

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

John H. Dorsey, Referee

## PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WABASH RAILROAD COMPANY

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

(1) The Carrier violated the Agreement and the seniority rights of Booker T. Williams when it refused to permit Mr. Williams to return to active service on and subsequent to September 19, 1960.

(2) Booker T. Williams now be reinstated to service with seniority and all other rights unimpaired.

(3) Booker T. Williams be allowed eight hours' pay at his straight-time rate for each working day that he is held out of service.

EMPLOYES' STATEMENT OF FACTS: The factual situation was partially described in the following quoted excerpt from the letter of claim declination by the Carrier's highest appellate officer:

"Our investigation develops that:

1. Mr. Booker T. Williams, Extra Gang Laborer, Gang No. 2, Decatur, Illinois, was granted a leave of absence on May 9, 1960, due to 'sickness.'
2. A surgical operation for the partial removal of Mr. Williams' stomach was performed at the Decatur and Macon County Hospital at Decatur, Illinois, on May 11, 1960.
3. Due to a reduction in force Mr. Williams was furloughed on July 13, 1960.
4. Mr. Williams had not reported for work as of July 13, 1960, after being granted leave of absence on May 9, 1960.
5. Mr. Williams was recalled to service on September 19, 1960, and was sent to The Wabash Employees' Hospital Association hospital

- (3) Booker T. Williams be allowed eight hours' pay at his straight-time rate for each working day that he is held out of service."

Copy of all of the correspondence had between the representatives of the parties is attached hereto and made a part hereof, marked Carrier's Exhibit C.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Carrier moves for the dismissal of the claim on two grounds: (1) the Claim submitted to the Board was never presented to any officer of the Carrier and was never handled on the property; and (2) the Claim was not presented on the property within the time limitation prescribed in Article V of the Agreement of August 21, 1954.

We find that the Claim, as framed in the Employees' Submission, is in substance the same as that presented and handled on the property. Substance, not form or wording, governs.

Since the submission of this dispute to this Board the parties to the August 21, 1954, Agreement created a National Disputes Committee to consider various interpretations and applications of said Agreement, including Article V thereof. That Committee has since rendered several decisions to the effect that if the Carrier or the Organization does not raise the time limitation question on the property it is considered to have waived its rights in this respect and may not properly raise the issue for the first time before this Board. See NDC Decisions 3, 5, 10 and 17. Carrier, in the record before us, did not raise the issue on the property.

Carrier's motions to dismiss are denied.

#### THE FACTS

Claimant held seniority as Extra Gang Laborer from June 19, 1957. He was granted leave of absence account of sickness on May 9, 1960. Two days later, May 11, 1960, he was operated on for partial removal of his stomach.

While on leave he was furloughed in a reduction of force. He was recalled to service on September 19, 1960; and, was sent to the Wabash Employees' Hospital Association at Decatur, Illinois for a physical examination in accord with Carrier's established practice that:

"All employees who have suffered severe injury or illness must be examined before they re-enter the service."

On the basis of the following diagnosis and prognosis, Dr. C. Ruiz, examining surgeon, found Claimant "not qualified for employment in the position of E. G. L":

"still looks weak. Has weakness of upper end of abd. incision — early rupture."

Following that disqualification Claimant, voluntarily and at his own expense, on September 26, 1960, submitted himself to two doctors for examination: Dr. R. E. Mulrooney, who had operated on Claimant; and, Dr. E. S. Lockhart. The following are their reported diagnoses:

"9-26-60

To Whom It May Concern:

This is to certify that I examined Booker T. Williams and find no evidence of a post-operative ventral hernia. His abdominal muscles are a little flabby, due to not working. In my opinion he is capable of lifting and returning to work.

/s/ Dr. Mulrooney."

"8-26-60 [sic]

To Whom It May Concern:

Mr. Booker T. Williams was examined in this office on September 26, 1960 regarding a scar from an abdominal incision.

This incision is firm, firmly healed and there is no evidence of hernia. He should be able to perform any type of work to which he might be assigned.

/s/ Edmund S. Lockhart, M. D."

Under date of November 22, 1960, the General Chairman addressed the following to Carrier's Division Engineer:

"I have received complaint from Booker T. Williams, laborer, Decatur, Illinois, who advises that while furloughed it was necessary for him to undergo surgery. When he was recalled to service he was disqualified by Dr. D. A. Pence.

He was subsequently examined by two practioners, Dr. Raymond Mulrooney and Dr. Edmund S. Lockhart, both of whom after careful examination, advised that he was capable of lifting and performing any type of work to which he might be assigned.

Would you please reinstate Booker T. Williams, with all rights unimpaired and pay him at his regular straight time rate for eight hours each working day that he was held out of service, account being disqualified by Dr. Pence, retroactive sixty days.

