

**Award No. 4693**

**Docket No. 4537**

**2-ACL-CM-'65**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYEES'  
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**ATLANTIC COAST LINE RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:** (a) That, under the controlling agreement Car Inspector W. H. Chaplin, Waycross, Georgia has been denied his contractual right to work since December 13, 1962.

(b) That accordingly the Atlantic Coast Line Railroad Company be ordered to restore him to service with seniority, vacation rights and all other benefits accruing to him under the current agreement unimpaired, and pay for all time lost, at the applicable rate, since December 13, 1962.

**EMPLOYEES STATEMENT OF FACTS:** W. H. Chaplin, hereinafter referred to as the claimant was employed as a carman by the Atlantic Coast Line Railroad, hereinafter referred to as carrier, on October 26, 1954.

The claimant's left knee was injured while on duty on October 17, 1961, he was assigned as a car inspector on the Waycross Train Yard on the date in question. He was treated by the carrier's Doctors until July 19, 1962 at which time he was given a certificate of ability to work (form 38) by Dr. S. Victor.

The claimant was still experiencing pain in his knee and decided to consult his private physician before returning to work, he was advised that surgery would be required to correct the existing condition. An operation was performed on the claimant's knee August 14, 1962 by Dr. Thomas Beath, Richmond, Virginia. Upon recovery from the operation the claimant reported to Dr. Butterworth, the company doctor, on December 12, 1962 for examination. Dr. Butterworth made a report to Dr. Benjamin Rawles, Chief Surgeon, Atlantic Coast Line Railroad, in which he recommended that the claimant be held out of service.

The claimant felt that he was able to return to work and decided that he would go back to Dr. Beath for further examination Dr. Beath issued a detailed report on the claimant's condition on January 10, 1963 in which he stated that in his opinion claimant was able to return to work. After receiving Dr. Beath's report the claimant returned to his home in Waycross,

Georgia and was examined by three prominent doctors there, all agreed with Dr. Beath that the claimant was able to perform his duties as a car inspector for the Atlantic Coast Line Railroad.

This evidence of the claimant's fitness to return to work was presented to Mr. W. S. Baker, assistant vice president, Atlantic Coast Line Railroad Company on April 9, 1963 by General Chairman, J. S. Head after which claim was again denied.

This claim has been successively handled on appeal as prescribed under the controlling agreement up to and including the highest designated officer with whom such disputes are to be handled and the carrier has consistently declined this claim, and refused to allow the claimant to return to work.

The agreement effective November 11, 1940, as revised and amended, is controlling.

**POSITION OF EMPLOYEES:** The employes contend that the carrier has set up an unreasonable standard of physical fitness and submit in support of our position statements of five doctors who examined the claimant in the months of December 1963 and January 1963, Marked as follows:

1. Statement of Dr. Butterworth, dated December 13, 1962.
2. Statement of Dr. Thomas Beath, dated January 10, 1963.
3. Statement of Dr. C. M. Blanton, dated January 15, 1963.
4. Statement of Dr. H. K. Heath Jr., dated January 15, 1963.
5. Statement of Dr. Floyd Davis, dated January 17, 1963.

The employes wish to call particular attention to certain inconsistencies in the statement of Dr. Butterworth, the carrier's doctor. He states in the last paragraph that this man (the claimant) is recovering beautifully from an operation on his knee and is getting a great deal better, however in the same paragraph he predicts that he (the claimant) is more than likely to have difficulty with this knee in the very near future.

Doctor Thomas Beath who performed the operation in question, and who is a respected and widely recognized authority in this field, made a careful examination (including an ex-ray of the knee) of the claimant on January 10, 1963, his conclusions were that the knee that had been treated would stand up to work activities that he (the claimant) did before the injury was sustained.

Doctors Blanton, Heat and Davis, all concur in Dr. Heath's opinion that the claimant was physically able to resume his full duties as a car inspector on January 10, 1963.

In summarizing, the employes wish to emphasize the fact that Doctor Butterworth did not say that the claimant was able to work on December 13, 1962, but predicted that he would have trouble with his knee in the very near future. Holding the claimant out of service on the basis of such prediction is most unfair and constitutes an irresponsible and capricious action on the part of the carrier.

We, therefore, invoke the provisions of Rule 21, pertinent part of which reads as follows:

“If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wages lost, if any, resulting from said suspension or dismissal.”

and respectfully request that the claim of the employes be sustained.

**CARRIER'S STATEMENT OF FACTS:** Claimant W. H. Chaplin entered service for the carrier on August 25, 1950, at Waycross, Georgia.

