

Award No. 1478

Docket No. 1369

2-L&N-CM-'51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the termination of the service rights of Carman Frank McCarthy, at the beginning of his shift on April 19, 1950, was not authorized by the terms of the current agreement.

2. That accordingly, the carrier be ordered to restore this employe to service with pay for all time lost, excepting between the dates of May 15 and June 5, 1950, inclusive, retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: Carman Frank McCarthy, hereinafter referred to as the claimant, was employed by the carrier at South Louisville roundhouse, Louisville, Kentucky during the hours of 3:00 P. M. to 11:00 P. M., Wednesday through Sunday, with seniority beginning as carman (engine carpenter) at 3:00 P. M. April 6, 1950, as provided in Rule 28, he having passed the required physical examination of the carrier prior to his employment.

Between the dates of October 7, 1935 and July 14, 1947 the claimant worked as a carman at South Louisville shops, Louisville, Kentucky for the carrier, thereby establishing his qualifications, as provided in Rule 102.

On April 10, 1950, a carrier official, Mr. M. V. Mitchell, roundhouse foreman, suggested, in conference with the local committee, that the claimant be sent to the company doctor and re-examined for the purpose of having him dismissed from the service of the company, to which the committee did not agree, copy of correspondence dealing with conference submitted herewith, identified as Exhibit B. On April 11, 1950, the management arbitrarily sent the claimant to their physician for physical re-examination.

The claimant worked his regular assignment until the close of his shift on April 16, 1950; April 17 and 18 being his rest days, he reported for duty at 3:00 P. M. on April 19 and was advised by the local officials that he was being removed from the service and has not been permitted to work from that time forward.

On May 9, 1950, Bulletin No. 548, identified as Exhibit C, was placed on roundhouse bulletin board indicating a force reduction, and since the

Further, Rule 34 of the agreement provides:

"An employe entering the service, and remaining therein 30 days, will thereby establish his competency."

Mr. McCarthy demonstrated he was not competent to perform the duties of an engine carpenter and was removed from the service long before the thirty days allowed under this rule had expired.

When it became apparent, after McCarthy had actually gone to work, that his mental or physical condition was such that it may have constituted a hazard to McCarthy, to other employes or to the company to continue him in the service, not only was the carrier within its rights to have him examined again by the district surgeon, but it was obligated to do so for the protection of McCarthy, other employes and itself. In this connection attention is invited to this Board's Awards 541 to 553, inclusive. The current agreement contains nothing whatever pertaining to physical examinations, and the carrier did not violate any provision of the agreement in requiring examination of McCarthy. Carrier further submits that its action in disqualifying and removing McCarthy from service did not constitute unreasonable or unjust treatment, and that claim of employes should be declined.

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.

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

Claimant was employed by the carrier at South Louisville roundhouse as a carman (engine carpenter), with seniority as of April 6, 1950. He was examined as to his physical qualifications and accepted as a fit person for employment before commencing work. Claimant had previously qualified as a carman prior to a previous termination of his employe relationship with the carrier. On April 11, 1950, carrier required a physical re-examination. He worked his shift on April 16, 1950, and was subsequently disqualified for service as physically unfit. The claimant contends that he was unfairly treated and this claim resulted.

Claimant's entrance to service examination was taken on April 5, 1950. While the report of the examination qualified him for service, the examining doctor noted that claimant "appears to be in only fairly good general health." After reporting for work, W. V. Mitchell, his foreman, observed that he had a sluggish mentality, that he was unable to understand instructions, and that he was not able to do the work of his position. The foreman recommended a physical re-examination which was ordered for April 11, 1950. The physician's report states that claimant had no information on current matters, that he did not have the mentality to perform responsible work, and that a neuropsychiatric examination should be given to determine the cause of his mental disability. The report shows syphilis tests were positive and that possibly he has paresis. The carrier's physician held claimant to be unfit for service. On April 21, 1950, claimant's personal physician "found him physically able to perform manual labor of any kind which he is qualified to perform."

This is not a discipline case requiring an investigation before claimant could be disqualified for service. He is entitled, however, to make a claim if he feels that he was unfairly treated.

The evidence upon which he was disqualified does not appear very satisfactory. The first physical examination qualified claimant for service.

Upon re-examination five days later the physician says that Wasserman and Kahn tests indicated that he has syphilis. This finding of itself is not necessarily disqualifying. The examining physician then says that this makes it possible that he has paresis. The latter states a mere possibility and not a fact. The findings of claimant's physician appear to be a mere conclusion based upon no supporting facts as the record shows.

The right of the carrier to disqualify an employe for physical or mental incompetency to perform the work of his position cannot be questioned. Such disqualification should be based on something more than supposition or possibility. Certainly an adequate examination would reveal whether claimant was mentally and physically qualified, and if not, the basis for the disqualification.

We do not think this claimant has had such an examination as would warrant disqualification. On the other hand, the evidence is sufficient to hold claimant out of service for the purpose of determining if he is physically and mentally qualified to perform the work of his position. We remand the claim with directions that claimant be examined by competent physicians, a neutral physician, if necessary, to determine his mental and physical condition. If it be found that claimant is not mentally or physically qualified, the claim will stand denied. If it be found that claimant is physically and mentally qualified, the claim will be adjusted for the period that he is found to have been qualified to perform the work of his position.

AWARD

Claim remanded per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman,
Executive Secretary.

Dated at Chicago, Illinois, this 2nd day of August, 1951.