Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. *10426*
SECOND DIVISION Docket No. 10284
2-B&LE-CM-'85

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Bessemer and Lake Erie Railroad Company

Dispute: Claim of Employes:

1. That the Bessemer and Lake Erie Railroad Company violated Rule 15 and associated Rules of the controlling Agreement when in the restoration of forces it disregarded the principle of seniority whereby junior men rendered compensated service while senior men were subjcted to physical examination on June 10, 1981, at Greenville, Pennsylvania.

2. That the Bessemer and Lake Erie Railroad Company be ordered to compensate Carmen A. V. Wade, Jr. and M. G. Smith in the amount of eight (8) hours each at the straight time rate of pay for June 10, 1981.

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 employes 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 waived right of appearance at hearing thereon.

On March 31, 1981, the Carrier made a reduction in force which affected seventeen (17) carmen including the two Claimants, A. V. Wade, Jr., and M. G. Smith. On June 10, 1981, the Carrier recalled eight (8) carmen to service of which the Claimants were the senior employees. When they reported to work on June 10, the Claimants were directed to undergo a physical examination before they could begin compensated service.

The Organization argues the Carrier violated Rule 15 which, in pertinent part, states:

"In the restoration of forces, senior laid off men will be given preference of re-employment, if available, an shall be returned to their former position."

In subjecting the Claimants to a physical examination, the Organization contends the six junior employees performed compensated service on June 10 whereas the Claimants did not. The Organization believes the Carrier could have advised the Claimants to report for a physical on June 9 or any other day preceding recall. In failing to do so, it avers the Carrier failed to provide the Claimants with preference of re-employment.

The Carrier denies a violation of Rule 15 and also argues that Rule 33 of the scheduled agreement, in pertinent part, provides specifically for a physical examination upon return from furlough, as follows:

"Rule 33 (a)

The Management will designate the Company surgeon to make the physical examination required of employee and absorb the examination fee. Examinations may be made at such times as directed by the Company, as follows:

(1) at stated periods

(2) after furlough or leave of absence

(3) whenever in the judgement of management a physical examination should be made."

In the face of this clear and plain, permissive language, the Organization basically argues that the Carrier's resort to a physical examination was not based upon evidence to suggest the Claimants were not capable of performing their duties after just seventy-one days of furlough. In essence, this is an argument that the Carrier's determination to subject both Claimants to a physical examination was arbitrary and capricious. The record discloses the Carrier's claim that the only distinction between Claimants and the six other recalled carmen is a medical history of hypertension. This assertion was not challenged by the Organization. The Board's attention is directed by the Organization to Second Division Awards Nos. 6429 and 8091. Award 6429 is distinguishable from this case in that therein the Carrier argued that, as a condition for return to service upon recall, a medical re-examination is automatic. The Board found no authority in the Agreement for the Carrier to do so. In Award 8091, the issue centered upon the Carrier's actions in delaying the physical examination of the Claimant. Herein, despite an assertion the Carrier could have scheduled the examinations on June 9, there is no development of supporting facts in the on-property handling which could support such a conclusion. Therefore, faced with a clear contractual right to require an examination after a furlough and in the absence of any evidence the Carrier's decision to do so was arbitrary and capricious, this Board will deny the claim.

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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Atest: _____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this *5th day of June 1985.*