On April 3, 1952, he was set up as carman, under provisions of Rule 406, and qualified as car inspector on June 13, 1960. He has sustained eight in-service injuries to date, including two injuries to his left knee, the same disabled knee in question here. The following represents all known left knee injuries sustained by W. H. Chaplin:

- (1) May 6, 1955—Sprain of left knee.
- (2) October 19, 1956—Twisted left knee.
- (3) October 20, 1956—Stepped in hole aggravating and further injuring left knee.
- (4) October 17, 1961—Fall resulting in internal injury to left knee.

While the 1955 injury did not involve loss of time from work, it was a precursor of further injuries to claimant's left knee. After the successive injuries to his left knee in 1956, claimant entered carrier's Waycross Hospital on October 20, 1956, remaining there until November 19, 1956. Then he returned to work until February 5, 1957, when he again became disabled. Claimant's first left knee surgery was performed on February 12, 1957, by Dr. Thomas Beath. He returned to work on March 11, 1957. Settlement for the 1955 injury was effected for \$730.00.

On various occasions prior to October 17, 1961, claimant was known to have complained of continuing knee difficulty and was observed limping. On October 17, 1961, claimant sustained still another injury to his left knee. Through his attorneys, suit was instituted for a sum in excess of \$3,000, alleging permanent and total disability, severe pain, mental anguish, past and future.

Total disability continued and on July 19, 1962, Dr. Samuel Victor of Waycross examined the claimant after the claimant had requested a form 38 (which is an authorization to return to duty). He was still wearing a brace. A form 38 was issued for July 21, 1962, with instructions to the claimant to return for a check-up in one week, but claimant refused the form 38 and did not return to duty. Instead, he advised he was entering a Richmond, Virginia, Hospital on August 12, 1962, for further surgery on the still injured and disabling left knee, to be performed on August 14, 1962.

Trial of the case was set for October 1, 1962, but settlement was effected just prior to trial for \$15,000. While the medical evidence on the extent of permanent disability to the left knee was inconclusive at that date, the claimant's attorney presented a bleak picture of the claimant's ability to perform

his job in the future. The representations were intended to be relied upon by the railroad and were, in fact, relied upon and contributed to the approval of the \$15,000 settlement.

Dr. Beath released the claimant as fully recovered and able to return to work on December 12, 1962. The claimant reported himself available for duty on December 13, 1962, but on the basis of an examination by the carrier's chief surgeon on December 14, 1962, supported by an examination by Dr. R. D. Butterworth, of Richmond, Virginia, the claimant was rejected for duty.

The organization then progressed a time claim on behalf of the claimant, alleging violation of Rule 21:

"No employe shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe and the local chairman will be apprised in writing of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and be represented by the duly authorized representative of System Federation No. 42.

When cases are being investigated, the evidence will be written up with sufficient copies to give those concerned.

If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wage lost, if any, resulting from said suspension or dismissal."

On April 10, 1963, the claim was declined by the highest officer of the carrier designated to make the decision and the organization gave written notice of intent to file ex parte submission with the second division of the National Railroad Adjustment Board.

**POSITION OF CARRIER:** Before outlining the reasons for disqualifying the claimant, the carrier emphatically and unequivocally declares Rule 21 has absolutely no relevance to this case. This medical disqualification of the claimant was based solely on his present and future inability to perform the duties of his former position. Carrier knows of no bases for disciplining the claimant and, therefore, the holding of a discipline hearing would be ludicrous.

The carrier has three bases for refusing to reinstate the claimant:

I. It is the sole right and duty of an employer to decide the necessary physical qualifications of its employes. This is an inviolate management prerogative. Your board has clearly supported this view in Award No. 4244:

"The responsibility that a carrier owes to its employes, to the public, as well as with respect to its own liability are all calculated to preclude this Board from substituting its judgment for that of the carriers with respect to such an involved matter as an employe's physical fitness to return to work."

The reasoning behind the rule is succinctly stated in Award 3749 of your board:

"The responsibility of Management for the safety of its employes

and the public requires the use of reasonable discretion in determining the physical condition of its employes.”

Again, your board in Award 3108 held:

“On the facts and circumstances shown of record, we think the carrier did not act arbitrarily in withholding claimant from service on the basis of the opinion of its chief surgeon. This Board is not qualified to determine whether the examination of the Chief Surgeon in April 1955 was adequate from a medical standpoint. In view of claimant's past medical history we think the carrier acted in good faith in holding him out of service . . . It would be unwise for this Board to substitute its judgment for the carrier on the basis of this record.”

Similarly, the first division has decided the rule in Award 17154:

“The setting up of standards of physical fitness is a responsibility of management, and may not be challenged by us in the absence of evidence of bad faith or abuse.”

