

Award 17646

Docket 33531

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Mortimer Stone

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Request for reinstatement of Engineer F. J. Gunther to service with all seniority rights unimpaired and pay for all time lost account of physical disqualified and taken out of service December 30, 1954.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It

is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **FIRST DIVISION**

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1956.