Award No. 4721

Docket No. 4606

2-PRR-MA-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That the Carrier violated the controlling agreement by unjustly withholding from service E. W. Dafforn, Machinist, Ft. Wayne, Indiana.

(2) That the Carrier be ordered to compensate E. W. Dafforn for eight (8) hours' pay at the Grade E. Machinist rate of pay, beginning December 23, 1961, and to continue for each succeeding work day until he is restored to service in accordance with the applicable rules of the Agreement.

EMPLOYES' STATEMENT OF FACTS: E. W. Dafforn, hereinafter referred to as the claimant, was employed by the Pennsylvania Railroad Company, hereinafter referred to as the carrier, at the carrier's Ft. Wayne, Indiana, Shops. Prior to August 30, 1961, the claimant was regularly assigned as a machinist, enginehouse, Ft. Wayne, Indiana, with a tour of duty from 7:00 A. M. to 3:00 P. M., Thursday and Friday relief days. The claimant has a machinist craft seniority date as machinist 9-28-42, machinist helper 3-14-42.

On August 29, 1961, claimant was injured in an off duty accident, that resulted in the loss of sight in one of his eyes. Claimant was off duty from August 30, 1961, and reported for duty on December 21, 1961. Claimant was referred to the Ft. Wayne, Indiana, medical officer, Dr. Laycock, who could not issue a return to duty slip. Dr. Laycock referred the claimant to the regional medical officer at Chicago, Illinois, and the claimant journeyed to and was examined by that officer on December 28, 1961. The Chicago medical officer issued an MD-3, stating that the claimant was not qualified to return to duty.

On January 12, 1962, local chairman filed a request that the claimant be restored to service, and be reimbursed for all time lost. The foreman denied the request on January 16, 1962. The local chairman rejected the foreman's decision on January 18, 1962, and appealed the foreman's decision to the superintendent-personnel on January 18, 1962. The superintendent-personnel denied the claim on January 25, 1962, and on February 1, 1962, the local chairman rejected the superintendent-personnel's decision, and requested that a joint sub-

this dispute have they set forth the specific provisions of the agreement which were supposedly violated. The reason for this is obvious—they cannot do so for there is no provision in the applicable agreement which prohibits the carrier from removing from service any employe who is physically unfit to safely perform the duties of his position. Therefore, carrier submits that the employes have failed to meet the burden of proof which, as your board has so consistently held, rests with the party advancing the claim.

In contrast to the employes' failure to make any showing in support of their claim, the carrier has shown that it has the indisputable right to withhold from service any employe who lacks the necessary physical fitness to safely perform the duties of his position and that, in view of the claimant's recognized inability to meet the reasonable physical standards attached to the position of Machinist, its action in the instant case was entirely proper.

The carrier having shown the complete lack of merit in the instant claim, it is axiomatic that claimant is not entitled to the compensation claimed. This is particularly so when it is considered that claimant rejected the carrier's offer to place him on an equally rated position suited to his limited physical capacities. However, if, contrary to all of the evidence herein presented, your board should somehow determine that claimant was improperly withheld from service, any award of compensation should take into consideration any earnings of the claimant in outside employment during the period involved. See Awards 3110, 3280, 3449, and 3562.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement, which constitutes the applicable agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties. To grant the claim of the employes in this case would require the board to disregard the agreement between the parties hereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon the parties to this dispute. The board has no jurisdiction or authority to take any such action.

CONCLUSION: The carrier has shown that claimant has been properly handled under the applicable agreement, that said agreeement has not, in any manner, been violated and that claimant is not entitled to the compensation claimed.

Therefore, the carrier respectfully submits that your honorable board should dismiss or deny the claim of the employes in this matter.

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.

On August 29, 1961 the claimant was injured in an off duty accident resulting in the loss of sight in his left eye. He reported for return to duty on December 21, 1961 and, after examination by the Carrier's Regional Medical Officer, was declared not qualified to resume work as a machinist.

A claim was filed for pay while held out of service. After discussion thereof between the General Chairman and the Manager Labor Relations, on August 6, 1962 the Company submitted a proposed agreement under Rule 3-G-1 (placement of disabled employes by agreement) for placement of the claimant as a machinist in the Diesel Truck Gang at the Fort Wayne Back Shop. On August 8th the Local Chairman replied that claimant preferred work at the enginehouse and that "our position is that Mr. Dafforn should have his full seniority rights, with an understanding that he be restricted from work on moving locomotives such as wheel or flange turning, and also restricted from the daily inspection job, which includes the coupling and uncoupling of locomotive consists both in the Enginehouse and outside". The Carrier replied denying the request to permit him to exercise his seniority at the enginehouse restricted from working on or about moving equipment, because "the force at the enginehouse is not sufficient to adequately protect the operation with an employe working under such restrictions".

Effective January 1, 1963 the Railroad Retirement Board approved claimant's application for occupational disability annuity.

On March 13, 1963 the General Chairman advised the Carrier that he desired to have the question of claimant's physical fitness to be finally decided, before he is restricted from resuming service, as set forth in Rule 8-K-2. The Carrier declined to participate because claimant's condition was not in dispute.

Rule 8-K-2 provides that "when an employe has been removed from or is withheld from service on account of his physical condition and the General Chairman desires the question of his physical fitness to be finally determined before he is permanently removed from his position", a Board of Doctors will be selected to decide on the physical fitness of the employe to continue in his regular occupation. The provision has no application to this situation. The employe lost the sight in his left eye and both Company and Union representatives have recognized that this physical condition requires some restrictions from the normal duties of his regular occupation. Hence in this case there is no issue regarding claimant's physical fitness to continue in his regular occupation for determination by a medical board under that rule.

Under the circumstances shown, it appears that the Carrier has not violated any agreement provision, but has acted in good faith to provide work for an employe, disabled through activities not connected with his employment, in accordance with Rule 3-G-1. Hence there is no valid basis for this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May, 1965.