Carrier strongly urges that this is a sole management right, as stated in first division Award 19538:

“The Division finds that these questions are not for a board of physicians to answer. They must be determined by this Division from the record of the case. Numerous awards of this Division have asserted a railroad's right and duty to take all reasonable precautions and establish all reasonable rules and standards for the protection of passengers' safety and of shippers' as well as carrier's property. Given said right and duty, the record here is found to contain no evidence that carrier exercised the right or applied its standards unreasonably. Specifically, the standard of two eyes for a fireman is not shown to be arbitrary or unreasonable, nor is the application of said standard to claimant shown to have been arbitrary or discriminatory.”

A very recent FELA case in the supreme court of Alabama goes even further by imposing a duty on management to prevent employes from working who are not physically fit. Specifically, a jury question is raised where the employer railroad knew or should have known the employe had a disability rendering him physically unfit for his job, notwithstanding the fact that both the employe and his doctor claimed he was physically fit to work. Please see *Louisville & Nashville Railroad Company v. Boyles*, cited in 153 S 2 639 (1963):

“It is insisted that the evidence as summarized above was not sufficient to show that the railroad had knowledge of Boyles' physical infirmities or that it required him to do the work in which he was engaged at the time he suffered the stroke. We do not agree. Under the liberal view which the Supreme Court of the United States has taken in regard to cases brought under the Federal Employers' Liability Act, we feel constrained to hold that the railroad's knowledge, actual or constructive, of Boyles' illness was a jury question.”

Thus, there exists a management right augmented by an unequivocal duty to employ only those persons physically able to perform the work. The carrier urges in the strongest possible terms that only its chief surgeon should be the

final arbiter when this issue is presented. There is no rule in the agreement relinquishing this managerial responsibility to a three-man medical board.

II. The medical disqualification of the claimant was founded on the best qualified medical information and most competent professional judgment available.

(a) HISTORY AND PROGNOSIS:

The medical history of an individual is frequently indicative of his medical future. Dr. Thomas Beath, who has operated twice on the claimant's left knee, stated in his operative notes dated February 12, 1957:

"At the conclusion of the operation. I did not feel entirely satisfied that the causative pathology had been found and removed and would not be excessively surprised if, at a later time, re-operation to remove the lateral meniscus might be necessary. I fully recognize that, in presenting these notes in this form, it must be felt that an inefficient job of diagnosis or surgery had been done, but it might be realized, and anyone who does this work knows, that problems such as this arise from time to time. I feel that it is important to record the precise finding and what was done at this time to be helpful in case an unfavorable outcome should occur."

After his fourth known left knee injury, Dr. Richard Worsham stated in his December 1, 1961 report:

"I would think that this injury of October 17, 1961, would respond to conservative treatment and that he will recover from this, however, he could expect from time to time to continue to have pain and difficulty with his knee because of the degenerative changes which are present."

After several examinations following the latest left knee surgery, Dr. George Raybin testified by deposition:

"Also, we're dealing with a man who, from either of his operations should do well, but he's had two operations. That don't make it so good, and I'm a little skeptical about full recovery in this because of that, more than anything else."

(This same doctor was to have testified on behalf of the claimant at his then upcoming trial.)

After his December 12, 1962, examination, Dr. R. D. Butterworth wrote:

". . . and I think if he has a job which requires him to walk on rough terrain or walk any great distance, squatting and stooping, he is more than likely to have difficulty with his knee in the very near future. In fact, he will probably have trouble with the near future regardless."

Nevertheless, carrier felt that to be completely sure it was being fair in its medical disqualification of the claimant, another examination was advisable. In this latest examination, dated August 31, 1963, Dr. Worsham concludes:

"In addition, this man does not have a strong left knee and can

expect to have increasing difficulty with the knee because of his disease. In addition, he is not able to return to the work of a car inspector for the railroad as this job requires a normally functioning knee which this patient does not have." All of these doctors are specialists in orthopedics and have examined the claimant numerous times over the past five years.

(b) DIAGNOSIS:

In his X-ray study dated November 16, 1961, Dr. Richard Worsham reported:

"These findings are not suggestive of recent trauma and are typical of chondromalacia."

Dr. Worsham's report of December 1, 1961, elaborated on the degenerative arthritic condition of claimant's left knee. Marked atrophy of the left thigh was noted.

Then on February 12, 1962, Dr. R. D. Butterworth stated the Claimant "may have a slight dissecans beneath the patella . . ." "This was later confirmed by the same doctor on December 12, 1962:

"I took X-rays on this gentleman in three views. The patella view shows he has a very definite dessicated area on the side of the patella and there almost appears to be a very small dissecans in this area. The rest of the knee is ngative except for a mild amount of arthritic change.

