Award No. 3137
Docket No. 2973
2-ACL-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(a) That, under the controlling agreement, Carrier acted arbitrarily, beyond all bounds of reason and without contractual authority when requiring Car Inspector E. D. Brown to undergo physical re-examination Desember 14, 1956.

(b) That the examination revealed no physical deficiency not already fully known to Carrier and admitted by Inspector Brown since July 1929.

(c) That Inspector Brown was unjustly removed from his second shift car inspector's assignment December 26, 1956.

(d) That Carrier be ordered to discontinue the practice of arbitrarily subjecting employes to physical re-examination, particularly in the absence of marked visible evidence of mental and/or physical deficiency over and above that normally accompanying advanced years.

(e) That E. D. Brown be permitted, at his discretion, to return to his second shift car inspector's assignment, and that he be compensated for any loss in earnings he may have suffered.

EMPLOYES' STATEMENT OF FACTS: Carman E. D. Brown was employed by the AB&C Railroad (now the Western Division of the Atlantic Coast Line Railroad) in its Bellwood Shops, Atlanta, Georgia December 19, 1925.

will require his presence around live tracks. See Awards 235, 489, 592 and 772."

Here the carrier was sustained in its contention that an employe with defective vision was no longer qualified to occupy a position which would require him to be around live tracks where trains and engines were being moved. Here again is a case which is comparable in many respects to the Brown case here at issue.

Second Division Award No. 998 involved claim of a laborer for wages lost when held out of service following an injury when he declined to submit to physical examination. In denying claim, the Board, with Referee I. L. Sharfman sitting as a member thereof, stated in part as follows:

> "In these circumstances, which obviously put the carrier on definite notice as to the adequacy of the then physical condition of the claimant, and in the absence of any provision in the controlling agreement either providing for physical reexamination or prohibiting them, it is the opinion of the Division that the carrier did not act arbitrarily or unjustly in requiring the claimant to submit to a physical reexamination by the company physician. If, after such reexamination, the report of the company physician had conflicted with that of the claimant's personal physician, there conceivably might have been a basis, in the interest of according the claimant just treatment, for ordering that the conflict be dissolved through an independent report by a neutral physician. But the mere requirement of a physical reexamination by the company physician did not, in the light of the facts of record in this proceeding, constitute unjust treatment or a violation of the agreement."

In Award No. 79, one of the earlier cases decided by the Second Division, without a referee, the Board issued a denial award. This case involved a blacksmith who, due to the poor condition of his eyes, together with certain other physical handicaps, was unable to qualify as a welder, which required the use of oxyacetylene torches. While the Board recognized this employe as being able to perform the ordinary duties of a blacksmith, it denied the request of the employes that he be assigned an autogenous welding position for the reason that he could not and was not qualified.

While there are many other awards that might be quoted, the foregoing clearly portray the thinking of the Adjustment Board and substantiate carrier's position that employes who are not physically qualified should not be permitted to occupy positions which would involve their safety, that of their fellow employes, or the public.

The carrier's action in disqualifying Mr. Brown as a car inspector was fully justified by the facts. His physical condition was such that he was unsafe for such assignment. He was treated no differently than other employes whose vision became defective and who were barred from positions which required them to cross live tracks or come in contact with moving trains, engines, or cars. Even though Mr. Brown had suffered a loss in compensation, which he did not, he was not qualified to occupy the position of car inspector. The carrier contends that it was fully justified in its action in this case and requests that the claim 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 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.

Carman E. D. Brown, the claimant, has been employed since 1925. In 1929, he lost an eye in an auto accident and from then until 1950, he worked under a restriction precluding him from the job of inspector. During this period there were negotiations between the organization and the company concerning removal of the restriction. In 1950, Brown bid for and was assigned a job as car inspector in the train yard. He held this job without complaint until December 14, 1956 when he was given a physical examination on orders of the carrier. The examination showed he had 20/15 vision, with correction, in his only eye. On December 26, 1956, he was removed from the inspector's job.

The most significant facts are that Brown worked twenty-one years under the restriction and six years as an inspector. Regardless of how he acquired the inspector's job, we must decide whether the carrier has acted arbitrarily in examining him and re-instating the restriction. Under the claim for return to the inspector's job, we must also rule whether a man with partial vision in his only eye is qualified.

The present claim, consisting of five subsections, emphasizes the alleged arbitrariness of the carrier. Considering the salient facts we are of the opinion that the carrier was acting in good faith and was not being hypercritical of the claimant in its pursuit of safety for all concerned. Its action here stands the test of reasonableness and was not arbitrary.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March, 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3137

The majority has ignored the fact that when the claimant worked under the original restriction he was working under a different agreement than the one now applicable. When the carrier assigned claimant to a position as car inspector in 1950 it knew that he had only one eye. This fact was a subject of discussion when his assignment as car inspector was approved. Subsequently the claimant held the job as car inspector without complaint until six years later the carrier arbitrarily required him to take a physical examination. This action on the part of the carrier not only violated the agreement, which requires an employe to submit to a physical examination only when he is an applicant for employment, but is proof that carrier acted unreasonably.

The claimant should have been returned to his position as car inspector as claimed.

James B. Zink

R. W. Blake

C. E. Goodlin

T. E. Losey

Edward W. Wiesner