Award No. 6039
Docket No. 5857
2-EL-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.—C. I. O. (Carmen)

ERIE LACKAWANNA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier arbitrarily removed Mr. C. A. Cartella, a bonifide Carman, working at Hornell, N.Y., from the Hornell Wreckers list without a proper hearing under Rule 27E of the current agreement.

2. That the Carrier be instructed to pay Mr. Cartella three (3) hours at straight time rate, 31 hours at time and one half and 9 hours at double time for work performed on the wreckers by junior employes.

EMPLOYES' STATEMENT OF FACTS: C. A. Cartella, hereinafter referred to as the claimant, is regularly employed as a carman at Hornell, New York, for the Erie Lackawanna Railway Company, hereinafter referred to as the carrier.

Approximately, around January 1967, the claimant requested, in writing, with a copy to Local Chairman Bert Meyers, that he be used as an extra wrecker.

This has been the practice at this point and since it always had been handled smoothly, the organization had never insisted that these jobs be advertised under Rule 13A, which reads in part "When new jobs are created or vacancies occur in the respective crafts, the senior employe in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or vacancies that may be desirable to them. All vacancies or new jobs created will be bulletined."

Evidently the claimant had shown enough ability to fill this position, because he held it for about a year until January 19, 1963, when he re-

has the prerogative of determining if an individual is qualified to perform certain type work. Second Division Award 4844 (Johnson) holds:

> "It has long been recognized that in the performance of its service the Carrier has all powers not forbidden by law nor relinquished by contract, and that it necessarily has the right to determine in good faith the qualifications of its employes."

The petitioning organization can point to no rule of the schedule agreement restricting management's right to determine an individual's capability to safely perform his work. Under the circumstances, there can be no violation of the parties' agreement and carrier submits that this board should so hold by rendering a denial decision in this case.

During the various steps of appeal on the property, Petitioner included vague charges of violation of Rules 24(a) and 13(a) which carrier feels should not go unchallenged.

Rule 24(a) — SENIORITY, has no bearing on the matter in dispute. Seniority rights in and of themselves do not give individuals a demand right to all work. The principle of ability to perform certain types of work must be considered. The parties who negotiated the applicable agreement recognized this in Rule 13(a) when they provided:

> "When new jobs are created or vacancies occur in the respective crafts, the senior employes in point of service shall, **if sufficient ability is shown by trial,** be given preference in filling such new jobs or vacancies that may be desirable to them."

Under the circumstances, Rule 13(a) lends no support to Petitioner's claim. As pointed out heretofore, the additional wreck crews provided for under Rule 84 are not new jobs or vacancies requiring bulletining under Rule 13, but merely extra work made available to qualified employes indicating a desire to perform this service. Significant is the fact that to obtain a new job or vacancy advertised under Rule 13, sufficient ability must be shown by trial. In the judgment of the Wreckmaster, after a trial, claimant's speech defect restricted his ability to safely perform duties in extra wreck service. Carrier submits that this rule was not violated, but in fact completely supports carrier's disqualification of claimant.

In conclusion, carrier respectfully submits that the instant claim should be dismissed because petitioner's original claim was changed and not resubmitted to the general car foreman, or denied for want of merit and rules support.

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 waived right of appearance at hearing thereon.

Claimant, with seniority date of August 27, 1950, on the Hornell Carmen's Roster, holds a regular assignment as Carman on the Caboose Track, Hornell Diesel Shop. He made application to be placed on the Hornell Wrecker Extra List. He was used on this extra list for approximately one year, but on January 19, 1968, he was informed by Carrier that he was not capable of safely performing his duties in wrecking service due to a speech impediment, and his name was removed from the extra list. The Organization contends that Claimant was wrongfully removed from the wrecking crew extra list on account of not being afforded a hearing. Carrier contends that the claim as presented by the Local Chairman on March 8, 1968, alleged a violation of the Agreement, but failed to cite a specific rule being violated. Subsequently, the Organization included specific rule violations, and Carrier contends that this constituted an unauthorized amendment. Carrier further contends that, on the merits, Claimant was not disciplined, suspended or dismissed from service, and that, therefore, the rule cited by the Organization, Rule 27(e), does not apply; that the Claimant was not deprived of work, for the reason that he is still in service of the Carrier; and that Carrier has the managerial right to bar the Claimant from working extra on this wrecking crew.

The Board finds that Rule 27(e) does not apply to this dispute for the reason that the Claimant was not subjected to disciplinary action and was not deprived of employment by Carrier. It is axiomatic that Carrier has the sole responsibility for the safe and efficient operation of the railroad. Award 8394 (Bailer). The Board finds that the Carrier was acting in good faith and that the responsibility of Management for the safety of its employes and the public requires the use of reasonable discretion in determining the physical condition of its employes. Award 3749 (Mitchell). In this instance, the Carrier has been put on notice that this Claimant had an impairment that could be detrimental to the safety of the crew that he might be working with. The United States Circuit Court of Appeals for the Third Circuit has said that where a plaintiff can prove the Management forced a sick employe, of whose illness they knew or should have known, into work for which he was unfitted, because of his physical condition, a case is made out for the jury under the Federal Employers' Liability Act. (Dunn v. Black Lick Railroad, 367 F.2nd 571 — Award 13879, Third Division, (O'Gallagher).

Therefore, it is the opinion of this Board that the Management in this instance would have been derelict in its duty if it had not taken the action that it did take, after being informed of the possible and probable unsafe situation, caused by the speech impediment of Claimant. The Carrier is solely responsible for the safety of the crew and is, therefore, held in absolute liability for working an unsafe employe. Since no disciplinary action was taken, Carrier violated no rule in taking the action outlined in the record. Therefore, this claim will be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1970.

LABOR MEMBERS' DISSENT TO AWARD 6039 (DOCKET 5857)

Claim 1. That the Carrier arbitrarily removed Mr. C. A. Cartella, a bonifide Carman, working at Hornell, N.Y., from the Hornell Wreckers list without a proper hearing under Rule 27E of the current agreement.

Rule 13 (a) provides:

> "When new jobs are created or vacancies occur in the respective crafts, the senior employes in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or vacancies that may be desirable to them. * * *."

Rule 27 (e) provides:

> "No employe shall be disciplined without a fair hearing by designated officer of the Railroad. * * *."

The Claimant in this dispute was assigned the vacancy of extra carman on the wrecking crew as provided in Rule 13(a) and which, according to the record before us, worked for approximately one year without complaint from his fellow workers or foreman as being an unsafe employe to work with due to having a slight impediment of speech, nor was he ever charged with or accused of causing an injury to a fellow employe. However, on January 19, 1968 he was informed by the Carrier that he was not capable of safely performing his duties in wrecking service due to a speech impediment and arbitrarily removed him from his assignment as extra carman on the wrecking crew.

The Carrier's failure to give Claimant a hearing to defend himself against the charge and being disciplined to the extent of being removed from his assignment as extra carman on the wrecking crew, was in violation of Rule 27(e) as quoted above.

The excuse given by the Referee in his proposed award for Claimant not being given a hearing as provided in Rule 27(e), and it being adopted with support of the Carrier Members, is simply nonsense and will not be dignified by comments of the Labor Members.

O. L. Wertz

D. S. Anderson

R. E. Stenzinger

E. H. Wolfe

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