

Award No. 5540
Docket No. 5415-I
2-DM&CI-I-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

THOMAS B. HADDEN, PETITIONER
DES MOINES AND CENTRAL IOWA RAILWAY COMPANY
DISPUTE: CLAIM OF EMPLOYES:

The Petitioner comes before the National Railroad Adjustment Board and makes the following statements as the basis for his claim against the Des Moines & Central Iowa Railroad Company, hereinafter referred to as "The Employer":

1.) The position of Car Foreman was abolished by the Employer on December 30, 1966 without adequate notice to the incumbent (the Petitioner), without negotiation with or agreement by the union, and for the purpose of reducing the rate of pay of the Petitioner and evading its obligations to the Petitioner under the Agreement between the Employer and the union. The abolition of the said position is in violation of Rule 14 of the said Agreement, dated April 9, 1946, which provides as follows:

"Established positions shall not be discontinued and new ones created under different title covering a similar class of work for the purpose of reducing the rate of pay or evading the application of these rules."

2.) The Employer denied the Petitioner the opportunity to exercise his seniority rights in violation of Rule 3 of the said Agreement.

3.) On January 13, 1967, the Employer summarily discharged the Petitioner without an investigation or hearing, in violation of Rule 2 of the said Agreement.

4.) The reason stated by the Employer for the dismissal of the Petitioner was that he was physically unable to perform his duties. No effort was made by the Employer to furnish employment suited to the Petitioner's capacity as required by Rule 10 of the said Agreement.

5.) The Employer ceased to pay the Petitioner from and after January 13, 1967, the day of his dismissal. He was not paid for 18 additional working days, as required by Rule 19 of the said Agreement.

6.) The Employer has refused to pay to the Petitioner a coordination allowance, as required by Section 6 of the Shop Crafts Agreement, dated September 25, 1964, and which is a part of the agreement existing between the Employer and the Union.

7.) The Employer has denied the Petitioner an opportunity to receive a separation allowance, in violation of Section 7 of the Shop Crafts Agreement.

8.) The Petitioner was paid at a lower rate than the rate paid to those holding the position of Car Foreman by the Employer for the three days from January 10 to January 13, 1967, even though the Petitioner performed the duties of the Car Foreman during that period.

9.) The Petitioner, at the time of his wrongful discharge, had accumulated three weeks vacation pay. The Employer paid the Petitioner for this vacation time at a rate of pay less than that to which he was entitled as Car Foreman.

STATEMENT OF FACTS: On December 30, 1966, the Petitioner was notified that his job classification, that of Car Foreman, was abolished by the Employer, and the work formerly included in that classification was absorbed by another classification. The Petitioner was notified of the abolition of the said position by the posting of a notice on a bulletin board in the offices of the Employer. A facsimile of the said notice is attached hereto, and marked Exhibit "A." On that same date, December 30, 1966, the Petitioner wrote to the General Manager of the Employer, M. C. Jacobs, requesting an opportunity to exercise his seniority rights and asking that a conference be arranged with the Union representatives to present his grievance. A copy of that communication is attached hereto, marked Exhibit "B."

On January 3, 1967, the Union president, Edison Steffens, wrote to M. C. Jacobs to demand a conference with the Employer to discuss the rights of the Petitioner in the abolition of the position of Car Foreman. A copy of the letter from Mr. Steffens to Mr. Jacobs is attached hereto, marked Exhibit "C."

On January 13, 1967, the Petitioner was informed, both by letter and in person, by C. J. Hilts, an agent of the Employer, that the Petitioner was being discharged because he was physically unable to perform his duties. A copy of the communication of discharge to the Petitioner by Mr. Hilts is attached hereto, marked Exhibit "D." The Petitioner was not notified in advance of the said dismissal, nor was he granted an investigation or hearing.

None of the agents of the Employer would discuss the matter of the exercise of the Petitioner's seniority rights, either during the period between December 30, 1966 and January 13, 1967 nor any time thereafter. The request of the Petitioner and the Union for a conference concerning any of the matters attending the discharge, abolition of the position of Car Foreman, and the matter of seniority rights was ignored and denied by the Employer. The Employer

It is the carrier's position that it had the perfect right to abolish a job that was no longer needed and as a consequence it in no manner violated the above-referred to rules or the National Mediation agreement dated September 25, 1964.

In view of the foregoing the carrier requests the claim be denied.

(Exhibits not reproduced.)

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.

The instant claim arose as a direct result of Claimant's removal from service on January 13, 1967 as a car repairman because of physical disability. The fundamental issue here for determination is whether Claimant was constructively discharged by Carrier as alleged by petitioner or properly found disqualified to hold the position of Car Repairman to which he would otherwise be entitled by authority of his seniority.

