NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM.—

"Claim of James Smiddy, yard clerk, Knoxville, Tennessee, for pay for all monetary loss suffered from October 19, 1935, when he reported for work on car marker's position, rate $4.35 per day, after being off on sick leave, until permitted to return to work on April 23, 1936, after submitting to a physical examination by a Company Doctor."

STATEMENT OF FACTS.—The following statement of facts was jointly certified by the parties:

"Mr. Smiddy, who had been off on sick leave for several years and reported for work on October 19, 1935, was advised by the officer in charge that it would be necessary for him to be examined by the Company Surgeon before returning to work. Claim was filed by Mr. Smiddy that he be allowed to return to work without being examined by Company Surgeon and that he be reimbursed for all monetary loss suffered. The claim was progressed up through the various officials. Certificates as to the physical condition of Mr. Smiddy from two physicians were presented to the management but they refused to permit him to return to work until examined by their Company Surgeon. While discussing this matter with Mr. Coile, Personnel Officer, on April 16, 1936, it was agreed that Mr. Smiddy would submit to the examination by the Company Surgeon, which he did on April 21st, with the result that his condition was found to be such that the Terminal Trainmaster was instructed on April 23, 1936, to allow him to return to work when he reported."

An agreement between the parties bearing effective date of September 1, 1926, was placed in evidence, and Rule 18 thereof was specifically cited as bearing upon the determination of this dispute, said rule reading as follows:

LEAVE OF ABSENCE RULE 18. (a) Leave of absence for more than ninety (90) days within twelve (12) consecutive months will not be granted except in case of sickness, injury, unavoidable causes, or to employees representing those covered by this agreement, except by agreement in writing between representatives of Management and employees. Leave of absence in excess of thirty (30) days will not be given except in writing. Copy of notice of leave allowed to be furnished on request.

(b) Upon return to service from leave of absence, employees embraced by this agreement shall be given their former standing, displacing those temporarily filling any position during their absence, or may, upon return or within three days thereafter, exercise seniority rights to any position bulletined during such absence. Employees displaced by their return may exercise their seniority in the same manner.

(c) An employee whose position is abolished or who has been displaced while on leave of absence shall have the privilege upon his return of exercising his seniority rights.

POSITION OF EMPLOYEES.—The employes contend that Smiddy should have been allowed to return to work at his discretion following his letter of October 18, 1935, addressed to the Superintendent of Terminals and reading:

"I desire to exercise my seniority by relieving D. S. Turner, Car Marker, East Yard John Sevier, 11:00 P. M. to 7:00 A. M., effective Saturday night, October 19, 1935"; and that by declining to permit him to return without undergoing a physical examination by the company physician the carrier violated Rule 18 of the agreement, since no such physical examination is required by that rule upon return from leaves of absence, whether on account of illness or otherwise, or by any other rule of the agreement. The employes further contend that the certificates from his personal physicians submitted by Smiddy October 22, 1935, November 16, 1935, and February 19, 1936, indicated that he was fit for service; that these findings of his personal physicians were confirmed by the results of the examination of April 21, 1936, by the company physician; that these circumstances establish that he was physically able to resume his duties as Car Marker when he first asserted his right to return to work; and that the carrier is therefore liable to him for time lost because of its requirement of a physical examination by the company physician.

POSITION OF CARRIER.—The carrier points out that Smiddy (age, 63; height, 5 feet 6¾ inches; weight, 218¼ pounds) had been on leave on account of illness (arthritis of right wrist and middle finger and of right hip and shoulder) since June 24, 1932, for a period of approximately 3 years and 4 months; that during this entire period he had been engaged in operating a combined grocery store, soft drink stand, and restaurant in such close proximity to the yard that the officers in charge of its operation, who made frequent visits to his store, were enabled to keep themselves generally informed concerning his physical condition; that these officers had reason to believe that he was physically unable to perform the duties of Car Marker, which included climbing to the tops of cars in connection with the taking of ventilation and refrigeration records and crossing tracks upon which switch engines and trains were operating; that the requirement of a physical examination by the company physician at the carrier's expense was merely designed as a reasonable safeguard against the hazards of the work which Smiddy sought to resume; and that the position of the employes is tantamount to a contention that regardless of any and all circumstances surrounding the matter, under the leave of absence rule the carrier had no rights other than to restore Smiddy to the service on the position of his choice and then disqualifying him if it later developed that he was physically unable to perform the duties of the position. The carrier contends that an application of the leave of absence rule in the manner insisted upon by the employes would subject it to unnecessary and unjustified liabilities on account of personal injuries; that it is within its rights in requiring employes to stand physical examination, if, as, and when, in the judgment of the proper officer of the company, such examination is necessary in order to determine whether or not the employes are physically able to perform the duties of the position upon which they seek to place themselves and can do so without unnecessary hazards; that under the circumstances surrounding the instant case the requirement that Smiddy stand a physical examination by the company physician was not an unreasonable one; and that the time lost by Smiddy was due solely to his refusal to submit to this reasonable requirement and hence imposes no liability upon the carrier.

