

Award No. 16926
Docket No. SG-17482

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN
ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie-Lackawanna Railroad Company:

On behalf of Mr. A. D. Langone that he be restored to his original assignment of Leading Signal Maintainer at Syracuse, New York, with seniority, vacation, and other rights unimpaired; and be paid from October 26, 1966 — the date he was able, willing and ready to return to work from leave of absence in accordance with the provisions of Rule 47 — and continuing until he is restored to service. (Carrier's File: 115.1-4-148 (Sig.))

EMPLOYEES' STATEMENT OF FACTS: This dispute involves an employee who — in spite of favorable medical opinions and reports by three different doctors — has been held out of service since October 26, 1966, allegedly because of his physical condition.

On July 9, 1966, Leading Signal Maintainer A. D. Langone — at age 40 — suffered a Posterior Coronary Infarction and was in the Oswego Hospital until August 9, 1966. Following his recovery the cardiologist, Dr. Olin J. Mowry, who attended him during this period, stated in a report to Carrier's Chief Surgeon W. E. Mishler that:

"The risk of this individual is actually better now than it was prior to his cardiac accident."

Dr. Mowry's report dated November 15, 1966, to Dr. Mishler was as follows:

"OLIN J. MOWRY, M.D.
55 West Bridge Street
Oswego, New York
Telephone FI 3-3351

November 15, 1966

W. E. Mishler, M.D.
737 Midland Building
Cleveland, Ohio 44115

OPINION OF BOARD: On July 9, 1966, Claimant suffered a posterior myocardial (coronary) infarction. He was hospitalized until August 6, 1966 at which time he was released to his home to convalesce. He was subsequently examined by his own attending Physician, a Cardiologist, the local Carrier Doctor, and a Veterans Administration Physician, all of who recommended that he be returned to duty. The local Carrier's Doctor's examination is dated October 22, 1966, and it is from that date forward that the claim has been submitted.

The Carrier's Chief Medical Officer, despite the recommendations of the above mentioned Physicians, would not approve Claimant's return to duty.

The Railroad Retirement Board paid Claimant sickness benefits until October 28, 1966. Inasmuch as Carrier refused to return him to duty, the Board then began paying unemployment benefits. On November 30, 1967, Claimant suffered an acute myocardial infarction due to coronary arteriosclerosis on the street and was pronounced dead on arrival at the hospital.

We have in this case a difference of opinion between Doctors. The claim is based on the allegation that Carrier's refusal to return the Claimant to duty, was arbitrary and capricious.

From a review of the evidence, Carrier's Chief Medical Officer never personally examined the Claimant. Nor would he agree to accept the findings and recommendations of outside independent Medical Authority, which Claimant was willing to consult and for which he was willing to bear the expense thereof.

When a difference involving opinion occurs, the Agreement, by means of an Addendum entitled "Understanding on Physical Reexaminations" provide a procedure to be followed by the General Chairman. It reads in pertinent parts as follows:

"Upon request of the employe the Chief Surgeon will submit a report of the medical findings to the employe's family physician. If after consultation with his family physician the employe so desires, the Chief Surgeon will furnish him a report covering his examination in layman's language. If an employe is dissatisfied with the action taken by the Chief Surgeon as a result of this physical examination, the General Chairman may progress the matter with the Chief Surgeon and upon presentation of written authorization by the employe the Chief Surgeon will make available and explain to the General Chairman the medical findings in the case. If still dissatisfied, the General Chairman may arrange with the Chief Surgeon for further handling of the case between the Chief Surgeon and the employe's family physician. If thereafter it is desired to further progress the case, the Chief Surgeon and the family physician of the employe will arrange for a neutral physician (qualified as an expert in the field of medicine concerned and qualified by the American Board or equally rated society), who will reexamine the employe. The decision of this neutral physician will be considered final. Any expenses incidental to reexamination by this neutral physician will be divided equally between the two parties. The expense of the respective medical appointees (others than the neutral physician) will be borne by the party selecting the physician. If in the opinion of the neutral physician the employe's condition was not such as to render him unfit to perform his usual duties, he will be reinstated and compensated for wage

loss suffered. Should the decision be adverse to the employe and it later develops through medical findings that his physical condition has improved, a reexamination will be arranged upon the request of the employe or his representative.

This understanding, will not apply in cases involving personal injuries sustained in the service of the company.

The above may not be changed or canceled except in accordance with the provisions of the Railway Labor Act, as amended."

Although the General Chairman did not officially progress this matter in accordance with the procedure outlined above, there is evidence in the record that this procedure was suggested to the Chief Medical Officer and he summarily refused to follow it. This fact is not controverted in the record by the Carrier.

The subsequent death of Claimant a year later would indicate that Carrier's Chief Medical Officer may have been correct in his judgment. However, we are concerned with his decision of the prior year. It would appear to us that with three other physicians recommending Claimant's return to duty, all of whom personally examined him, and with the Chief Medical Officer refusing to accept independent authority offered by Claimant as well as his refusal to follow the procedure outlined above, his action in this case was arbitrary.

To argue that the General Chairman should nevertheless have progressed the matter in accord with the procedure outlined in "Understanding on Physical Reexaminations," despite the uncontroverted refusal of Carrier's Chief Medical Officer, is to encourage exercises in futility. Compensation is therefore awarded from October 26, 1966 to Claimant's date of death.

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 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 the Agreement was violated to the extent indicated in the opinion.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1969.

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