

Award No. 1385

Docket No. 1304

2-NP-FO-'50

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee E. B. Chappell when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (Firemen and Oilers)**

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Laborer Odell C. Hendricks was unjustly removed from the service at the close of his shift on May 4, 1948, and that accordingly the carrier be ordered to restore him to service with pay for all time lost.

EMPLOYES' STATEMENT OF FACTS: Mr. Odell C. Hendricks, hereinafter referred to as the claimant, was employed by the carrier at Northtown, (Minneapolis) Minnesota, on March 20, 1945, with assigned duties of sweeping and picking up scrap in the car department, which duties he continually performed until he was removed from the service on May 4, 1948.

On April 22, 1948, the carrier instructed the claimant to report to the Northern Pacific Benefit Association Hospital at St. Paul, Minnesota, for a physical re-examination, with the result that the claimant obeyed said instructions on April 24, and because thereof he was physically disqualified for retention in the service after May 4, 1948, by the carrier.

This dispute has been handled in accordance with the terms of the collective controlling agreement effective June 1, 1947, and as subsequently amended, up to and with the highest officer of the carrier designated to handle such disputes, with the result that this officer on more than one occasion, and lastly on July 6, 1949, has declined to settle it on any basis.

POSITION OF EMPLOYES: It is submitted on the basis of the above facts that the carrier employed this claimant on March 20, 1945, under the former agreement Rule 41, reading:

"An applicant for employment will be required to fill out and execute the Railway Company's application form and pass required physical and visual examinations.

If application is not disapproved within sixty (60) days of commencement of service, the application will be considered as having been approved, unless it is found that false information has been given."

(which is the same as Rule 40 in the current agreement), and retained him in the service after May 19, 1945, thereby approving him as an employe subject

physically qualified to perform the work of a car department laborer, which he has not done.

Mr. Hendricks has been fairly treated. Prior to his first employment on March 12, 1945, he had certain physical defects, which defects, however, did not disqualify him for service as a car department laborer. Notwithstanding these defects the carrier gave Mr. Hendricks employment and continued him in service until May 4, 1948. Sometime prior to May 4, 1948, these physical defects became aggravated until Mr. Hendricks was no longer physically able to conduct himself in a safe manner. The result was that he became a hazard to himself and fellow employees. When this condition developed the carrier could not consistently retain him in service. Mr. Hendricks was removed from service on May 4, 1948, but his name has been continued on the seniority roster. When and if Mr. Hendricks is physically qualified to again perform service, he will be permitted to do so on the basis of his seniority.

The employees have presented a claim in behalf of Mr. Hendricks for return to service and compensation for all time lost subsequent to his removal from service on May 4, 1948. Notwithstanding the evidence in this case, should this Division supersede its judgment for that of the officers of the carrier and the examining physician and order the reinstatement of Mr. Hendricks, the claim for compensation is not tenable. This Division has firmly established the proposition that the measure of damages to an employee who has been unjustly removed from service is the difference between the amount the employee would have earned had he remained in service and the amount actually earned while out of service. See Awards Nos. 362, 655 and 1215 of this Division. Therefore, in any view of this case the maximum compensation that Mr. Hendricks would be entitled to would be the amount he would have earned less earnings in outside employment while out of service.

The carrier has shown that a decided change had occurred in Mr. Hendricks' physical condition prior to April 24, 1948, creating a hazard to himself and fellow employees; that Mr. Hendricks submitted to a physical examination on April 24, 1948; that the examining physician pronounced Mr. Hendricks physically unqualified to continue working as a car department laborer. It would be unwise to order the return of this employee to service at a time when he is not physically qualified to perform work.

The carrier respectfully submits that the claim covered by this docket should be denied.

All data in support of the carrier's position in connection with this claim has been presented to the duly authorized representative of the employees, and is made a part of the particular question in dispute.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The parties to said dispute were given due notice of hearing thereon.

At the time claimant was employed by the carrier, he concededly had obvious physical defects affecting his ability to walk normally, but which did not then disqualify him from performing the simple duties required of him as a laborer in the car department.

After careful examination of the record the Division is convinced that subsequently there was not any obvious decisive change in his physical ap-

pearance, condition or actions which would enhance the probability of hazard to himself, his fellow employes or the carrier. Rather there is competent evidence that his physical condition had slightly improved. In the light thereof he was unjustly removed from the service.

Therefore the Division concludes that claimant should be restored to service with seniority rights unimpaired and pay for all time lost, if any, after deducting all wages earned in any other employment during the period from and including May 5, 1948, to the effective date of this award.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 12th day of July, 1950.