

Award No. 16579
Docket No. TE-16985

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Transportation-Communication Employees Union on The Pennsylvania Railroad, that:

1. The Carrier, in holding the claimant, R. E. Strickling, out of service, when he is fit and able to perform the duties of a block operator on his position is depriving the claimant of his rights as an employee on the Pennsylvania Railroad.
2. Effective January 31, 1966, and continuing each date thereafter until the claimant is returned to duty, the Carrier shall compensate R. E. Strickling an eight (8) hour day for each day of his assignment, first trick "AY" and any holiday pay when accruing to said position.

EMPLOYEES' STATEMENT OF FACTS: The Agreement between the parties effective July 1, 1965, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

Mr. R. E. Strickling, hereinafter referred to as claimant, seniority date November 5, 1945, was, prior to January 31, 1966, regularly assigned to the first trick block operator position at "AY" Tower, Arlington, Akron, Ohio. On January 29, 1966, claimant was notified by Carrier that he would not be permitted to perform service as block operator account not meeting the visual requirements of such position, and was removed from his position at "AY" block station effective January 31, 1966.

Claimant was operated on in May of 1964 as a result of a hemorrhage in his left eye. Claimant resumed service at "AY" block station after his release from the hospital. Claimant was given a medical examination by Carrier's medical officer, Dr. W. R. Murphy, on July 23, August 20 and December 11, 1964, June 24, 1965 and January 6, 1966. Claimant worked on his position for approximately eighteen months with the same eye defect. Carrier's medical officer has never indicated that he believed claimant's sight in the left eye would improve from what it was on July 23, 1964. The reports from Carrier's medical officer are attached hereto as TCU Exhibits 1 through 5.

R. E. Strickling who was held out of service effective January 6, 1966, because of his inability to pass the visual requirements of Regulations 12 and 14 of the G-45 manual.

You state that in your opinion Mr. Strickling's condition is referable to a Board of Doctors. If not, you contend that a field test should be given the employee similar to the test given former Lake Region Block Operator W. H. Welch in System Docket No. 654. That docket, however, you will recall involved the employee's ability to satisfactorily pass the color perception requirements. A field test was conducted and Mr. Welch subsequently returned to duty.

The facts and the issues involved in the instant case are not the same as those in System Docket No. 654. Mr. Strickling unfortunately is unable to meet the mandatory requirements of Regulations 12 and 14 which require 20-30 vision in one eye and not less than 20-40 in the other, with or without glasses. A field test would not change that fact.

Our position in this matter as set forth in our letter of July 6, 1966, is reaffirmed and your request for a field test is declined.

We submit again, however, it may be possible to find a position which Mr. Strickling may be permitted to fill, subject, of course, to an agreement under Regulation 2-O-1 by and between the Superintendent-Personnel and the District Chairman. We understand that in the original handling of Mr. Strickling's matter on the Division, he was offered a 2-O-1 placement by the Assistant Superintendent-Personnel, Lake Division, Cleveland. The offer was rejected Mr. Strickling indicating he was unwilling to be assigned to any location other than 'AY' Block Station, Arlington, Ohio, where he was regularly assigned prior to his disqualification."

Effective January 29, 1966, the Railroad Retirement Board approved Mr. Strickling's application for an occupational disability annuity which he is receiving at the present time.

Therefore, so far as the Carrier is able to anticipate the basis of this claim, the questions to be decided by your Board are whether the action of the Carrier in removing the Claimant from service account of his inability to meet the standard visual requirement was improper and whether he is entitled to the compensation claimed.

(Exhibits not reproduced.)

OPINION OF BOARD: R. E. Strickling, regularly assigned Block Operator, was notified by Carrier that effective January 31, 1966, he would not be permitted to continue with his work as Block Operator because he failed to meet the visual requirements of that position. Mr. Strickling suffered eye impairment as a result of a hemorrhage in his left eye for which he was operated on in May 1964. He was given periodic medical examinations by Carrier's physician on various dates between 1964 and 1966. After being permitted to work on his position for eighteen months with the eye defect, Carrier disqualified him as a Block Operator on the basis of a report of its Medical Officer on January 6, 1966, which stated that Mr. Strickling's vision had not improved and did not meet the visual requirements of Carrier.

