

**Award No. 3108**

**Docket No. 2738**

**2-GN-CM-'59**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYES'  
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**GREAT NORTHERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That under the current agreement Carman Helper Leo Schmidtbauer was improperly withheld from the service of the Great Northern Railway Company from May 4, 1955 to October 29, 1955.

2. That accordingly the Carrier be ordered to compensate Carman Helper Leo Schmidtbauer for such time and in the amount he would have received had he been working for the Carrier during the period involved.

**EMPLOYES' STATEMENT OF FACTS:** On May 4, 1955, Carman Helper Leo Schmidtbauer, hereinafter referred to as the claimant, was given a notice signed by Master Mechanic A. T. Walker advising that effective May 5, 1955, claimant would be withheld from service as a carman helper account failure to pass physical examination on recommendation of carrier's chief surgeon.

Claimant subsequently submitted to a three party examination of his own doctor, the carrier's doctor and a third doctor selected by the carrier's and claimant's doctors. The result of this examination was that Mr. Schmidtbauer was in good physical condition to perform his work for the carrier. Cost of this examination was borne equally by the claimant and the carrier.

During all the time that claimant was withheld from service of the carrier, he was in sufficient good health to work for a concrete contractor doing laborer's work in connection with concrete work. He was employed by Frank J. Dukowitz, contractor at St. Cloud, Minnesota, claimant's home town. A copy of statement setting forth days worked, hourly rate, daily 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."

**Award No. 1308**—Carmen vs. Louisville & Nashville RR Co., Referee Harold M. Gilden:

"That George Fite's service rights were unjustly terminated on September 30, 1947, 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."

**Award No. 1309**—Carmen vs. Louisville & Nashville RR Co., Referee Harold M. Gilden:

"That Sally Fite's service rights were unjustly terminated on September 22, 1947, and she 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 she is awarded back pay."

In conclusion, therefore, carrier holds that if claimant is entitled to any compensation whatsoever it shall only be in amount of the difference between what he earned while out of service and what he would have earned had he remained in the service of the carrier between May 5, 1955 and October 28, 1955.

**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.

During furlough from carrier's service in April 1954, claimant incurred an aggravated back condition while working for another contractor and was operated on for removal of an intervertebral disc in August 1954. When he was recalled by the carrier in April 1955, he failed to receive approval of the carrier's chief surgeon as being fit for railroad service. On May 5 he was informed of his indefinite leave of absence and that he would not be returned to service until he passed a physical examination to the satisfaction of carrier's chief surgeon. Subsequently, on October 18, 1955, by agreement between the organization and the carrier, claimant was examined by a panel of three doctors (carrier's chief surgeon, claimant's personal doctor and a third doctor) and on the basis of their findings he was restored to carrier's service on October 28, 1955.

The essence of this claim is that the examination given claimant by the carrier's chief surgeon on April 21, 1955 was inadequate and superficial

and that consequently he was unjustly treated by being withheld from service for a period of about six months. It is undisputed that during this period claimant performed laborer's work for a concrete contractor. In effect we are asked to substitute our judgment with respect to claimant's physical condition on April 21, 1955 for that of the carrier's medical expert who examined him at the time and saw the x-rays of his spine taken in 1954. What, if any, further investigation the chief surgeon may have made in respect of the claimant is not indicated. It is apparent, however, that the chief surgeon had knowledge of claimant's history of trouble with his back extending from 1948; that claimant was disabled for four months due to back trouble in 1949, and that he had undergone two operations in March and August 1954. While the organization states that claimant was OK'd for work in December 1954 by his personal physician, the record does not indicate that this information was given the carrier at any other time prior to October 1955. In this respect this case is distinguishable from Award 1531 of this Division, cited by the Union.

On the facts and circumstances shown of record, we think the carrier did not act arbitrarily in withholding claimant from service on the basis of the opinion of its chief surgeon. This Board is not qualified to determine whether the examination of the chief surgeon in April 1955 was adequate from a medical standpoint. In view of claimant's past medical history we think the carrier acted in good faith in holding him out of service until his subsequent examination by the three doctor panel. It would be unwise for this Board to substitute its judgment for the carrier on the basis of this record.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary.

Dated at Chicago, Illinois, this 16th day of February, 1959.