

Award No. 2799
Docket No. 2563
2-P&LE-TWUA-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Livingston Smith when award was rendered.

PARTIES TO DISPUTE:

**TRANSPORT WORKERS UNION OF AMERICA,
AFL-CIO (Railroad Division)**

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY

THE LAKE ERIE & EASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That the practice of compulsory examinations among the equipment department employees be discontinued and that Mr. D. N. Esposito, Car Inspector, be restored to his position at Youngstown, Ohio, which he held at the time of dismissal by the Pittsburgh & Lake Erie Railroad Company and that he be compensated for all time lost due to said dismissal.

EMPLOYEES' STATEMENT OF FACTS: That Mr. D. N. Esposito was working as a car inspector at the time he was dismissed from service of the carrier.

That Mr. Esposito took a physical examination and worked nine (9) days as a car inspector before he was dismissed from service and was given no reasons for the dismissal.

That there is no rule in the current agreement and there never was a rule that required the employees in the equipment department to take physical examinations.

That there is a rule in the current agreement as to dismissal of employees.

That this rule was not carried out when Mr. Esposito was dismissed.

That the carrier has never negotiated a physical examination rule with the organization nor has the carrier ever supplied the organization with a copy of their employment rules.

That the Railroad Division, Transport Workers Union of America, AFL-CIO has a collective bargaining agreement, effective May 1, 1948 and revised

Third Division Award No. 4816.

In this award the Third Division, with Referee Shake, held that it is not the function of the Board, nor is the Board qualified to substitute its judgment for that of skilled medical men in determining the question of physical fitness of an individual to work. In this connection the attention of your Honorable Board is directed to the following statement appearing in Third Division Award No. 4816.

"On the other hand this Board is not competent to substitute its judgment for that of skilled medical men in determining the question of the physical fitness of an employee to work."

Third Division Award No. 5815:

The same conclusion that was drawn in Award No. 4816 was, also, drawn in this award in the following statement contained therein:

"This Board is not competent to substitute its judgment for that of skilled medical men in determining the question of the fitness of an employee to work."

CONCLUSION

The carrier has shown that the regulations requiring all applicants for the position of carmen to undergo physical examination were placed in effect on August 15, 1928, and that the claimant was rejected for the position of car inspector by the medical director. Further, the carrier has shown that the claimant was not dismissed from service, but was disqualified because of his physical condition. Failure to have disqualified him would have exposed him, and possibly his fellow employees, to serious injury.

The carrier respectfully submits that the claim is without merit and should be denied.

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.

The confronting claim has three facets. The organization seeks the return to active service as car inspector, one D. N. Esposito, together with compensation for all time lost during the period he has been held from active service. Request is likewise made that this Board order discontinuance of practice of requiring medical examinations of equipment department employees.

The record indicates that claimant Esposito was in carrier's employ as a helper and oiler between February 5, 1951, and November 18, 1955, at which time the oiler position Esposito held was abolished. When he (claimant) determined that his seniority would not permit him to hold any helper

position, application was made by him for a car inspector position. Claimant was given a preliminary examination and certified for service. After some nine (9) days of service as a car inspector, claimant was removed from service because of medical disclosures, the nature of which led the respondent to decide that it was inadvisable to permit him (claimant) to remain in active service as a car inspector.

We cannot agree with the contention that the claimant could not be removed from active service without an investigation or hearing under the rule pertaining to this subject. Claimant's removal from active service did not concern any dereliction of duty for which he might have been subjected to discipline. Matters of physical condition or disability are not a proper subject for handling under the investigation rule of the agreement.

Neither can we agree that once having been placed on the position the claimant was not subject to later removal from service. This conclusion is based on evidence of record that such placement was made prior to complete and final medical examination, diagnosis and prognosis. He was approved only on the basis of sight and vision.

The respondent's action, according to evidence of record, was based upon the fact that claimant had undergone a series of operations for osteomyelitis. It is also noted that claimant had on prior occasions been denied positions in the locomotive department because of supposed physical deficiencies.

Claimant knew, or should have known, the reason for his removal from active service, yet insofar as this record indicates did not secure an examination by a physician of his choice to the end that a more favorable medical report or diagnosis might have been furnished the respondent or this Board. In brief, there is no evidence of record to disprove or lend doubt as to the accuracy of the confronting medical report or the soundness of carrier's judgment or the exercise of its discretion.

For the reasons stated, this claim lacks merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March, 1958.