

Award No. 14173
Docket No. MW-15454

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the Agreement when, beginning November 19, 1963, it arbitrarily withheld Extra Gang Foreman Edgar J. Conway from service. (Carrier's Case No. 8.64 MW)

(2) Claimant Conway be reinstated to service with seniority, vacation and all other rights unimpaired; and that he be reimbursed for all wage loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On August 23, 1963, the claimant became ill with a heart disease which necessitated his absence from work for about ten weeks.

On October 29, 1963, he submitted to a physical examination by his personal physician, Dr. T. J. McDonnell. At the conclusion of the examination, Dr. McDonnell verbally advised the claimant that he was physically able to and could "resume full work as of November 4, 1963". Dr. McDonnell subsequently confirmed his findings and verbal opinion of October 29, 1963, in a statement reading:

"Dunmore, Penna.
December 12, 1963

Re: Edgar Conway
544 Deacon St.
Scranton, Pa.

This man was hospitalized by me from August 23, 1963 to September 22, 1963 with acute subendocardial infarction and essential hypertension. He has made a complete recovery with normal blood count, blood chemistry, urinalysis, blood cholesterol, chest x-ray and regulated normal blood pressure.

his statement captioned "Occupational Duties" and it will be noted that he has stated that his conclusion is based on the occupational duties of the assignment as carrier has stated them to be and has proven them to be herein beyond a shadow of doubt.

Upon receipt of Dr. Filippone's report of April 10, 1964, Carrier's Chief Surgeon, Dr. W. H. deRouville, advised as follows: "Mr. Conway is not considered physically fit to perform the duties of a track foreman." Copy of Dr. deRouville's report of April 10, 1964 is attached hereto, marked Exhibit K.

It is the carrier's position that the issue in this case is whether or not the claimant, following the incidence of disability due to "acute endocardial myocardial infarction and essential hypertension", has recovered his physical ability sufficiently to meet the minimum standards of Carrier's Chief Surgeon for return to the service of this carrier in the position of Extra Gang Foreman. The Chief Surgeon clearly found both on the basis of Dr. Druffner's examination report and on the basis of Dr. Filippone's report that the claimant's physical fitness was not sufficient to warrant his assuming all of the duties and responsibilities of an Extra Gang Foreman.

In view of these facts, a denial award is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, over 62 years of age, suffered a heart attack on August 23, 1963. After he had had several weeks of hospital confinement and recuperation, his personal physician examined him and stated that "He has made a complete recovery . . . and . . . was declared physically able to resume full work as of November 4, 1963."

On October 31, 1963, he was examined by a Carrier physician, Dr. Druffner, whose report, made to the Chief Surgeon, was not revealed to the Claimant nor was it made a part of the record.

The Chief Surgeon, acting on Dr. Druffner's report, authorized Claimant to return to work "provided his duties do not entail any strenuous physical activities."

He reported to work November 13 and worked until November 18 when he was advised by Track Supervisor Borst that he was being withheld from service because he was restricted from performing the "strenuous physical activities" of his job. Borst explained that he did not learn until later that Claimant's clearance was qualified and when he did he immediately took him off the job.

Claimant was examined again on April 1, 1964, by a heart specialist, Dr. J. F. Filippone, whose opinion was that Claimant "is permanently disabled for strenuous work."

The record does not disclose any disagreement among the doctors as to the physical condition of the Claimant. The Organization raised objections that Dr. Druffner's report was not revealed and that the Chief Surgeon had not personally examined the Claimant. These objections, however, do not seem to be material since the dispute is not over differences in the diagnosis but whether the Claimant was thereby incapacitated from doing his job.

Claimant said that his personal physician declared him "physically able to resume full work as of November 4, 1963." There is nothing in the record to indicate that the physician had any notion of what Claimant's "full work" was. Carrier alleged that Claimant told Dr. Druffner that as foreman he sat in a truck and watched his men work. While this may be mere assertion on Carrier's part, it is not inconsistent with the position of the Organization that the normal and usual duties of the job "are supervisory and do not entail strenuous physical activities." Therein is the crux of the dispute: What are the job duties of a gang foreman and do they involve strenuous physical activity?

The Carrier submitted evidence regarding the job content to which the Organization objected because it was not submitted on the property. Even if this evidence is not admitted, there is enough evidence that on occasion the foreman did the physical work of the men he supervised. The General Chairman, for example, wrote Carrier's Manager of Personnel, as follows:

"I also note that Dr. Filippone refers to the Chief Engineer's outline of duties of a track foreman which apparently indicated that a foreman participates in actual physical labor with trackmen in all of their duties. **While we both understand that this may occur on occasion** it is not the normal duties of a foreman to perform the same work as the employees he supervises." (Emphasis added.)

It is apparent from the record that a foreman does on occasion pitch in and work along with his crew. The Organization is on record as acknowledging this but seeks to disregard it by arguing that a foreman may be required to perform only the "normal and usual" duties, not the occasional and unusual duties.

This Board has previously held that an employee must be able to perform all the duties of the position. (Award 4892). We take this to include the occasional and the unusual.

An employee may not, by infirmity, refuse to perform any part of his job for in doing so he changes the job, a function he has no contractual right to perform.

Even if we assume that Claimant's personal physician thought him capable of doing physical work, Carrier is not obliged to accept this opinion in the face of the opinion of its physicians, especially in the absence of any showing that its physicians were not acting in good faith. We have previously held that it is not within the province of the Board to resolve conflicts between physicians. (Award 11029). We can only hold that there is no showing that Carrier acted improperly. It had an obligation to the public, other employees and, indeed, the Claimant, himself, not to permit him to return to work in which he might risk another heart attack.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.