

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Donald F. McMahon, Referee

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**PARTIES TO DISPUTE:**

**UNION PACIFIC RAILROAD COMPANY**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**STATEMENT OF CLAIM:** Claim of the Union Pacific Railroad Company that:

Its action in removing B&B Carpenter John R. Long from service on account of his physical condition, effective September 19, 1949, was not improper nor in violation of the effective agreement.

**CARRIER'S STATEMENT OF FACTS:** At the close of work on May 17, 1949, John R. Long, while getting off of a platform at Portland, Oregon, on which he had been working, suffered an injury which resulted in his being unable to work from that date until August 12, 1949. On this date, his attending physician gave him a release to return to work, but subject to continuing under the doctor's care. (A photostatic copy of the release is attached hereto marked Carrier's Exhibit A.) This release does not indicate the reason for the continuing treatment, but merely states that Long was "hereby released for duty (Still under Treatment)". Mr. Long was not fully recovered from his injury, but felt that he was sufficiently recovered to enable him to return to work. On August 15, 1949, Mr. Long returned to the service of the Carrier in the B&B gang in which he had been employed prior to his injury.

On or about August 23, 1949, Long, through his attorneys in Los Angeles, California, filed suit against the Carrier in the Superior Court of California (Los Angeles County) seeking damages in amount of \$50,000.00 because of the injury he incurred on May 17, 1949. Permanent injuries were alleged in Long's complaint. Long's complaint for damages alleged in part as follows:

"VI

"That by reason of the facts hereinabove set forth, and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: fracture of ribs on right side, severe injury in the region of the chest, internal injuries the exact nature and extent of which are unknown to plaintiff, extreme pain and suffering and a severe shock to his nervous system.

"VII

"That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the

In summary, the Employees sincerely believe that the Carrier's officers acted contrary to the provisions and intent of Article 5, Rule 40, and that the injustices which have resulted obligate the Carrier to reinstate the employee in accordance with the provisions of Article 5, Rule 40, Paragraph (d).

We respectfully request that our claim be sustained.

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and are hereby made a part of the question in dispute.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This case comes before the Board and is progressed by and on behalf of Carrier. For the purpose of identification of parties we will refer to Carrier as claimant, and John Long, employee and the Organization as Respondents.

Carrier contends its action in removing John Long from its service as B. & B. Carpenter, effective September 19, 1949, was not improper nor in violation of the Agreement between the parties.

Briefly the facts in the case before us are: John Long has been in the employ of Claimant since November, 1945. He held position of B. & B. carpenter, Portland, Oregon. On May 17, 1949, Long suffered an accidental personal injury while in the employ of Claimant and was off work until August 15, 1949, having returned to work on authorization by Dr. Brown on August 12, 1949, with the proviso he was "still under treatment", as evidenced by Carrier's Exhibit A. He remained in the service of Claimant until he was removed on account of his physical condition on September 17, 1949. During the time he returned to work in August, 1949, to the time of his removal from duty, the record discloses he was given some light work and on one occasion, August 19, 1949, he had been doing shoveling work and was not able to work the next day. Again on August 24, 1949, it is disclosed the Respondent Long left his work and was later found by his foreman to be lying under a tree and he explained "he had taken a pill and it had made him sick and almost pass out". After removal from service on September 19, 1949, Respondent Long requested a hearing on his alleged dismissal, which was granted at Portland on October 4, 1949. On October 19, the Claimant requested Long to report to the Supervisor's office for order for physical examination, which further stated that if qualified physically he would be returned to service, and again on October 24, 1949, Claimant advised by letter to Long he would be returned to service, after passing physical examination, with seniority, vacation and pass privileges unimpaired, the question of pay for lost time to be handled further.

The hearing held on October 4, 1949, was undertaken as provided by Article 5—Rule 40 of the Agreement, and provides for procedure in discipline and grievance matters.

The Respondents, while sometimes contending this to be a discipline case, have stated in writing in the record this is not a discipline case, as set out in letter from the General Chairman to the Claimant and in addition stating he had advised Long after examination he would be returned to service with seniority and vacation rights unimpaired but would not be paid between September 17, 1949, and October 18, 1949, the period during which Long had refused to have physical examination at Claimant's request.

We are unable to find in the record that Long did not receive a fair and impartial hearing, nor was Long denied any rights by refusal of Claimant to produce certain witnesses. Their presence was not material.

We are of the opinion and hold, the Employee arbitrarily and against the advice of his representative refused to comply with the request for him to

have a physical examination to determine his ability to perform his work and by his refusal to submit to such examination his position is not well taken, and he is not entitled to be reinstated to his position, with all its benefits, during the period of such refusal. The Claimant, by the same token, had no right to remove Long as it did, without proper medical examination, and we hold that Long is entitled to all his pay for the period from September 17 to October 19, 1949, with all his rights unimpaired, but subsequent to such date until the employee, Long, submits to physical examination as requested by the Claimant, no pay or other allowances shall be construed as due and owing under this opinion and award.

The Carrier, Claimant, has the inherent right to take precautionary measures, where the safety of the employee is involved, or the public, and we hold the request of the Claimant for physical examination was not an arbitrary or unreasonable request. See Awards 4649, 875.

It is our opinion the Carrier should compensate the Employee for all lost time and all rights unimpaired up to and including October 19, 1949. That after such date the Employee has arbitrarily refused to submit himself for physical examination and is not entitled to compensation or other benefits of his employment during the period of such refusal.

The Board is of the opinion that the Employee, Respondent, be required to submit himself for physical examination within ninety days from the date of this award to the medical examiner authorized by Claimant, and it is so ordered. It is further ordered that if the Employee at the end of such ninety days refuses to submit to such physical examination, the Carrier as Claimant will be relieved of all further responsibility to such employee.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That claim be sustained in part and denied in part.

#### AWARD

In accordance with the foregoing Opinion and Findings, claim is sustained in part and denied in part.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1953.