

H. G. Harper

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19231  
Docket Number MW-19566

Arthur W. Devine, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Norfolk and Western Railway Company (Western Region)

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

(1) The dismissal of Messrs. Wayne Greenfield and Cecil Cupp on August 18, 1970 because of allegedly being physically disqualified was arbitrary, capricious, unjustified and in violation of the Agreement (System Files MW-DEC-70-104 and MW-MOB-70-105).

(2) The refusal to grant and to hold a hearing as requested by Local Chairman Sol Hammons, Jr. was in violation of the Agreement.

(3) The claimants shall be reinstated, their records cleared and payment be made for the assigned working hours actually lost, all in accordance with Rule 20(g).

OPINION OF BOARD: The record shows that Claimant Greenfield entered the Carrier's service as track laborer on January 27, 1970. Claimant Cupp entered service as track laborer on January 2, 1970.

The Carrier states that as part of the usual hiring process, Claimants were sent to Company doctor for physical examinations, which included x-rays. Because of shortage of laborers, they were permitted to begin working pending receipt of the evaluation of their physical examinations by the Carrier's Medical Director. The Medical Director found that their physical condition did not meet the standards set by the Carrier for new employees in that classification. The Claimants were not notified of physical disqualification until August 18, 1970, or approximately seven months after starting to work, when they were removed from service.

Rule 42 of the applicable Agreement provides:

"APPLICATION FOR EMPLOYMENT

Applicants for employment will be required to complete necessary application forms and will be required to pass a satisfactory physical examination before entering the service, and employment will be considered temporary until application has been approved.

"The application will be approved or disapproved within sixty (60) days after the applicant begins work".

The Carrier states that failure to notify Claimants within sixty days that they were not physically qualified only served to give the Claimants some seven months work which they otherwise would not have had, and further that Claimants had not acquired seniority under Rule 2(f) of the Agreement.

The Board must apply agreements as written and finds that the Carrier's action in this case was in violation of the Agreement. We recognize that Carrier has the right to set its physical requirements. However, Rule 42 is specific in providing that applicants will be required to pass satisfactory physical examination before entering the service. Of course, such requirement may be waived by the Carrier if it desires. The rule goes on to provide that applications will be approved or disapproved within sixty days. By not being notified within the sixty days that applications were disapproved, then the Claimants had a right to consider that the applications had been approved, and after that time their employment could not be terminated except by proceeding under other provisions of the Agreement. We agree with the Organization that while the Claimants may not have acquired seniority under Rule 2(f), they were subject to other rules of the Agreement.

The claim will be sustained.

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;

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 the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

E. A. Killen  
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1972.