

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

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**PARTIES TO DISPUTE:**

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

**RAILWAY EXPRESS AGENCY, INC.**

**STATEMENT OF CLAIM:** Claim of the District Committee of the Brotherhood that (a) The Agreement governing hours of service and working conditions between the Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated in the Omaha, Nebraska Train Service Employees Seniority district No. 4 in the treatment accorded A. L. Kirkpatrick in refusing to permit him to return to work on June 15, 1951: and

(b) He shall now be permitted to return to work and be compensated for salary loss sustained, retroactive to and including June 15, 1951.

**EMPLOYEES' STATEMENT OF FACTS:** A. L. Kirkpatrick with seniority date of January 26, 1945 in the Omaha, Nebraska Train Service employees seniority district No. 4 is one of a pool of four Helpers assigned to operate on Chicago Great Western Railway Trains No. 33-34, Carroll, Iowa—Minneapolis, Minnesota, Salary \$305.75 basic per month. While in the performance of his duties on October 29, 1950, Helper Kirkpatrick was injured in a train derailment at Austin, Minnesota. He was removed to Omaha, Nebr. and placed in charge of Dr. James W. Martin from whom he continued to receive medical attention until June 13, 1951.

June 13, 1951, Kirkpatrick was released by Dr. Martin as being "able to return to his employment as of June 15, 1951." (Exhibit "A") He immediately attempted to displace a junior employe and return to work. (Exhibit "B") Instead of permitting him to return to work, Carrier requested that he submit to a further examination by Dr. J. D. Bradley, which he did on June 18, 1951.

July 12, 1951, District Chairman W. J. Kreider wrote Superintendent R. L. Linihan requesting the reasons why Kirkpatrick had not been permitted to return to work, (Exhibit "C") and when no reply was received, the District Chairman again wrote the Superintendent and entered formal claim for wage losses sustained by Kirkpatrick, retroactive to and including June 15, 1951. (Exhibit "D") The claim was acknowledged by Carrier on August 20, 1951. (Exhibit "E").

All evidence and data have been considered by the parties in correspondence and conference.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Account of a train derailment on October 29, 1950, claimant sustained disabling injuries that kept him under a physician's care until released to return to work as of June 15, 1951.

Armed with a release from the physician who had treated the injuries, and who, incidentally, was not of claimant's choosing, but in the employment of the railroad with which claimant's employer held a contract for performance of that service in which claimant was engaged and working pursuant to rules of agreement; claimant sought to return to the service from which he had been displaced while under the physician's care.

Claimant was held out of service for reasons fully explained in the record, but largely having to do with the attending physician later undertaking to qualify the general release furnished claimant, and attempt on Carrier's part to impeach same by results of a later examination made by still another physician and again not of claimant's choosing. Claimant did not request the examination, but submitted to same at Carrier's direction as a condition for returning to service, and not for purposes of informing claimant of any apparent disability.

On the record before us, it would be unwise for this Board to undertake to determine whether claimant was or is physically able to be and remain in Carrier's service. An orderly process is provided by contract for placing, or for removing, employes from service when no longer qualified to perform the work to which assigned pursuant to their seniority standing. All that is here in dispute as to physical fitness or motives could best have been tested by strict adherence to rules on which Carrier is compelled to rely for defending against charges of undue interference with the fixed tenure of employment of those who enjoy protection of rules that are inflexible as to their application.

Those rules, when applied to the facts of a record that shows claimant has not been afforded full protection of the processes afforded by the contract, leaves us without a basis for saying there has been no interference with vested rights, and, therefore, the claim as stated must be sustained.

**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 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 Agreement was violated.

#### AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon  
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1956.