

Award No. 8724
Docket No. MW-9797

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ATLANTIC COAST LINE RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when, without just and sufficient cause, and without benefit of hearing, it dismissed and/or held out of service Track Foreman Z. P. Shaw, beginning with the close of work on January 18, 1957.

(2) Mr. Z. P. Shaw be reinstated to his former position, with seniority unimpaired, and that he be compensated in the amount he would have earned had he continued in service, less the amount earned in other employment, all in accordance with Section 3 of Rule 10.

EMPLOYEES' STATEMENT OF FACTS: Claimant employe, Mr. Z. P. Shaw, has a record of service with this Carrier dating from April 5, 1917, with continuous service dating from May 20, 1920, and has been employed as a track foreman a considerable period of time. Because he was troubled with cataracts on both eyes, he underwent an operation in July, 1956, on the right eye, and in October 1956 for the left eye. The operation was performed by Dr. Leo Smith, an eye specialist at Waycross, Georgia.

When the Claimant was discharged by Dr. Leo Smith, the eye specialist, he was informed by Dr. Smith that his eyes were now better than they had been for several years and that he was giving him a Form 38 authorizing his return to work. Claimant returned to work on January 2, 1957, and worked through January 18, 1957, at which time he was taken out of service on the basis of a letter reading as follows:

Lakeland, Florida, January 31, 1957

Mr. Z. P. Shaw
Plant City, Florida

In regard to you being removed from service account of Form 38 not issued by Dr. Bunten, I am quoting letter received from Dr. Bunten. Please acknowledge receipt of this letter:

employee to perform work. This statement appears in many Awards of this Division." Carrier feels that there should be adherence to that position in this instance.

While it sincerely regrets the necessity for its action in removing Claimant Shaw from service, Carrier feels that it was in every respect amply justified in doing so for the many reasons stated herein. Accordingly, Carrier urges that your Board follow its oft-announced policy of not substituting its judgment for that of skilled medical men. This claim should be denied in its entirety, and Carrier so urges.

The respondent Carrier reserves the right, if and when it is furnished with ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer.

Data in support of the Carrier's position have been presented to the Employees' representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Shaw, continuously employed by Carrier since May 20, 1920, and working for a number of recent years as track foreman, marked off duty on July 3, 1956, because of eye trouble. On July 6, 1956, Dr. Leo Smith, Ophthalmologist and consultant to Carrier's hospital staff, successfully removed a cataract from Claimant's right eye at Carrier's hospital in Waycross, Georgia, and on October 19, 1956, performed a similar successful operation on Claimant's left eye at said hospital.

Near the close of said year Claimant was discharged as a patient by Dr. Smith; and the latter, telling Claimant that his eyes were in better condition than for several years, gave him a Form RD-38 authorizing him to resume his work with Carrier. Claimant did return to his job on January 2, 1957.

On January 18, 1957, it was discovered that the proper procedure had not been followed in permitting Claimant to return to work. Under Carrier's rules, in cases involving surgery on an employee or absence from illness for six months or more, a Form RD-38 may not be issued and made effective without the express and official signed approval of Carrier's Chief Surgeon. Accordingly, Claimant was at once taken out of service by his Roadmaster, pending action by Chief Surgeon Bunten. The latter conferred with Dr. Smith on January 23, 1957. Claimant received a letter dated January 31, 1957, from Roadmaster Newsome, quoting a statement from Dr. Bunten that, because "A bilateral cataract operation disqualifies a man for maintenance foreman", Claimant could not be issued a Form RD-38. On April 2, 1957, Claimant received another letter from Newsome asking him to turn in switch key and rule book.

The record contains a copy of a letter dated March 23, 1957, addressed "To Whom It May Concern" by three ophthalmologists. Said letter stated that Claimant now had corrected vision of 20/20 in his right eye and 20/25 in his left eye; both eye grounds were negative; and there was no reason why Claimant " * * * should not be able to do regular work, especially outdoors—such as a section foreman, or any other type of work that does not require perfect vision for near." The contents of this communication was transmitted to Carrier by Claimant's General Chairman in a letter dated April 9, 1957, during the course of appeals from Carrier's decision to remove Claimant from service.

It appears from the record that Carrier has certain regulations on physical standards and requirements for initial and continued employment with Carrier on various kinds of work, said standards being based on recommendations of the Medical and Surgical Section of the Association of American Railroads. For track foreman (and several other classes of employees) the re-examination requirements include 20/40 vision in one eye and 20/50 in the other, together with binocular single vision.

It appears further from the record that (1) Chief Surgeon Bunten believed Claimant had "gun-barrel vision" and lacked adequate peripheral vision after his operations; and (2) after said operations Bunten had no examinations conducted to determine whether or not such inadequacies in fact existed in Claimant.

The Employees assert that claim should be sustained because (1) Claimant was dismissed from Carrier's service without obeying the requirements of Rule 10, Section 1, including fair investigation; and (2) Carrier's decision of dismissal was arbitrary, unreasonable, and not grounded on facts. Carrier defends by (1) denying the applicability of Rule 10 (Claimant was not disciplined or dismissed within the meaning and intent of Rule 10, Section 1); (2) pointing out that Claimant might have properly used Rule 10, Section 5, on Unjust Treatment, but Claimant did not observe the 10 day time limit thereof in regard to request for hearing; and (3) denying any unreasonableness or arbitrariness in its decision to remove Claimant from service.