Would you please allow this claim, advising."

The Division Engineer replied on December 2, 1960:

"Please refer to your letter of November 22, 1960, regarding complaint from Booker T. Williams concerning disqualification by Dr. D. A. Pence, and making claim for reinstatement and pay for time he was held out of service.

Dr. D. A. Pence, Surgeon in charge of the Wabash Employees' Hospital Association, has advised that he does not feel justified in returning Mr. Williams to heavy work as extra gang laborer, with a weakness of his incision which, in a short time, would be a fully developed rupture.

Therefore, this claim is denied."

Thereafter, throughout the handling of the dispute on the property, Carrier took the position that: (1) it was its prerogative to decide the physical qualifications of its employees; (2) it had acted in good faith on the basis of competent medical advice; and, (3) the Claim "is without basis under the effective agreement." Equally adamant was the Organization in its position that since two doctors, engaged by Claimant, had concluded that he was physically qualified, it followed that Carrier's disqualification of Claimant was wrongful. It is significant that neither party made demand upon the other that the conflict in the medical opinions be resolved by a three-doctor board or in any other manner.

## THE ISSUES

The issues are whether: (1) a wrongful physical disqualification is a violation of the Agreement; (2) Carrier wrongfully concluded that Claimant was physically disqualified.

## RESOLUTION

### A. Interpretation of the Agreement.

With *Gunther v. San Diego & Arizona Eastern Railway Company*, 382 U. S. 257, decided December 8, 1965, as authority, we construe the collective bargaining provisions which secured seniority rights, together with other provisions of the contract, as justifying an interpretation of the contract guaranteeing to Claimant priority in service according to his seniority and pursuant to the Agreement so long as he is physically qualified. Therefore, if Carrier wrongfully classified Claimant as physically disqualified, the Agreement was violated.

### B. Was Claimant Wrongfully Found To Be Physically Disqualified?

In our consideration of this case we have carefully studied the *Gunther* case and the First Division Awards and Interpretation from which it sprung. Award 17161, Vol. 122, pp. 957-963; Award 17646, Vol. 127, pp. 226-227; and, Interpretation of Award 17646, issued October 8, 1958.

In the *Gunther* case the Supreme Court, seemingly, gave great weight to the railroad's refusal to comply with *Gunther's* request to join him in the selection of a three-doctor board to re-examine his physical qualifications for return to service. The inference drawn from the Opinion is that the Court considered the refusal to be a breach of the railroad's statutory duty to exert every reasonable effort to maintain the collective bargaining agreement. See, the Railway Labor Act, Title I, Section 2, First. There was no like request and refusal in the instant case. Nor is there evidence of record that Carrier acted in bad faith.

Here, in essence, we are asked to make a finding, from conflicting medical opinions, that Claimant was or was not physically qualified to perform the duties of Extra Gang Laborer. This we cannot do.

On a question like the one before us here — the condition of an abdominal incision over five years ago — it is highly unlikely that a three-doctor board, created as of now, could resolve the conflicting diagnoses and prognoses *nunc pro tunc*.

At best we can and will, with the Gunther case as authority, remand the case to the property, the parties to comply with the following:

1. Claimant shall have sixty days from the date of this Award in which to apply for his seniority entitlements to a position of Extra Gang Laborer;
2. If Claimant makes such application Carrier shall cause him to be medically examined to determine whether he is, as of then, physically qualified to perform the duties of the position; and, if found qualified Carrier will place him in the status he would be enjoying absent the September 19, 1960 finding of physical disqualification;
3. Should Carrier, from the medical examination prescribed in 2, above, find Claimant to be physically disqualified; and, should thereafter, within ten days, Claimant serve on Carrier a more recent conflicting medical report as to his physical qualification, a three-doctor board shall be convened to resolve the conflict — each party will name one doctor to the board and the third doctor shall be selected by the two named by the parties. The finding of the three-doctor board, as to Claimant's physical qualification, shall be binding upon the parties;
4. Should a three-doctor board be convened pursuant to 3, above; and, should such board find Claimant physically qualified, Carrier shall forthwith restore Claimant to the status, with all rights and entitlements, he would be enjoying, under the provisions of the Agreement, had he not been classified by Carrier as physically disqualified on September 19, 1960; and
5. Should, after exhaustion of 1 through 4, above, the Claimant be found, ultimately, physically disqualified, the Claim shall stand denied.

Inasmuch as we are unable to determine, from the record, whether Claimant was wrongfully found physically disqualified on September 19, 1960, we must deny the prayer for monetary damages set forth in paragraph 3 of the Claim.

**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 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, from the record, we are unable to make a finding as to whether Carrier violated the Agreement.

## AWARD

1. Paragraph 3 of the Claim is denied.
2. The case is remanded to the property for further handling and resolution as prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1966.