

Award No. 2119

Docket No. 1928

2-UP-MA-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Machinists)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. The Carrier has unjustly deprived Machinist Charles F. Johnson of his service rights in failing to comply with Award 1849, Docket 1747, of the National Railroad Adjustment Board, Second Division.

2. That accordingly the Carrier be ordered to:

a) Reinstatement this employee to all service rights unimpaired.

b) Compensate this employee for all wage loss retroactive to December 24, 1954.

EMPLOYEES' STATEMENT OF FACTS: Mr. Charles F. Johnson, hereinafter referred to as the claimant, was employed by the Carrier at Denver, Colorado, as a machinist apprentice on August 12, 1940; was advanced to machinist on September 2, 1943, and completed his apprenticeship as a set-up machinist on December 26, 1944, and has a seniority date as a machinist of December 27, 1944, and was in continuous service until his removal on July 30, 1953, with regularly assigned hours from 8:00 A. M. to 4:00 P. M. Monday through Friday, rest days Saturday and Sunday.

The claimant complied with both the provisions of the controlling agreement and the Railway Labor Act. This organization handled his case on the property up to and including the highest designated officer, and failing of adjustment, submitted the case to your Honorable Board whose decision was that the claimant should be reinstated to his former position on December 24, 1954, with service rights unimpaired.

The carrier has refused to return the claimant to service alleging that he failed to pass a physical re-examination and that the claimant was returned to service on December 24, 1954, and is being carried on leave of absence until such time as he can pass physical re-examination.

ever, solely on the basis of a medical finding that he is presently disqualified for the position of machinist. He has been reinstated, however, and may return to active service as a machinist when able to satisfactorily pass the physical examination required by the rules.

It was the carrier's sincere intention to return Johnson to duty provided he could satisfactorily pass the physical re-examination required by Rule 46 of the "Physical Examination Rules", as revised July 1, 1949. Since Johnson "was returning to service after an absence of six months or more", it was necessary under the provisions of Rule 46 that he "must be re-examined as prescribed in Rule 45 before resuming duty". Included within the prescribed scope of such a re-examination, as indicated by Rule 45, was a physical re-examination of his "lungs".

The re-examination of his lungs, in accordance with Rules 45 and 46, indicated that he was suffering from chronic bronchitis and pulmonary emphysema, which was complicated by his also being overweight. Pulmonary emphysema is an incapacitating disease of the lungs, characterized by an overdistention of the bronchial tubes with air, so that the normal exchange of carbon dioxide for oxygen doesn't take place sufficiently, resulting in the patient being short of breath, either at rest or on slight exertion. Such a condition is further complicated if the patient is overweight, and can be aggravated by heavy work or exertion. Under such circumstances, prescribed treatment usually includes both reduction in excess weight and rest. The presence of such a condition, in the professional opinion of the carrier's medical examiner, disqualified Johnson for duty as a machinist.

Johnson was properly re-examined in accordance with the rules before being permitted to return to service after an absence of almost seventeen months. It was the medical finding from that examination that he was suffering from a lung disease which disqualified him from returning to service as a machinist at that time. Under these circumstances, the carrier had both the right, and the obligation, to continue to hold him from duty until that disabling condition has improved sufficiently to permit him safely to return to work as a machinist.

If there were any objection or dispute as to the medical findings, a method has been provided for the handling of such disputes as to physical qualifications in Rule 54 of "Physical Examination Rules", which specifically sets forth the procedure to be followed in resolving any such disputes concerning physical disability. That procedure, however, has neither been followed, nor invoked, by Johnson or his representative organization. Moreover, throughout the handling on the property there has been no challenge whatsoever of the validity of Dr. Benwell's medical findings and conclusions, upon which carrier has relied in holding Johnson from duty. In the absence of such a challenge and invocation of the procedure provided by Rule 54, those findings and conclusions must be accepted as medically correct, under which circumstances there can be no doubt that Johnson was properly withheld from duty and the claim for compensation "retroactive to December 24, 1954" is without sound basis.

The entire 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 this dispute were given due notice of hearing thereon.

Claimant, Charles F. Johnson, was charged on July 20, 1953, with having been insubordinate to his district foreman and was dismissed from the service. On appeal to this Board it was found that the evidence supported the charges. Claimant was reinstated, however, with his seniority unimpaired, but without compensation for wages lost. See Award 1849. Upon receipt of the award, carrier arranged for the claimant to take a physical re-examination prior to his return to service. The medical examination revealed that claimant was overweight and suffering from chronic bronchitis and pulmonary emphysema. He was disqualified from service because of physical disability. Claimant was given his seniority status and held out of service because of physical disability as heretofore stated.

The carrier could properly require a re-examination of the claimant under Rule 46. A comprehensive method of handling disputed physical disability cases is set out in Rule 54. This rule in part states:

“A medical board shall be comprised of three physicians who will be graduates of a Class A medical school, who have had at least five years medical practice, and of good professional reputation in the community. The Company will select one member, the employee will select one member, and the two thus selected will select a third member to be agreed upon by them.

* * * * *

The findings and decision of a majority of this board shall be final and binding upon the Company and the employee; and the employee shall not be considered eligible for employment by the Company unless a majority of the board shall have rendered decision declaring him physically qualified. * * *”

The foregoing rule provides the exclusive method of handling disputed disability cases. If the claimant was dissatisfied with the findings of carrier's medical officer, the remedy was to invoke the provisions of Rule 54 and not by an appeal to this Board. We necessarily hold that the purported appeal to this Board is premature. There is nothing before this Board until the provisions of Rule 54 have been invoked.

AWARD

Appeal dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1956.