In respect to the opposing contentions of the Parties on the applicability of Rule 10, Sections 1 and 5, the Board is compelled to hold with the Carrier. That is to say, the Board finds that (1) as to Section 1, Claimant's removal from service was not a dismissal within the meaning and intent of said Section; and (2) although Section 5 would have been applicable, it may not be applied now because Claimant failed to meet the time-limit requirement.

On the issue of whether Carrier's decision was arbitrary, the Board finds as follows: (1) In numerous Awards this Division has emphasized (a) the importance of the railroad's responsibilities for safe and efficient service to passengers and shippers and (b) the propriety of, nay the necessity for, rules and regulations aimed at fulfillment of said responsibilities. (2) Said rules and regulations include those governing the physical fitness of railroad employees. (3) However, said rules and regulations must be reasonably related to the fulfillment of said responsibilities; and they must be applied to all employees evenhandedly, without discrimination. (4) As regards the facts of the instant case: (a) There is no evidence that Carrier's rules were and are not reasonable. This Board has no technical knowledge and no authority whereby it would be justified in substituting its judgment for that of Carrier (and other American railroads) on whether possession of gun barrel vision or lack of binocular single vision or lack of peripheral vision properly disqualifies a man for performing safely and effectively the duties of track foreman. (b) The record contains no evidence of probative value that Carrier discriminated against Claimant, i.e., applied its rules more strictly to him than to other similarly placed employees. (c) The sole remaining question then is, Did Carrier apply its reasonable rules and regulations fairly and reasonably to Claimant himself? (d) On this question the answer compelled by the facts of record must be "no". Carrier, on whom the burden of proof rests in a case involving removal of an employee from service, failed to establish that gun barrel vision or lack of binocular single vision or lack of adequate peripheral vision inevitably and automatically results from a double cataract operation. If there is no automatic result, Carrier may reasonably be said to have had an

obligation to get Claimant examined by competent authorities before deciding whether or not to issue him a proper Form RD-38. In short, Carrier's decision appears to have had an inadequate factual basis.

This ruling, in respect to the specific claims here before the Board, is sufficient to require that Carrier reinstate Claimant as of the date he was removed from service (January 18, 1957), with seniority rights unimpaired. It is sufficient also to require that Carrier compensate Claimant in the amount he would have earned if he had continued in service, minus any wage earnings he may have had in any other employment and minus any compensation he may have received by virtue of possibly going on to a voluntary disability or retirement status.

However, the Board is not unmindful of the Carrier's necessity for having physically fit employees at all times. The Board's ruling as previously set forth does not necessarily justify requiring Carrier to employ Claimant after the effective date of this Award. Accordingly the Board directs Carrier to have Claimant, if he now wishes to resume employment with Carrier, properly examined by competent expert or experts. If Claimant then is shown to meet Carrier's reasonable rules for physical fitness (including vision), Carrier shall continue him in service after the effective date of this Award. Otherwise, Carrier's obligation to Claimant shall cease as of said date.

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 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 Carrier's decision in respect to Claimant's employment status was not reasonably grounded.

AWARD

Claim sustained as set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 5th day of February, 1959.

DISSENT TO AWARD NO. 8724, DOCKET NO. MW-9797

The Majority Opinion in this Award is in error in holding:

"This ruling, in respect to the specific claims here before the Board, is sufficient to require that Carrier reinstate Claimant as of the date he was removed from service (January 18, 1957), with seniority

rights unimpaired. It is sufficient also to require that Carrier compensate Claimant in the amount he would have earned if he had continued in service, minus any wage earnings he may have had in any other employment and minus any compensation he may have received by virtue of possibly going on to a voluntary disability or retirement status."

and in proceeding to hold:

"However, the Board is not unmindful of Carrier's necessity for having physically fit employees at all times. The Board's ruling as previously set forth does not necessarily justify requiring Carrier to employ Claimant after the effective date of this Award. Accordingly the Board directs Carrier to have Claimant, if he now wishes to resume employment with Carrier, properly examined by competent expert or experts. If Claimant then is shown to meet Carrier's reasonable rules for physical fitness (including vision), Carrier shall continue him in service after the effective date of this Award. Otherwise, Carrier's obligation to Claimant shall cease as of said date."

The Award admits this is not a discipline case, but one of unjust treatment, and orders Carrier to have Claimant, if he now wishes to resume employment with the Carrier as Section Foreman, properly examined by competent expert or experts. However, two years have elapsed since Carrier's Medical Staff determined that Claimant's vision was such as to require it to relieve him of the important duties of a Section Foreman; such a determination at this late date will fully justify the conclusions reached by Carrier's Chief Medical Officer when Claimant was removed from service as a Section Foreman, and no penalty should be assessed against Carrier pending the result of such examination. The assessing of penalties under such circumstances as set forth in this Award is not justified by the facts or any rule in the Agreement.

For the foregoing reasons, among others, we dissent.

/s/ C. P. Dugan

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp