

Award No. 1310

Docket No. 1232

2-L&N-CM-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1—That the carrier's removal of Carman E. M. Murray from the service on February 4, 1948, was not authorized by the current agreement.

2—That accordingly, the carrier be ordered to restore him to the service with pay for all time lost retroactive to and including the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: E. M. Murray, hereinafter referred to as the claimant, was employed by the carrier at Montgomery, Alabama, as carman helper May 15, 1923. The claimant worked in this capacity until elevated to the position of carman November 12, 1941, which position he has held continuously since that date, he being shown on carmen's seniority roster as November 12, 1941, Montgomery, Alabama.

The claimant on December 1, 1944, was assigned to position of lead car inspector, third shift, hours of assignment 11 P. M. to 7 A. M., Union Passenger Station, Montgomery, Alabama, and remained thereon until the close of his shift, February 3, 1948.

On December 17, 1947, the claimant was required to submit to physical re-examination by the carrier, company physician, J. R. Penton making the examination. Copy of the findings of Dr. Penton is submitted herewith as Exhibit A.

On February 4, 1948, at 3 P. M., while off duty, the claimant was called by 'phone to the office of general foreman, Mr. W. C. Carr, who verbally, but authoritatively, suspended him from service effective immediately.

The agreement effective September 1, 1943 is controlling.

POSITION OF EMPLOYEES: It is an undeniable fact that this claimant rendered satisfactory service as lead car inspector up to and including February 3, 1948. Moreover, he has worked a total of 239 full eight (8) hour shifts over and above his regular eight (8) hour assignment since the beginning of his assignment to this position on December 31, 1944; nine of the aforementioned eight-hour overtime shifts being performed between the dates of December 17, 1947—the date on which he was required to submit to physical re-examination—and February 3, 1948—date on which he was removed from the service by the carrier.

the rule but would be an unfair demerit mark against his employment record. In Award 977, (Referee I. L. Sharfman) this Division said:

"The evidence of record supports the following conclusions: that Rule 33 of the agreement, dealing with investigations incident to disciplinary action on the part of the carrier, is not applicable to the circumstances of this proceeding; * * *."

This principle has been followed by the First Division in Awards 4845 and 4846 (Referee Swacker). It is a sound principle that should be applied here.

In the first paragraph of their statement of claim herein, the employes say that the disqualification of the claimant "Was not authorized by the current agreement." That contention was also very effectively disposed of by this Division in Award No. 977 wherein it was held that in ordering a physical examination, which was not provided for by the agreement, the carrier acted reasonably and that whether the claimant had a right to reinstatement depended upon his physical fitness to perform his duties.

For the reasons given carrier submits that it was fully justified in removing this employe from active service. Knowing Mr. Murray's physical condition, which could at any time result in serious injury to himself or some other employe, the carrier insists that the Board should not assume the responsibility, which the organization is now asking it to assume, of ordering the return of Mr. Murray to active service. Therefore, the claim 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 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.

The parties to said dispute were given due notice of hearing thereon.

Outward signs of physical disability, separate and apart from consideration of age, were not apparent when the claimant's medical examination was ordered. A physical check-up was demanded although there was no apparent dissatisfaction with his work performance, and there was no noticeable change in the claimant's physical condition as would raise a doubt about his ability to satisfactorily continue at work. Previous decisions of the Second Division hold that these essentials are a prerequisite to the carrier's right to secure a medical report. See Awards 271, 481. It is concluded that the instant request for a physical examination was arbitrary, and, therefore, the medical findings do not constitute justifiable grounds for the claimant's dismissal.

AWARD

That Carman E. M. Murray's removal from service on February 4, 1948, was in violation of the current labor agreement, and he should be reinstated with seniority rights unimpaired and remunerated for all time lost as a result of the carrier's action, with deductions for wages, if any, earned in any other employment during the period for which he is awarded back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 7th day of March, 1949.