It is my opinion that this man who is recovering beautifully from an operation on his knee and is getting a great deal better. He will improve some more yet, but this man has a knee which is weak, which is prone to progression of his arthritis and of the dissecans which he has had beneath the patella. I feel he has a definite chondromalacia of his patella and this is a precursor of arthritis . . ."

On August 27, 1963, another X-ray study and physical examination was made by Dr. Worsham:

"The same four diagnostic views of the left knee were taken as were taken on November 16, 1961, and carefully compared. The degenerative arthritic changes are still present involving, as formerly reported, all of the articular surfaces of the knee, namely, the patella, the femur and the tibia. These changes are considered typical of chondromalacia involving the three bones as formerly reported."

What are these terms "Chondromalacia" and "dissecans?" The 22nd edition of the American Illustrated Medical Dictionary by Dr. W. A. N. Darland defines the former term as "Preternatural softness of the cartilages; It is a degenerative condition for which there is no treatment. The same dictionary defines dissecans as "splitting of pieces of cartilage into the joint, particularly the knee joint . . ." "These loose joint bodies, often called "joint mice" break off from the cartilage and can cause a knee to catch and/or lock. Therefore, this is a recurring condition that surgery can sometimes temporarily correct, but in fact represents a permanent disability. This is the physically disabled claimant the organization wants to return to work. Carrier respectfully sub-

mits that such callous indifference to an individual's future physical well-being should not be condoned. To compel the carrier to employ the claimant is to ask the carrier to breach its duty to the claimant himself, his fellow employes and the railroad using public.

In deciding the medical issue, the carrier requests the board compare the reports of Drs. Butterworth, Worsham and Rawles with those of Drs. Davis, Heath, Blanton and Beath. They should be compared on these factors: frequency and duration of examinations, exhaustiveness of examinations and objective v. subjective findings. While carrier contends it is the sole judge of whom it employs. Carrier submits it is not the sheer weight of numbers, but the quality of the reports that should determine the adequate physical qualifications.

**III. Any employe, who establishes he is permanently disabled from performing the duties of his job and has been paid for this disability, is estopped from later showing he has no permanent disability.**

The complaint in this case of *William Henry Chaplin v. Atlantic Coast Line Railroad Company* has this statement:

"Plaintiff has lost wages from his employment and will continue to do so in the future and plaintiff will continue to suffer and endure pain in the future by reason of such injury for a long period of time, to wit: permanently."

From a reading of the attached medical reports that all describe claimant's present and future inability to perform the duties of his former position, it is obvious that the cause is a permanently disabled left knee.

Numerous awards of this Division, e.g., 1672 and 1805, and first division Awards Nos. 15543, 16819 and 17191 support the carrier's position. Those cases running contra have uniformly been held unenforceable in the federal courts.

The carrier is not contending that the settlement constitutes a "purchase of the claimant's job" at the moment the settlement was effected. It was premature to ascertain conclusively that the claimant could no longer perform his former duties. Post-operative examinations by Drs. Rawles, Butterworth and Worsham confirmed what his history clearly indicated, i.e., that he could no longer do the job.

#### **IV. CONCLUSIONS:**

Carrier respectfully requests the board to find in its favor for these reasons:

(a) Management's right to decide the physical qualifications of its employes has not been abused.

(b) Management's duty to reject physically unqualified persons has been fully justified.

(c) The medical basis for disqualifying the claimant was based upon exhaustive, objective medical findings rather than self-serving subjective hearsay or hand-written inconclusive guesses.

(d) Even though the carrier contends it should retain this managerial



right, medical reports should be weighed on the basis of quality, not quantity.

(e) The claimant is no longer physically qualified to perform car inspector duties by virtue of his permanent disability.

The respondent carrier reserves the right, if and when it is furnished ex parte petition filed by the petitioner in this case, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered herein.

**FINDINGS:** The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This case involves a claim of an injured employe whose claim for compensation for his injury resulted in a settlement as the result of which Claimant was paid \$15,000.00. Thereafter he applied for work, claimed he was fully recovered from his injury, and supported his fitness for work by a statement from his physician. The Carrier's chief surgeon examined Claimant found that he was not physically able to perform his duties, and the Carrier refused to put him back to work. There are other medical reports in the record which are also in conflict as to Claimant's physical ability to do his job.

In view of the conflict of the evidence in the instant case it is impossible to resolve the matter since it involves medical expertise not possessed by the Board. Insofar as the facts are similar the Board has spoken at length on the subject of conflicting medical opinion as to physical fitness in Award No. 4692.

#### AWARD

Claim dismissed in accordance with the above decision.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.