OPINION OF BOARD.—That the agreement is silent on the specific matter of requiring physical examinations as a condition of continued employment for clerical employes falling within its scope, whether following leaves of absence or at other times, is acknowledged by both parties. Such silence, however, cannot reasonably be construed either as authorizing the carrier to request physical examinations under any and all circumstances or as prohibiting the carrier from requesting such examinations under any and all circumstances. To accord absolute freedom to the carrier would open the door to arbitrary infringements upon the seniority rules of the agreement; to impose an absolute prohibition upon the carrier would restrict its managerial discretion beyond the limits contemplated by the agreement. In its extreme form, on principle, neither the position of the employes nor that of the carrier is tenable. No such sweeping authority or denial of authority can, by interpretation, properly be read into the agreement. The decision of an employe to return to work after leave is subject in some measure to the judgment of the carrier as to his physical fitness, and this judgment in turn is not final, but subject, upon a properly submitted dispute, to review by this Board as to its reasonableness, in light of the express provisions of the agreement. It is unnecessary, even if it were possible, to define more concretely, as a matter of principle, the respective

rights of employes and carriers in this connection; our task is merely to determine whether the requirement of a physical examination here at issue constituted a violation of the agreement.

When thus narrowed to the circumstances of this particular case, the position of the carrier appears to be amply persuasive. The age and physical build of the complainant, the evidence as to the character of his illness, the protracted period of that illness, the knowledge of the carrier's officers concerning his physical condition, and the nature of the duties to be performed by him—all these factors clearly support the contention that the requirement of a physical examination was a reasonably necessary precaution. "In the instant case," said the carrier, "an employee, 63 years of age, height 5 feet 6¾ inches, weight 218¼ pounds, who had been absent from service approximately 3 years and 4 months on account of physical disability, and who the Superintendent of Terminals had reason to believe was still physically disabled, was endeavoring to place himself upon a position, the duties of which would subject him to the hazards of accident incident to climbing to the tops of cars and the performance of other service in the yard where switch engines were working and trains entering and leaving the yard, and, in such circumstances, the requirement that he stand physical examination was reasonable and in accordance with past practice." There appears to be no grounds for questioning the soundness of this position.

Once the requirement of a physical examination is recognized to have been reasonable under the circumstances of this case, the fact that the complainant submitted certificates of fitness from his personal physicians the findings of which were later confirmed by the company's physician does not alter the conclusion as to the propriety of the carrier's action. Had such certificates been submitted at the time of his request for resumption of work, prior to his notification of the carrier's requirement, there might conceivably have been some basis for the contention that the carrier's request for an examination by the company physician rather than by his own physicians was an unreasonable one; but since he submitted these certificates after he had declined to comply with the carrier's requirement, there was nothing unreasonable in the carrier's insistence that he be examined by the company physician as originally stipulated. The fact that the complainant submitted medical certificates from his personal physicians was in itself an acknowledgment that the requirement of a physical examination was reasonable, and there appears to be no ground for accepting the findings of these physicians in place of those of the company physician as required by the carrier.

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 employe involved in this dispute are respectively carrier and employe 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 under the circumstances of this case as disclosed of record, including, among other things, the character and duration of the illness and the nature of the duties to be performed, the requirement of a physical examination by the company physician was neither unreasonable nor in violation of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 25th day of January, 1937.