Award No. 5527
Docket No. MW-5508

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) That the Carrier violated Rule 20 of the effective agreement by removing Trackman Joseph A. Denis from the service on April 8, 1948;

(2) That Claimant Joseph A. Denis be returned to his former position with seniority and vacation rights unimpaired, and be compensated for all monetary loss suffered by him because of the Carrier's improper action.

EMPLOYES' STATEMENT OF FACTS: On April 8, 1948, Trackman Joseph A. Denis received a notice of "separation from service," on the basis of the Chief Surgeon's recommendation that his condition rendered him unfit for service because of hearing, eyesight, and mentality.

The Employes contended that the Carrier had violated Rule 20 of the effective agreement by not giving Joseph A. Denis a fair and impartial hearing before he was dismissed from service.

A claim was filed in behalf of Mr. Denis and the claim was declined.

The agreement in effect between the two parties to this dispute dated May 15, 1942, and all subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Trackman Joseph Denis, on April 8th, was dismissed from service without a fair and impartial hearing on the basis of the recommendation of the Carrier's Chief Surgeon.

Rule 20 of the effective agreement reads as follows:

"An employe, who is disciplined or feels he has been unjustly treated, will be advised of the cause for such action, in writing, if requested by him or his representative, and upon a written request, by either, to the Supervisor, within ten (10) days from date of advice of discipline or unjust treatment, be given a fair and impartial hearing within ten (10) days thereafter and a decision shall be rendered within twenty (20) days after hearing.

have not been protested by Petitioner's representative, and which show Claimant as trackman, extra crew, District 1, New Hampshire Division #87, 4-17-44, on the 1950 roster and as #89, with same data, on the 1949 roster. Copies of these rosters are furnished to representatives of Petitioner and are posted.

SUMMARY: The facts in this docket are relatively clear and simple. Carrier's responsible officers noticed that Claimant, while working as a trackman, was performing erratically. Claimant was referred to Carrier's Chief Surgeon for an examination. The Chief Surgeon's report stated that Claimant was in such physical and/or mental condition as to make him an unsafe employe for Carrier to have working on tracks near moving trains, etc. Carrier, acting upon the competent medical advice of its Chief Surgeon removed Claimant from active service by notifying him, and his local chairman, that he was being "separated from the service." Carrier did not discharge or dismiss Claimant. No discipline was involved. Claimant's authorized representative (local chairman) at first **recommended** "reinstatement and pay for time lost" but quickly changed this **recommendation** to a claim that Claimant had been discharged. Immediately Carrier's local official received this organization interpretation of Carrier's use of the language "separated from the service," advice was promptly submitted to all concerned that Claimant had not been dismissed or discharged but merely taken out of service for physical and/or mental reasons.

Then followed a long delayed procedure, a delay entirely chargeable to the organization, wherein Carrier waived the time limit feature of Rule 20 of the controlling agreement, and offered on at least **six (6)** different occasions to be entirely fair and either give Claimant a hearing or wait until he had corrected the defects which resulted in his being removed from active service. These offers of hearing for Claimant (or reconsideration of his condition by new examination) were made on April 17, 1948, May 7, 1948, May 21, 1948, June 1, 1948, June 29, 1948, and December 2, 1948. What more could Carrier do?

Petitioner's representative refused all of the aforesaid offers and clung to the ridiculous theory that Carrier had discharged Claimant and could not, therefore, hold any hearing involving him. Carrier asserts emphatically that it did **not dismiss or discharge** Claimant; that it removed Claimant from active service on competent medical advice from the Chief Surgeon; that no evidenced has been adduced indicating any error in the report of Carrier's Chief Surgeon; that Carrier is certainly under obligation to remove from active service any employe who is adjudged unsafe, physically and/or mentally; that the burden to prove otherwise is entirely Claimant's and/or his representatives; that this has not been done; that the delay in resolving this dispute is entirely with Petitioner and there is no merit in the claim and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Rule 20 of the effective Agreement between the parties provides:

"Grievances and Hearings

An employe, who is disciplined or feels he has been unjustly treated, will be advised of the cause for such action, in writing, if requested by him or his representative and, upon a written request, by either, to the Supervisor, within ten (10) days from date of advice of discipline or unjust treatment, be given a fair and impartial hearing within ten (10) days thereafter and a decision shall be rendered within twenty (20) days after hearing.

No such employe will be dismissed without a fair and impartial hearing held in accordance with the first paragraph of this rule. An employe may, however, be held out of service pending a hearing."

It will be noted that such rule is not solely a discipline rule but applies to "an employe who is disciplined or feels he has been unjustly treated." It then provides that an employe may be held out of service pending a hearing but will not be dismissed without a fair and impartial hearing. We consider that such rule was applicable to the claimant when he was held out of service on April 8, 1948.

In accordance with the rule, the local Chairman requested advice as to the status of the claimant on April 9, 1948, and was advised by letter from the Carrier, dated April 12, 1948, that claimant was "separated from the service on April 8 on the basis of the Chief Surgeon's recommendation." Separation of an employe from the service by action of the Carrier is a dismissal. Hence the Carrier violated the Agreement and became liable for pay to the employe dismissed in violation of the Agreement. We think the Carrier's statement of facts appearing in our Award No. 3778, involving the same parties, shows that the parties previously interpreted the rule in the same way.

The Carrier later attempted to change the status of the claimant by notice that the separation from the service on April 8th was "considered as a suspension." That did not cure the violation. It could only be cured by paying the loss of wages caused by the violation and then giving notice of suspension as is shown to have been done by the parties in Carrier's statement of facts in Award No. 3778. Hence the claim must be sustained.

However, it appears that on January 7, 1949, the Carrier advised the General Chairman that it would be glad to join in submitting the case to this Board and asked for a proposed joint statement of facts. The General Chairman did not submit a proposed joint statement of facts until December 4, 1950. That is an unconscionable delay in a case of this nature. Hence we hold that the Carrier shall be relieved from liability for wages lost for the period from March 7, 1949, to December 4, 1950.

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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1951.