

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Grand Trunk Western Railroad Company

Dispute: Claim of Employes:

1. That the Grand Trunk Western Railroad Company violated the controlling agreement when Carman Donald Marshall was denied the right to return to the service on December 15, 1978, and subsequent thereto.
2. That accordingly, the Grand Trunk Western Railroad Company be ordered to restore Carman Donald Marshall to service and compensate him for all time lost since December 15, 1978 until he is restored to his rightful position, with vacation, health and welfare and life insurance rights unimpaired.

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 waived right of appearance at hearing thereon.

The Claimant in the instant case is Mr. Donald C. Marshall. Prior to December, 1978, Mr. Marshall had six years of service with the Carrier; and held a Carman's seniority date of June 9, 1978.

Mr. Marshall was out of work after November 7, 1978, due to a medical problem and was released by his physician to return to work on December 15, 1978. The Carrier's Chief Medical Officer, V. J. Gallant, M.D. directed Mr. Marshall to be examined by the Industrial Clinic at Flint, Michigan on December 15, 1978 to determine if he was physically fit to return to work. As a result of this examination at the Industrial Clinic, Dr. Gallant concluded in part on December 27, 1978 as follows:

"... X-ray examination of his lumbosacral spine was performed and sent to this office and these findings reveal that this man has a

congenital and developmental condition involving the lower lumbar spine which precludes him from doing any type of laboring work which involves any heavy lifting, excessive bending, squatting, etc. I have been told by Mr. R. F. Miller that there is no light work available in the car shop and henceforth this man will have to be disqualified from his present position as a carman. ..."

The Carrier states that Car Foreman R. F. Miller personally contacted Mr. Marshall on either January 8 or 9, 1979 and orally advised him that he had been physically disqualified for return to service as a Carman by the Carrier's Chief Medical Officer. The Organization states that Mr. Marshall was informed by phone around the end of January, 1979, concerning his disqualification.

By letter dated February 6, 1979, the Local Chairman submitted a claim on Mr. Marshall's behalf which claim was denied by Car Foreman Miller. By letter dated February 26, 1979, the General Chairman appealed Mr. Miller's decision and stated in part as follows:

"... Should the above, regarding an examination of Mr. Marshall, not be agreeable, then we request that due to conflict in medical findings, a neutral doctor be selected. We have the contractual right to request a neutral in accordance to Rule 124 of our current agreement. ..."

The General Chairman also set forth his opinion that the Carrier was in violation of Rule 31, concerning an employee being disciplined without a fair hearing.

The grievance was duly progressed and is now properly before this Board.

On behalf of the Claimant, Dr. A. F. Turcke, a radiologist, in a report dated February 17, 1979 concluded as follows concerning the Claimant:

- "1. 1st degree spondylolisthesis of L5 on S1.
2. Congenital fusion anomalies involving the 1st ribs, bilaterally.
3. No other significant findings."

George D. Seymour, M.D., the Claimant's physician, explained the term "spondylolisthesis" as used in the above report, in a handwritten document dated February 22, 1979 as follows:

"Spondylolisthesis means forward displacement of one vertebra over another, most commonly of the fifth lumbar over the sacrum. History has shown this to amount to a potentially unstable back. However, in many individuals it is asymptomatic even with heavy work and extreme physical exertion."

Orthopedic Surgeon J. B. Herzog, D.O. examined Mr. Marshall on April 25, 1979 and he concluded as follows:

"TO WHOM IT MAY CONCERN:

Donald Marshall was examined in my office 3-22-79 regarding intermittent lumbac discomfort noted for years.

Orthopedic and x-ray examination revealed an impression of grade I spondylolichthesis.

RECOMMENDATION: Full activity and flexion exercises."

The first paragraph of Rule 124, Physical Re-examination, states:

"An employee disqualified for service as the result of the findings of Carrier's Medical Department will, in the event he feels such disqualification is not justified, handle with the Management direct or through his representative in the usual way, and if the matter is not disposed of in a mutually satisfactory manner, the employee will, provided written request is made by him within fifteen (15) days from the date notified of his disqualification, be given a physical re-examination under the following conditions." (Emphasis added).

We find that the Claimant did not comply with the fifteen day time limit set forth above in the first paragraph of Rule 124. The Organization's written request for a Rule 124, paragraphs 1-6 physical re-examination was made in the General Chairman's letter of February 26, 1979. While the Carrier's position is that the Claimant was notified on either January 8, or 9, 1979, the Organization recognizes that the Claimant was at least informed of his physical disqualification "around the end of January". Under the Organization's view of the facts some twenty days had elapsed after the Claimant was informed of his physical disqualification before a request was made for a Rule 124, paragraphs 1-6 physical re-examination. We must find therefore that the Claimant no longer had the right to a physical re-examination under the conditions outlined in paragraph 1-6 of Rule 124 at the time the Organization first requested such a re-examination on February 26, 1979.

We find that Rule 31, Discipline, is not applicable to the instant case since the record is clear that Mr. Marshall's disqualification was based on his physical condition.

Paragraph 7 of Rule 124 states:

"Employees, disqualified for service on account of their physical condition, who do not elect to request a physical examination will, if it later definitely appears that their physical examination by a physician designated by the carrier."

Mr. Marshall is presently covered under paragraphs 7 and 8 of Rule 124. And, if it "later definitely appears" that "physical condition has improved", he is entitled to a physical examination by a physician designated by the Carrier. A review of the medical evidence made available to the Carrier by the Claimant from his personal physicians Doctors Turcke, Seymour and Herzog did not reveal that the Claimant's back condition for which he was physically disqualified had improved, as required by paragraph 7. We must find therefore that the Claimant was not in conformity with paragraph 7 of Rule 124 during the handling of this case on the property so as to be entitled to a physical examination by a physician designated by the Carrier under paragraph 7 of Rule 124.

Should it definitely appear now or in the future that Mr. Marshall's physical condition as determined in December of 1978 has improved he then shall be entitled to a physical examination under paragraph 7 of Rule 124. However based on the record before the Board we are compelled to deny Mr. Marshall's claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of December, 1981.