

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

Parties to Dispute: (System Federation No. 16, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the Current Working Agreement Carman Jerry Lang was unjustly disqualified from service of the Carrier on December 13, 1971.
2. That accordingly the Carrier be ordered to return Carman Jerry Lang to service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Jerry Lang was employed by Carrier at Brewster, Ohio, a point on the former Wheeling and Lake Erie Railway Company, as a carman in the Car Department. Mr. Lang has been employed by Carrier since 1960, except for periods of service in the armed forces. On July 26, 1971, while off duty, Mr. Lang was involved in an automobile accident which resulted in almost total loss of sight in his left eye.

Following a period of convalescence, Mr. Lang in December 1971 sought to return to duty with the Carrier. On December 13, 1971, the Carrier's Regional Medical Director disqualified him for all service. In April 1972, exception was taken to this decision by the Organization on behalf of claimant and a grievance was filed requesting his return to service or in the alternative invoking the provisions of Addendum "G" (sic) and Rule 11 of the Agreement. The cited Agreement provisions read as follows:

Addendum H

"Whenever, as a result of a Company doctor's report, the Company withholds from service any employee to whom either of these agreements applies, that employee, if he so desires, may undergo a second examination by another doctor of his own choosing, to verify the diagnosis of the Company doctor. When such an employee makes written request upon the Company, and the Company finds that the doctor whom the employee wants to visit for check diagnosis is reputable and qualified to investigate the employee's condition, the Company will give written permission to the employee to visit such doctor and will pay the doctor's fee for such confirmatory examination and diagnosis. If the diagnosis of the Company doctor and that of a second reputable and qualified doctor do not agree, the employee will be required to visit a mutually-satisfactory medical clinic for complete examination and diagnosis. The Company will bear the reasonable expense, including the medical fees, of such visit to the clinic. The diagnosis reported by the clinic shall be considered final as to the condition of the employee at the time of examination."

Rule 11

"FAITHFUL SERVICE

When employees under retirement age have rendered long and faithful service to the Company, and have become permanently incapacitated to such an extent that they are unable to physically fulfill the requirements of their position, they shall be given displacement rights to other work in accordance with these rules."

Carrier declined to reinstate Claimant but, upon being apprised of the name of Claimant's physician, Carrier arranged for the selection of the neutral doctor under Addendum H. Also, on June 27, 1972, Carrier declined to permit Claimant to exercise displacement rights under Rule 11 stating that in the opinion of Carrier there is no carman job which he could safely perform without hazard to himself and/or his fellow workers. Subsequently, Carrier informed Claimant that in the opinion of the neutral medical examiner selected under the provisions of Addendum H he should remain disqualified from service with the Carrier. It should be noted that Carrier has not submitted in evidence at any time the medical reports of the neutral doctor, Dr. James Meyer, upon which it relied when it disqualified Claimant.

The Organization on behalf of Claimant argues that Mr. Lang was wrongfully disqualified in the first instance, that Addendum H has not been complied with by Carrier because of its failure to reveal the neutral medical report to Claimant and, finally that Rule 11 provides Claimant displacement rights which Carrier has wrongfully prevented him from exercising.

Carrier maintains that it has the inherent right to exclude from employment those who do not meet its physical standards and who will be hazardous to themselves and others. Moreover, Carrier asserts that the requirements of Addendum H are rendered nugatory herein because both Claimant's doctor and the Carrier's doctor agreed that Claimant had lost nearly all the sight in his left eye. Finally, Carrier insists that there is no job in the Carmen Craft which Claimant can perform safely.

Close examination of the record herein indicates, contrary to the contention of Carrier, that the doctors of Claimant and Carrier were not in agreement regarding his continuing ability to perform service for the Carrier. Claimant's doctor, while conceding his impaired peripheral and distance vision in the left eye, concluded that aside from this damage Claimant could perform "any task anyone else can". There is no neutral testimony or evidence on the record to refute this conclusion, since Carrier has not submitted in evidence the report of the neutral doctor upon which it purportedly based its disqualification decision. See Award 3872. In these circumstances we are of the opinion that the facts do not support Carrier's total disqualification of Claimant from all service.

As noted supra, Rule 11 of the Agreements grants permanently incapacitated employees who have rendered long and faithful service displacements rights to other work in accordance with the Agreement rules. Claimant, with 11 years of service clearly qualifies for the opportunity to prove himself capable of continuing employment under this rule. As we have noted in another similar context, such a rule does not require Carrier to create a position solely with duties which such an employee can perform, but it does obligate Carrier to give him displacements rights to other work in accordance with these rules. See Award 1711. We have reviewed the Carmen's classification of work rule, Rule 64, and at least some of the work described therein appears to us to be within the capability of a carman with impaired vision in one eye. See Award 6561.

In all of the circumstances herein, we are of the opinion that Carrier's decision to disqualify Claimant totally from all service is not adequately supported on this record by substantial evidence. Specifically, we find that Carrier violated Rule 11 by refusing to give Claimant displacements rights to work other than his prior position, in accordance with the rules of the Agreement. Accordingly, we will sustain the claim and direct Carrier to grant Claimant displacement rights in accordance with Rule 11.

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Award No. 6761
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2-N&W-CM-'74

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of September, 1974.