Award No. 6665
Docket No. CL-6758

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the rules of the Clerks' Agreement by its unilateral action in suspending Mr. A. B. Tedd from service during the period May 21 to 31, 1951, incl.

(b) Mr. Tedd shall now be compensated for all wage loss sustained during the period May 21 to 31, 1951, inclusive, which loss involved both straight time and overtime.

(c) The Carrier violated and continues to violate the rules of the Clerks' Agreement by its improper action in permanently removing Mr. A. B. Tedd, Yard Checker at Oroville Yard, from his position on June 26, 1951.

(d) Mr. Tedd be returned to his position of Yard Checker from which he was improperly removed on June 26, 1951, and be compensated for all wage loss sustained, which loss involves both straight time and overtime.

EMPLOYES' STATEMENT OF FACTS: The facts in this claim are as follows: Mr. Albert B. Tedd, who was born February 28, 1910, lost the sight of his left eye when twelve years of age. He subsequently hired out in the car department of the Western Pacific Railroad Company at Oroville, California in August 1943, at which time he informed the Carrier's Car Foreman, Mr. R. E. Miller, that he was blind in one eye. Mr. Miller thereupon advised Mr. Tedd to go to Dr. A. E. Kusel, the company doctor at Oroville at that time, for an eye examination. Mr. Tedd did this and was given a release and permitted to return to work for the Carrier, notwithstanding his one-eyed condition.

Mr. Tedd thereafter continued to work as a car painter in the car department of the Western Pacific Railroad Company at Oroville, California for approximately a year, and then transferred to the Western Division of the Carrier where he secured employment as a clerk at Oroville. Since that time Mr. Tedd has continued to work on positions under the Clerks' Agreement at Oroville, where he has held such positions as Yard Clerk, Yard Checker and Train Desk Clerk.

the contrary. He was not removed from his position without definitely determining this fact.

The facts in this claim differ but little from those presented to your Board under Award 875, Docket 887, which involved a dispute in 1932 involving the same parties. Under Award 875, your Board stated:

> "The Board is of the opinion that where the question of personal safety is involved carrier is entitled to be abundantly precautious and even though it may have acquiesced in the employe filling the position in the past, it has the right, no discrimination being shown, to thereafter refuse to again assign the employe to a position that will require his presence around live tracks. See Awards 235, 389, 592 and 772."

To summarize, the record is clear that:

1. Tedd did not present full facts surrounding his early injuries on either of his two applications nor was this information available to the Superintendent prior to Tedd's injury in 1951 when struck by a moving car;

2. Carrier did not act with definite determination of the extent of impairment of Tedd's vision;

3. It is not safe to permit Tedd to work around live tracks and moving cars as evidenced by his injury on May 12, 1951;

4. Tedd's submission of his own Doctor's report merely confirms the fact that he has monocular vision; and

5. Statements of your Board in Award 875 fully support Carrier's action.

It is inconceivable that an award be issued permitting Tedd to be subjected to the hazards incident to working around live tracks and subjecting Carrier to responsibility beyond the realm of reasonable control. It is incredible that any one charged with responsibility for Tedd's safety, including the Organization were it so charged, would authorize the return of Tedd to a position requiring his presence around live tracks and the hazard of his being permanently maimed or killed.

All of the above has been presented to the employes.

(Exhibits not reproduced).

OPINION OF BOARD: While working as a Yard Checker about 12:45 A. M. on May 13, 1951, when Claimant left the Yard Office at Oroville for the purpose of handling up a list of cars to a switch engine crew, Claimant was struck by the rear car of a cut of flat cars which the switch engine was shoving. The day following the accident he was treated by the Company doctor at Oroville. Prior to his release by that doctor Claimant was instructed by the Trainmaster to report to the Chief Surgeon of the Carrier at San Francisco on May 28. When he so reported he was sent to an eye doctor for examination. He returned to work on June 1, 1951, and remained at work until June 26, 1951 when he was verbally advised by the Trainmaster that he could no longer work as a Yard Clerk. By letter to Claimant dated June 27, 1951, the Superintendent confirmed the Trainmaster's verbal advice stating that it had been found that Claimant's vision had become impaired to such an extent that it was necessary not to permit him to work the Yard Checker position. A copy of that letter was sent to the General Chairman. On July 25, 1951, Claimant filed time slips for June 26, 1951, when a junior man worked the Yard Checker job and no relief or qualified extra man was available and requested full restoration to seniority without restriction with payment for time lost. With that letter he also

filed a copy of a report made by an eye doctor and of a letter from a paint foreman which Claimant submitted as indication of the fact that the Company was aware of his defective vision for the past several years. The record reveals that Claimant first worked for Carrier in the capacity of car painter and later transferred to the Western Divison as a clerk sometime in the latter part of the year 1944, holding such positions as Yard Clerk, Yard Checker and Train Desk Clerk.

There is considerable conflict in the record as to whether or not Carrier by reason of knowledge of an official (the Superintendent of the Division, of which Oroville was a part) was aware of Claimant's impairment of vision at a time prior to the occurrence of the accident at Oroville on May 12, 1951. That conflict is not clearly resolved. In any event, conceding knowledge as having been established, it is within the contemplation of Rule 55 governing physical examinations that when the Superintendent or other head of a department considers that the physical condition of an employe materially increases risk of accident to himself or fellow employe, he may require the employe to submit to a physical examination by a Company physician. The accident of May 12, 1951, could reasonably cause the Superintendent to become apprehensive in that respect. Rule 55 further provides that the employe will not be permanently removed from his position until it is definitely determined that he is unfit to perform his duties and that the General Chairman will be notified immediately whenever an employe is suspended from his position because of physical or mental condition. That provision of the rule was complied with by the Superintendent's action in sending the General Chairman a copy of his letter of June 27, 1951 to Claimant. Rule 55 also provides that in the event of a dispute in which, within 30 days, the conclusion of Company physician is challenged by another reputable physician (selected and paid for by the employe) the employe shall be examined by and his medical history made available to a third, or neutral reputable physician (selected jointly by Carrier and Brotherhood within 30 days from date of challenge). The vital issue in this case is whether or not the conclusion of the Company physician was challenged by the doctor's report submitted by the Claimant with his letter of July 25, 1951.

The conclusion of the Carrier's Chief Surgeon was that it was inadvisable to employ Claimant around moving cars or live tracks based upon the findings of the eye doctor who examined him at the Chief Surgeon's request. This conclusion was communicated to Claimant and General Chairman by the Superintendent's letter of June 27, 1951. The report of Claimant's physician concluded that judging from Claimant's history of employment, driving record, and other activities, Claimant appeared to have made an excellent adaptation to his one-eyed condition. To say that one has made an excellent adaptation to a one-eyed condition is not to say that he is capable of performing the duties of a given position. Viewing the record in this light, there is no real conflict between the conclusions of the two physicians and the conclusion of the Carrier's physician stands unchallenged. It follows that the Employes have not shown a basis for invoking that provision of Rule 55 requiring examination by a neutral physician. Under these circumstances we can only conclude that the Agreement was not violated by the Carrier's action herein.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing thereon;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1954.