

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
BOSTON AND MAINE RAILROAD**

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

(1) That the Carrier violated the effective agreement when they discharged Trackman Joseph A. Denis from service because he was allegedly unable to perform the duties of his position;

(2) That Joseph A. Denis be returned to service with seniority and vacation rights unimpaired and reimbursed for all wage loss suffered due to his removal from service, retroactive to December 19, 1951.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Mr. Joseph A. Denis has been employed by the Carrier as a trackman since April 17, 1944. On April 8, 1948, he was dismissed from the Carrier's service for alleged defect in hearing and sight, without benefit of a hearing as required by the provisions of the Agreement between the Carrier and the Employees. The discharge resulted in a protest and claim being filed in behalf of Mr. Denis, which was denied as were all subsequent appeals. The case was subsequently submitted to this Board for adjudication, and such dispute is identified as Docket MW-5508. Award No. 5527 of the above-mentioned docket sustained the position of the Employees and ordered the claimant to be reinstated and with back pay for a stipulated period.

The Carrier complied in part with the Board's Award by reinstating the claimant, but as of this date, they have refused to compensate the claimant as ordered by Award No. 5527, which ordered that he be paid on or before December 16, 1951.

On December 19, 1951, the Carrier advised Mr. Denis as follows:

"Effective at once, you are suspended pending a hearing on account of your inability to meet the requirements in the performance of snow removal work."

By letter of December 27, 1951, General Chairman H. H. Cameron requested a hearing in connection with the suspension of the claimant.

By letter of January 2, 1952, the Carrier's Track Supervisor, Mr. A. A. McMullen, advised the General Chairman that he would comply with the

It is clear, therefore, that claimant was discharged after a fair and impartial hearing which disclosed that he was unable to properly perform the duties of his assignment. See Award No. 3778, Third Division, an award in a dispute between the parties hereto which is squarely in point."

There is no merit in Petitioner's claim in this docket and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was suspended pending a hearing on account inability to meet the requirements in the performance of snow removal work. One of those requirements is that the men work alone at times keeping switches clear. Considering the report and opinion of the Carrier's chief surgeon presented at the hearing and the testimony of claimant's section foreman it must be held that there was substantial evidence from which to conclude that claimant could not fulfill that requirement safely.

The request of the General Chairman at the conclusion of the hearing "that Mr. Denis be considered on a formal leave of absence until further notice" is some recognition of his incapacity in the respect alleged. However in filing an appeal the General Chairman withdrew such request so that matter is not before us.

The Carrier elected to dismiss claimant from the service after the hearing. Another alternative would have been to restrict him to working with a gang but the Carrier asserts that it has no jobs which meet the restrictions recommended by its chief surgeon. The contract contains no requirement that Carrier make work for partially incapacitated employees and since the Carrier has the primary responsibility for the safety of its employees and the public, we are unable to say that its action under these circumstances was arbitrary or capricious.

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 the agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of February, 1954.