

Award No. 8186
Docket No. MW-7613

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Section Laborer Richard Miller from service on or about June 23, 1954, was unjust, improper, and in violation of the effective Agreement;

(2) Section Laborer Richard Miller be returned to service with seniority, vacation, and all other rights unimpaired and compensated for all wage loss suffered account of the violation referred to in part (1) of this claim.

OPINION OF BOARD: One Richard Miller, classified as a section laborer, brings this claim charging that his dismissal from service was unjust, improper and in controvention of Rule 19(a) of the effective agreement. Request is made that he be restored to service with all contractual rights unimpaired, together with pay for all time lost.

The facts are few and not in dispute. Claimant was first furloughed from service in 1952. While on furlough he lost the sight in one eye. He was recalled to service in June 1953 and was again furloughed in October 1953. Upon return to service in June 1954, he was instructed to report to Respondent's physician for medical examination. The Chief Surgeon made a determination that it would be unwise to permit Claimant to perform service around "live" tracks and it was upon this recommendation that Claimant was no longer permitted to render service.

The Organization took the position that Claimant was in effect removed from service without benefit of a hearing as provided for in Rule 19(a) which provides as follows:

"RULE 19

Discipline And Grievances

(a) An employe in the service sixty (60) calendar days or more will not be disciplined or dismissed without first being given a fair

and impartial hearing before an officer superior in rank to the officer preferring charges. If the offense is considered sufficiently serious, the employe may be suspended pending the hearing and decision. At the hearing the employe covered by this agreement may be assisted by representatives of the Brotherhood, party hereto. The hearing will be held within ten (10) days of date when charged with the offense or held out of service. Decision will be rendered within (10) days after completion of hearing. Prior to the hearing the employe will be notified in writing of the precise charge against him, after which he will be allowed reasonable time for the purpose of having witnesses and representatives of his own choice present at the hearing."

It is asserted that the Respondent summarily restricted Claimant from further service as a Section Laborer without first being given the benefit of a fair and impartial hearing guaranteed to each employe possessing more than thirty days service. It was pointed out that the Claimant had, after suffering the loss of an eye, performed some four months of satisfactory service, as evidenced by statements from his Foreman. It was asserted that whether or not Claimant was "dismissed from service" as contended by the Organization or "restricted from the performance of actual service", as contended by the Carrier: the end result was the same, that is, Claimant was denied future employment without benefit of a hearing.

The Respondent asserted that Claimant had been relieved from service because of an obvious physical impairment which, it had been determined, rendered him (Claimant) a potential hazard, both to himself and fellow employes, when he (Claimant) worked around "live tracks". It was pointed out that this action in no way constituted the imposition of discipline within the meaning of 19(a) and that absent this fact, the Carrier was in no way obligated to conduct a hearing thereunder. The Respondent took the further position that it had relied on competent medical advice, and that the Claimant had submitted no medical opinion of any kind and had refused to submit the question of his fitness to a panel of medical authorities as had been required by this tribunal in earlier decisions.

Rule 19(a) pertains to investigations or hearings concerning the imposition of discipline. Since Claimant was not here charged with the infraction of any rule or dereliction of duty, Rule 19(a) is not applicable under present circumstances.

We are confronted with the question as to whether or not Claimant was improperly held off duty. We find that he was not improperly held off duty. The Respondent's action was not arbitrary. Their action was based on what they considered competent medical advice and their action was a proper exercise of their discretionary powers.

We have here however another question. Rule 19 in addition to the discipline provisions, provides:

"(f) Should an employe or his representative feel that he has been unjustly dealt with in other than discipline matter, or that any provision of this agreement has not been complied with, he or his representative may handle such matters with his immediate superior or appropriate officer of the railway. If a hearing is necessary to determine the facts, same will be granted by supervising officer within ten (10) calendar days thereafter.

"(g) Grievances or claims shall be made within ninety (90) days from date of the occurrence on which the grievance or claim is based. Decisions by subordinate officers and appeals shall be promptly made.

"Decision by the officer designated by the railroad to handle disputes shall be final and binding, unless within thirty (30) days after

written notice of such decision, the said officer is notified in writing that his decision is not accepted."

Certainly both the Claimant and the Organization is of the opinion that he (Claimant) has been unjustly dealt with. In light of our finding that this matter does not concern discipline, as such, it must of necessity follow that it concerns a subject that is "... in other than discipline matter, or that any provision of this agreement has not been complied with, ..." within the meaning of Rule 19(f).

This being true it is incumbent upon the Respondent to handle this matter in accordance with the rule, up to and including a hearing. This step having not been complied with, this Board is of the opinion that this matter should be, and the same is hereby remanded to the parties for handling and disposition under Rule 19(f) and (g).

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

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 this matter should be remanded to the parties in accordance with the above opinion.

AWARD

This matter is hereby remanded to the parties in accordance with the above opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1957.