

Award No. 4307

Docket No. 4034

2-MP-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Carman L. W. Beard, Little Rock, Arkansas, has been unjustly dealt with by being held out of service since August 1, 1960.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to restore Carman L. W. Beard to service and compensate him for all time lost since August 1, 1960 account being unjustly withheld from service.

EMPLOYEES' STATEMENT OF FACTS: Mr. L. W. Beard, hereinafter referred to as the claimant, was employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, in the capacity of carman at the Little Rock Union Depot, Little Rock, Arkansas, until he was injured on duty August 20, 1955. On April 29, 1957, the claimant brought suit against the Railway Express Agency, Inc. and the carrier in St. Louis Circuit Court and judgment was rendered in favor of the claimant who was awarded a settlement by the court. Mr. Beard, the claimant, did not forfeit his seniority rights as carman in the employ of the carrier and on July 25, 1960, the Local Chairman of Carmen, Mr. J. M. Pulliam, addressed letter to Mr. E. McNabb, Terminal Master Mechanic, reading as follows:

"July 25, 1960

Mr. E. McNabb
Terminal Master Mechanic
North Little Rock Diesel Facilities
North Little Rock, Arkansas.

Dear Sir:

L. W. Beard, Carman at Little Rock Union Depot was injured sometime in 1955 and has not worked for the Missouri Pacific since that date.

The carrier need not reemploy a person who cannot perform all of the duties of his position. In Award 3183, a car cleaner was injured and could not perform all the duties of a car cleaner. The doctor had reported the claimant was qualified for light work, but the carrier had no light work for a car cleaner. The Board found "that claimant was unable to resume the heavier duties he had been performing" and "the claim is without merit." Similarly here, there are no light duties of a carman. See Award 1780 where a claim of a machinist seeking restoration to service for light duties only was denied. For other awards upholding the carrier's right to refuse to employ persons who are not physically qualified, see Awards 2726, 2799 and Third Division Award 6740.

The issue in dispute may be simply stated. Claimant worked as a carman until injured August 20, 1955. He was not able to work thereafter because of the injury but on August 1, 1960, he asked to go back to work. He was required to take a physical examination in accordance with carrier's operating instructions. The doctor's report showed that claimant's back had been injured and that his physical condition did not meet the carrier's standards. Claimant has never submitted a report of his personal doctor as to his physical condition. Under those circumstances, the carrier could not put claimant back to work for his own safety as well as his inability to perform the work of a carman. This claim to reinstate a man who is not physically qualified must 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.

Parties to said dispute were given due notice of hearing thereon.

Claimant's employment by Carrier commenced in 1943 as Carman Helper. He became a Carman in 1946. While at work on August 20, 1955 he was injured in an accident in which an express agency baggage truck struck him in the back. In a subsequent law suit in 1957 he secured a favorable verdict following which he received a settlement from the Railway Express Agency, Inc. Prior to date of the claim before us, August 1, 1960, Claimant had not worked since his injury in August of 1955. He had been carried on the seniority roster as disabled.

In July of 1960, the Local Chairman of Carmen suggested in a letter to the Terminal Master Mechanic of North Little Rock Diesel Facilities that Claimant be notified to return to Little Rock to protect his seniority as Carman or show reasons for not doing so—this because of complaints from members of the Organization that Claimant was engaged in other employment, something later shown not to have been true. However, while this matter was under investigation by the Terminal Master Mechanic's office, Claimant returned and asked to go back to work. Under Operating Instructions he was later given a physical examination, his injury in 1955 having disabled him from working and he having been out of service for more than a year.

The examination of Claimant was conducted by Dr. P. O. Thomas, District Surgeon at Missouri Pacific Employees' Hospital, on October 27, 1960. The

"Applicant's Copy" of the "Medical Examiner's Report" given to Claimant at the conclusion of the examination showed "Examinee qualified", immediately following a "Note" thereon which read:

"Spine, Kyphosis of the thoracic spine. Surgical scar over Lumbar 2 to Sacral 2. Some limitation of motion of the lumbar spine and lumbosacral joints in all directions. Obesity with mild hypertension."

In later correspondence, August 15, 1961, with reference to this physical examination, Dr. Thomas wrote, in a letter to Chairman Bond:

"* * * * *

"On October 27, 1960 I addressed a letter to Mr. J. W. Treadwell, Superintendent, Arkansas Division, stating that this man was qualified for re-employment as he was considered an old employee returning to active service. The man would not had (sic) been qualified if had been considered a new employee. * * *

"* * * * *

Notwithstanding the result of said physical examination of October 27, 1960, Claimant was withheld from service, the reason given, as later stated in letter written to General Chairman Bond by Chief Personnel Officer Smith on March 21, 1961, being that:

"Claimant's employing officer has found that Claimant does not meet the physical standards set by the Carrier for carmen and he was not permitted to resume service for that reason."

Carrier insists that "the report of the Medical Examiner is merely to guide the employing officer who must make the final decision and is only one of the factors governing the decision"; that the responsibility for the decision is and must be that of "the Superintendent or other responsible officer, since qualifications rests (sic) not only on physical qualifications but on **ability, training and experience** to perform the duties to which assigned." (Emphasis ours.) Here, however, the record itself informs us that Claimant, by continuity of employment with this same Carrier, had given proof of his **ability and demonstrated the results of his training and experience** from the commencement of his performance of the duties to which assigned, beginning with his initial employment as a Carman Helper in 1943, through subsequent upgrading to Carman in 1946 and continuing until his injury during the course of employment on August 20, 1955.

Award 3719 of this Division, Referee Stone, March 29, 1961, is cited in this controversy by both Claimant and Carrier. We believe that award is controlling. As there observed:

"* * * There is no showing that claimant has at any time been disqualified by a Company doctor. To the contrary he was given a release by him stating that he was qualified for regular duties and with that in effect he was improperly withheld from service."

Hence, we are of the opinion that this claim should be sustained.

AWARD

Claim sustained with payment for loss of time, less outside earnings,
since October 27, 1960.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1963.