Award No. 1532
Docket No. 1433
2-L&N-CM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the carrier's removal of Carman J. C. Smith from the service on July 23, 1950, and from the seniority roster on January 1, 1951, was not authorized by the current agreement.

2. That accordingly the carrier be ordered to restore him to the service with all seniority rights unimpaired and with pay for all time lost retroactive to and including July 23, 1950.

EMPLOYES' STATEMENT OF FACTS: J. C. Smith, hereinafter referred to as the claimant, was employed by the carrier at Mobile, Alabama, as carman, April 27, 1944, he having qualified himself as such at the carrier's Decatur shops between the dates of June 1907 and July 1, 1922. The claimant worked in this capacity regularly since the aforesaid date, with a recent assignment of 11:00 P. M. to 7:00 A. M., Sunday through Thursday.

On May 15, 1950, the claimant became ill and requested of fellow employes that he be taken home. This was done and he returned for service at the beginning of his shift, July 23, 1950.

On July 21, 1950 at approximately 2:00 P. M., the claimant, together with his local organization representatives, appeared in the office of the master mechanic and presented for his observation statements from three physicians attesting his ability to return to work. Those statements are submitted herewith and identified as exhibits A, A-1 and A-2.

On July 23, 1950, the claimant reported for service at the beginning of his shift at 11:00 P. M. and worked same for approximately 2 hours, whereupon he was removed from service by a local carrier official and has not been permitted to work since that date.

Effective January 1, 1951, claimant's name was removed from the Mobile, Alabama carmen's roster.

The Agreement effective September 1, 1943 as amended September 1, 1949 is controlling.

sion. Regardless of the fact that Mr. Smith is able to pass a satisfactory physical examination, it is a matter of record that he is subject to sudden attacks of some kind, and by his own admission at such times he loses consciousness. In these circumstances it would be extremely dangerous, both as to his own safety as well as the safety of other employes, to permit this man to return to work in the train yards around moving locomotives and cars, and the carrier is unwilling to assume the responsibility of permitting him to do so. Likewise, the carrier does not feel that this Board will assume the responsibility, which the organization is now asking it to assume, of ordering the return of Mr. Smith to active service.

In handling on the property the employes contended that Rule 33 of the agreement was not complied with in removing Mr. Smith from the service. That rule provides:

> "No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

This is simply a case of an employe disqualified account of a physical condition which makes it extremely hazardous for him to work as a car inspector; he was not charged with the violation of any rules or instructions of the carrier and no question of discipline is involved, therefore, Rule 33 has no application.

> "This was not a discipline case, and therefore, it was unnecessary to conduct an investigation in accordance with Rule 27(a) of the controlling agreement." (Second Division Award 1288, Referee Gilden).

Attention is also invited to Second Division Award No. 977.

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.

Claimant was employed by the carrier as a car inspector in its Sibert, Alabama, train yards on April 27, 1944. It is alleged and not denied he worked his position regularly until March 26, 1949. It appears that on that date he became ill, was sent home, and remained away from work until June 7, 1949, when, based on a certificate from the carrier's district surgeon to the effect he was able to return to work, he was restored to duty. He worked his position regularly until May 15, 1950, when he again became ill and was sent home in the care of a yard clerk. June 10, 1950, claimant was directed to report to the same district surgeon who advised the carrier he was disqualified for work around engines because he had spasms at which time he lost consciousness.

On July 21, 1950, claimant presented the carrier with statements from three different physicians, stating in substance that he was in sound health and qualified to do any work requiring physical effort, and requested that he be allowed to return to work. This request was denied. Notwithstanding claimant reported for work on July 23, 1950. At that time he was advised the management would not assume the risk of permitting him to return to service and thereafter effective January 1, 1951, his name was removed from the carrier's roster.

Two preliminary questions raised by the carrier require early attention.

With respect to the first question, even though—as the carrier contends—this is not a discipline case requiring an investigation before removal from service, Rule 31 of the current agreement entitles the claimant to be heard on the question whether he was unjustly dealt with when removed from service. (See Awards 977, 1288, 1478 and 1492.)

The second question challenges the right of the Division to consider exhibits attached to claimant's rebuttal statement because of its rule that known evidence, not contained in the original submission of the interested parties, will not be accepted if and when a hearing is held. The rule is sound and should be adhered to. Even so, it has no application where—as here—the evidence is offered in pure rebuttal of an entirely new factual issue which has been injected into the case in a subsequent submission by the opposing party.

Turning to the merits we note the carrier defends its action on the ground the claimant was afflicted with epilepsy which caused him to have spasms and at times become unconscious while at work. All this is denied by the claimant who contends that when he was denied the right to return to service he had fully recovered from whatever illness had caused his absence from work on the occasions heretofore mentioned.

The evidence supporting the respective positions of the parties is in direct conflict and we are not disposed to labor the record. It suffices to say the medical experts were not in accord and that even the company's district surgeon based his written findings of epilepsy and recommended disqualification upon statements of the claimant, which the latter flatly denies, to the effect he had been having spasms and at times lost consciousness. In the same findings he admitted claimant's physical condition appeared to be good and conceded that his diagnosis of epilepsy was based entirely upon history and not upon a physical examination.

In the face of the foregoing facts, most of which, if not all, were known at the time of its action, we think that it cannot be said the carrier accorded claimant just treatment when it disqualified him without affording him an opportunity for further examination. On the other hand it must be admitted there was sufficient evidence to put it on guard and warrant investigation. Likewise conceded that if claimant was afflicted with epilepsy its action was proper and should be upheld. Under such circumstances we believe the fair and proper thing to do is to remand the claim with directions that claimant be examined by a neutral physician, to be agreed upon between the parties if possible, to determine whether he has epilepsy. In the event of a negative finding the claimant will stand allowed. In case of an affirmative finding, or if based on history and physical examination such physician certifies he is unable to determine the question, the claim will stand denied.

If the parties are unable to agree on a neutral physician within thirty days from the date of the adoption of this Award then each party, at its own expense, shall choose a neutral physician and the two so selected shall choose a third, whose fee shall be paid by the parties. A decision by a majority of these three physicians on the question for which the cause is remanded shall be final and have the same force and effect as if it had been determined by one physician in the manner heretofore indicated.

AWARD

Claim remanded for disposition in accord with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1952.