A similar claim was filed by petitioner with the Fourth Division of the National Railroad Adjustment Board, which already has adjudicated the merits of that portion of the instant claim which pertains to Claimant's former position of Car Foreman. However, the Fourth Division determined that it was without jurisdiction to adjudicate the remaining issue here before us as Section 3, First (h) of the Railway Labor Act vests exclusive jurisdiction in this Division to adjudicate disputes involving "carmen". (Fourth Division Award No. 2305)

All questions arising out of the Carrier's abolition of the Car Foreman position formerly held by Claimant until December 30, 1966 have been reviewed by the Fourth Division of the National Railroad Adjustment Board. In fact, the precise issues involved in this dispute under the same agreement were considered in Fourth Division Award No. 2305. We find no substantial error in said Award and must conclude that the principle of *stare decisis* has terminated the controversy as to the Carrier's right to abolish the Car Foreman position formerly held by Claimant, the alleged denial of Claimant's seniority rights and the Shop Crafts Agreement of 1964.

The pivotal issue before this Division concerns the physical disqualification of Claimant as a car repairman effective January 13, 1967. The record reveals that Claimant exercised his seniority as a car repairman effective Monday, January 9, 1967, and that he continued in this position until January 13, 1967, when Carrier relieved him from service because of physical disqualification. The following notice was received by Claimant on January 13, 1967.

"In have been informed that you are physically unable to perform your duties. Therefore, you are relieved from your duties with the Des Moines & Central Iowa Railway."

Thereafter, Claimant applied for his annual vacation, which was earned in 1966 but due in 1967. Carrier paid him for his earned vacation at the Carman's rate rather than the Car Foreman's rate because he held the position of car repairman at the time he applied for vacation pay.

Claimant also appealed to the officers of the Non-Operating Union to process his grievance on the theory that he was improperly discharged and entitled to reinstatement or severance pay, and also that he was entitled to vacation pay at the car foreman's rate rather than the lower carman's rate. Although the parties disagree as to the degree of vigor exercised by officers of the organization in handling the claim on behalf of Claimant, the record establishes that its president endeavored to invoke the assistance of the National Mediation Board and that a conference with the Carrier was ultimately held following which the application for mediation services was suspended.

Apparently, Claimant was dissatisfied with the manner in which his original claim was handled on the property by the Non-Operating Employees' Union, because he then retained legal counsel to pursue his claim. The following excerpts from correspondence delineates the issues raised on behalf of Claimant by his attorneys while the dispute was still on the property and before submission to the Board:

Claimant's Exhibit (G)

"In our telephone conversation of February 17, 1967, you stated that it is the position of the Des Moines and Central Iowa Railway Company that Thomas B. Hadden was discharged with justification, and that he received all of the wages and benefits due him under contract in existence between the Company and the Non-Operating Employees of the Des Moines and Central Iowa Railway Company.

After reviewing the file extensively, I am of the opinion that Mr. Hadden was discharged without justification and without an opportunity for a hearing or to present evidence of his physical fitness and ability to continue to perform his duties; that he should be compensated at the wage rate of Car Foreman until such time as his employment is lawfully and justifiably terminated; that the three week's vacation pay paid to Mr. Hadden should have been at the Car Foreman's rate, rather than at the Welder's rate; and that he is entitled to a coordination allowances under the Job Protection Agreement currently in effect, or at least a separation allowance under the same Agreement.

Mr. Hadden and I would appreciate the opportunity to confer with you or another duly authorized agent of the Company for the purpose of reaching an adjustment in this matter. I would suggest that we meet either on Tuesday, March 7, 1967 or Friday, March 10, 1967, if either of these dates meets with your convenience.

Claimant's Exhibit (H)

We acknowledge receipt of your letter dated March 2, 1967.

Your letter contains some inaccuracies which we would like to straighten out for the record.

Thomas B. Hadden was not discharged from the employ of the Des Moines and Central Iowa Railway Company. His former position of car foreman was eliminated, as the Railroad had the right to do under the circumstances.

After the position of car foreman was eliminated, Mr. Hadden elected to exercise his seniority as a carman. The Railroad is not denying his right to take this action. However, it is necessary that Mr. Hadden and all other employes qualify by passing a physical examination for this work. Mr. Hadden failed to pass his physical examination and, accordingly we were unable to continue his employment. Mr. Hadden failed to follow the prescribed administrative procedures to show that he was qualified physically.

Under these circumstances, we feel that there is nothing further that can be accomplished by a meeting."

