterial; we are not concerned with what the Carrier could have done—but with what the Agreement required it to do.

The Majority ignored the decisive evidence and the limited jurisdiction of this Board in making this decision. The Agreement does not require the Carrier to rearrange the normal duties of a section foreman to provide "light work" for an incapacitated incumbent. It is not our function to force the Carrier to take the risk of Claimant's further damaging his back before he was completely recovered. The majority committed error in deciding how the Carrier should have exercised a managerial prerogative which was not restricted by any Agreement rule. The Division's jurisdiction is limited to interpreting rules as written.

For the foregoing reasons, we dissent.

/s/ J. F. MULLEN

/s/ R. M. BUTLER

/s/ W. H. CASTLE

/s/ C. P. DUGAN

/s/ J. E. KEMP