Award No. 4611

Docket No. 4542

2-GN-MA-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling Agreement, Carrier acted unjustly when removing Machinist Harry Jenkins from active service on June 12, 1962, while employed as Machinist at the King Street Passenger Station, Seattle, Washington, for allegedly not meeting the minimum physical requirements for service.

2. That the Carrier be ordered to restore the claimant, Mr. Jenkins, to active service with seniority rights unimpaired.

3. That the claimant be compensated for all time lost by the carrier.

4. That the Carrier be ordered to make the claimant whole for all vacation rights.

5. That the Carrier be ordered to pay the Northern Pacific Benefit Association dues for all time held out of service and pay all premiums for Group Life Insurance for all time held out of service.

EMPLOYES' STATEMENT OF FACTS: Machinist Harry Jenkins, hereinafter referred to as the claimant, is fitfy-one (51) years of age. Claimant was employed by King Street Passenger Station in October 1948 and remained in its service continuously until removed from the service on June 12, 1962.

The King Street Passenger Station, hereinafter referred to as the carrier, is a passenger train terminal company, jointly owned by the Great Northern and Northern Pacific Railway Companies. The shop craft' employes, including machinists are covered by agreement between the Great Northern Railway Co., and System Federation No. 101, Railway Employes' Department, AFL-CIO.

We hold that Rule 60 did not require the Carrier to accord Claimant an investigation before disqualifying him from service on medical grounds because the Rule is limited to dismissals of a disciplinary nature."

Even if this board should find that the claimant was unjustly disqualified, the organization's claim to this board requests, in addition to return to service and payment for all time lost, vacation payments, hospital association dues and insurance premiums. No claim for anything other than 8 hours' pay each day was submitted within sixty days of the claimant's discharge, or at any time while the claim was handled on the property. Therefore, such a claim is barred by Article V of the August 21, 1954 National Agreement. In addition, Rule 26(e), upon which the organization bases its case, provides in pertinent part as follows:

"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 board has held that language essentially identical to the above-quoted rule limits recovery to loss of wages less outside earnings. See **Awards 1638 and 3883** of this Board.

THE CLAIM OF THE ORGANIZATION, THEREFORE, IS WITHOUT MERIT FOR THE FOLLOWING REASONS:

1. It is the carrier's legal duty and responsibility to establish, maintain and enforce minimum physical standards for its employes in the interests of its employes and the public.

2. The decision of the carrier to hold the claimant out of service until such time as he can perform the duties of a machinist without extraordinary danger of re-injury which would result in serious consequences, was based on uncontradicted medical evidence and the claimant's own testimony concerning his ability to perform the work.

3. The personal opinion of one of the claimant's personal physicians that there is "no medical reason at this time why he should not be permitted to continue the same type of work," is entirely inconsistent with that same doctor's previous statements, and indicates failure to consider the physical requirements of the claimant's employment, the legal responsibilities of the carrier, and the fact that the original injury allegedly incurred in the routine course of his work.

4. Schedule Rule 26 is not applicable to the facts in this case, except insofar as it provides for appeal of a grievance by an employe who believes he has been "unjustly dealt with," and the claimant has pursued that right without interference by the carrier.

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.

Parties to said dispute were given due notice of hearing thereon.

Claimant was employed as a machinist by carrier in October, 1948. In October of 1957 he sustained a back injury which resulted in his being off work for 22 days. He was compensated for this injury some 60 days afterward and he executed a general release to the carrier. In March, 1958, claimant sneezed and re-injured himself and was off work approximately three months.

After the re-injury claimant attempted to negotiate a settlement of his injury claim and being unable to arrive at an agreement he instituted suit. As a result of the suit he recovered a judgment against the carrier for $3,000. The day following his receiving the judgment he was withheld from service and sent to carrier's doctor for a physical examination. He remained off work for 3 days—later he was paid for this lost time—and then was re-instated.

On June 12, 1962, five weeks after his re-instatement and after having been found to be physically qualified for his job by carrier's Chief Surgeon, he was suspended and sent for another physical examination. Carrier tells us that as a result of this last physical it was determined that claimant was not physically qualified to perform the work of his job.

The employes allege that claimant was unjustly suspended on June 12, 1962 and request that he be re-instated and compensated for all time lost.

There are statements and arguments made by each of the parties hereto that are denied by the other. From this record we are unable to reconcile the differences expressed because no corroboration is presented by either side.

We are of the opinion that carrier had the right to have claimant take a physical examination after learning, during the course of the claimant's lawsuit, that he had some difficulty in performing the work of his position. However, when carrier's own Chief Surgeon examined him and released him to work, we believe that claimant's physical condition was established and without some evidence that another physical examination was required, by reason of a change in claimant's condition, we must conclude that carrier's act of suspension was arbitrary and capricious. Therefore, we believe that claimant should be re-instated and compensated for all time lost.

AWARD

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice Chairman

Dated at Chicago, Illinois, this 10th day of December, 1964.