Petitioner contends that the refusal of Carrier to refer the fitness of Claimant to a Board of Doctors for determination is in violation of Regulation 8-E-1 of the effective Agreement. It maintains that this regulation gives neither party the right to refuse or to refer the case to a Board of Doctors. It argues that Mr. Strickling is able to perform the duties of his position as was demonstrated by his performance for eighteen months with his left eye defect and that he should be returned to his position as Block Operator with compensation for the time lost until restored.

Carrier takes the position that the circumstances in the instant case are not of such a nature as to justify submitting Mr. Strickling's physical fitness for the position to a Board of Doctors. It argues that it is within its managerial prerogative to determine the sight standards as well as other physical standards that an employee must have to satisfy his remaining in service. It points out that it gave Mr. Strickling every possible consideration in keeping him in service for eighteen months before disqualifying him for not passing the visual requirements.

Regulations 12 and 14 of the G-45 Manual set forth the visual requirements that an employee must have to remain in service as a Block Operator. The record shows that Mr. Strickling did not meet these requirements of 20-30 vision in one eye and not less than 20-40 in the other, with or without glasses. Mr. Strickling's last medical examination by Carrier's physician on January 6, 1966, indicated that there was no improvement in his left eye and that he was unable to meet the visual requirements of a Block Operator.

The record does not include any evidence which is in conflict with the findings of the Medical Director of Carrier as to the degree of impairment of the left eye. While it is acknowledged that Regulation 8-E-1 provides for the procedure to be followed in the establishment of a Board of Doctors when the General Chairman desires the question of the physical fitness of an employee to be decided upon finally before he is permanently removed from his position, this regulation contemplates a difference of opinion concerning the physical condition of the employee. The disability of Mr. Strickling's left eye was so severe that an examination by a Board of Doctors would only confirm the visual deficiencies already known by both parties. Carrier's willingness to permit Mr. Strickling to work temporarily for eighteen months without meeting the visual requirements of a Block Operator with the possible expectation that his vision might improve does not obligate it to continue to suspend the requirements to qualify him as a Block Operator.

Inasmuch as Carrier was within its prerogatives in determining the physical qualifications for the position and there is no question that Mr. Strickling's left eye deficiency was such as to make him unable to satisfy the vision standards, an examination of Mr. Strickling by a Board of Doctors would not change the requirements of the position or disprove the fact that his left eye was impaired. For these reasons we hold the Agreement was not violated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the record and all the evidence, finds and holds:

That the Carrier and the Employee 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1968.

DISSENT TO AWARD 16579, DOCKET TE-16985

This Board has often—and appropriately—observed that it has no power to read into an agreement provision an intent not consistent with the language of such provision. Yet that is precisely what the majority did in this case.

In its "Opinion of Board" the majority said:

" . . . While it is acknowledged that Regulation 8-E-1 provides for the procedure to be followed in the establishment of a Board of Doctors when the General Chairman desires the question of the physical fitness of an employe to be decided upon finally before he is permanently removed from his position, **this regulation contemplates a difference of opinion concerning the physical condition of the employe. . . .**"

The emphasized language cannot be reconciled with the language of the regulation, the pertinent portion of which reads as follows:

"Physical fitness—determination of. When an employe has been removed from his position on account of his physical condition and the General Chairman desires the question of his physical fitness to be finally decided before he is permanently removed from his position, the case shall be handled in the following manner: . . ."

Thus it is seen that the only requirement for establishing a Board of Doctors is the desire of the General Chairman to have an opinion from a qualified doctor who is independent of the Carrier.

It is true that most rules of this nature do contemplate a conflict in medical opinion as the basis for establishment of such a Board of Doctors. But these parties negotiated a different rule.

Now, the majority has wiped out the difference—for this particular case—and has thus committed error. This error renders the award meaningless as an interpretation of the rule.

On these grounds I dissent.

J. W. Whitehouse
Labor Member

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