The disputed physical examination of Claimant occurred on January 9, 1967 when the Carrier's physician examined him. On January 12, 1967, said physician reported to Carrier that Claimant was physically disqualified because of varicose veins, hypertension and defective vision. Petitioner contends that Claimant and his legal representative were denied an opportunity to study the contents of this medical report prior to the hearing held before the Fourth Division of this Board. Petitioner further avers that Claimant and his legal representative also were denied an opportunity to meet with Carrier while the dispute was on the property and before submission to the Board. Consequently, Petitioner urges that we should consider contrary medical reports of two other physicians dated June 29, 1967 and June 30, 1967, copies of which were offered as evidence at the hearing before the Division.

The record reveals that officers of the Non-Operating Union were afforded an opportunity to confer with Carrier while underlying claim was being considered on the property, and it is not denied that such officials had an opportunity to examine the physical report dated January 12, 1967. This Division has no authority to weigh the diligence with which the Non-Operating Union handled the instant claim on behalf of Claimant or to determine whether such claim on behalf of Claimant or to determine whether such claim was wrongfully abandoned by the Organization. Accordingly, we are confined to considering whether all procedural rights guaranteed by the Railway Labor Act, as amended were extended to Claimant and his duly constituted representative on the property. Hence, we must conclude that Carrier's refusal to meet with Claimant and his legal representative was not violative of the Railway Labor Act as amended, despite the logical implications that arise from such refusal.

As to the admissability of two medical reports of other doctors concerning the Claimant's physical ability to perform the duties of a car repairman, such evidence was offered for the first time after this dispute had been submitted to this Division for adjudication. Said reports were not introduced while this dispute was being considered on the property as rebuttal to Carrier's finding that Claimant was physically unable to continue his employment nor in the original submission to this Division. The rules of procedure applicable to claim subject to the jurisdiction of the National Railroad Adjustment Board require the parties to include in their original written submission all known relevant facts and documentary evidence. We have appellate jurisdiction to review the grievance proceedings already concluded on the property, but such review must

be confined to the precise issues raised on the property and the supporting evidence introduced by the parties relative to such issues. Therefore said medical reports are not properly before us for consideration in this matter.

The thrust of Petitioner's position on the property was that Claimant was constructively discharged without a hearing as the physical examination by the Carrier's physician was not authorized either by the effective Agreement or past practice. Furthermore, Petitioner avers that said examination was actually a sham rather than the bonafide basis for Claimant's removal from service.

It is well established that management under normal circumstances has a right to expect that an employe possesses the physical ability to perform his assigned work and various awards have held that the requirement of physical examination is within the discretion of a Carrier. (Third Division Award No. 14866) Here, Claimant changed positions through the exercise of seniority, and Carrier's request for said physical examination was not arbitrary, capricious, or discriminatory under the particular circumstances involved in this dispute, including Claimant's advanced age. (Award No. 4099)

As to Petitioner's averment that the physical examination by Carrier's physician was a sham and tantamount to discharge, no probative evidence was offered to support such a finding. Moreover, Carrier vehemently denies this charge and mere assertions do not constitute proof. Under the circumstances, we must conclude that the medical determination was made by a competent physician and that Carrier acted in accordance with the medical advice of the examining physician.

Nevertheless, it is important to notice that Claimant was not discharged by Carrier and is still carried on the seniority roster, which connotes a continuing obligation on the part of Carrier to reinstate Claimant when and if his physical condition has improved sufficiently for him to perform the work of a car repairman which position he would otherwise hold by virtue of seniority.

In light of conflicting assertions concerning Claimant's present physical condition as well as the unusual circumstances surrounding Claimant's efforts to exercise his seniority rights following abolition of the Car Foreman position formerly held by him prior to December 30, 1966, we find that Claimant should be re-examined by a physician selected by Petitioner and another physician selected by Carrier to ascertain whether Claimant presently is physically qualified to perform the duties of a Carman position, to which he is entitled through his seniority. If these two physicians selected by the parties are unable to agree as to Claimant's physical qualifications for active service, then a third physician shall be agreed upon and designated for the parties to determine the question of Claimant's physical fitness for active service. If Claimant is found qualified for active service he will be reinstated with all rights unimpaired, but without back pay.

We further find that Claimant is entitled to disability pay for eighteen (18) days under Rule 19 of the effective Agreement. However, we must deny Claimant's request for three week's vacation pay at the higher Car Foreman's rate because he was properly compensated at the rate of the carman position that he held when applying for vacation benefits.

AWARD

Claim is sustained as modified by the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1968.