Award No. 2831
Docket No. CL-2761

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY & DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the management of the Ogden Union Railway and Depot Company violated the terms of the existing agreement;

(a) By refusing to restore Mr. J. M. Pierce, Jr. to the service of the Company on June 14, 1943 as a Jumbo Clerk in the yard office, after he had taken a leave of absence from the company on June 3, 1943 to enter the military service of the United States, for which military service he was unable to physically qualify; and

(b) Mr. J. M. Pierce, Jr. shall now be restored to the service of the Company and he shall be compensated for wage loss from June 14, 1943 to the date of his return to service.

EMPLOYES' STATEMENT OF FACTS: Mr. John M. Pierce, Jr. establisted seniority as a clerk with the Ogden Union Railway and Depot Company on January 6, 1943, after having passed the required physical examination on January 2, 1943.

Mr. Pierce remained continuously in the service of the Depot Company until June 3, 1943 when he was ordered to report for examination and induction into the military service of the United States at the induction center at Salt Lake City, Utah. All necessary arrangements were made by Mr. Pierce prior to June 3rd, including the proper receipt of leave of absence from the Depot Company in which leave of absence the Superintendent of the Company and the General Chairman of the Brotherhood concurred, to enter the military forces.

After undergoing physical examination at the hands of the Military Doctors Mr. Pierce was rejected from military service, whereupon he returned to Ogden, Utah and on June 14, 1943 attempted to report for and resume work with the Depot Company. Mr. Pierce was then and there notified he must report to the Medical Doctors of the Ogden Union Railway and Depot Company for re-examination before he would be permitted to return to work, which he did on June 15, 1943, and after re-examination he was notified he was being held out of service on doctor's orders. At this re-examination by the Company Doctors Mr. Pierce advised the reasons for his rejection by the military doctors.

It is here pertinent to state that Mr. Pierce, a youth of 19 years, had lived in a small town all his life up to the time he came to Ogden and entered the employ of the Depot Company. He had been treated probably once a

OPINION OF BOARD: J. M. Pierce, Jr., the claimant employe, entered the service of the Carrier and established seniority rights under Rule 41 as of January 6, 1943, after having passed the required physical examination and being certified as qualified by the examining surgeon on January 2, 1943. Pierce continued in the service of the Carrier, working the months of January through May, until June 3rd, as jumbo or car record clerk, when he was ordered to report for examination and induction into the military service of the United States at Salt Lake City, Utah. All necessary arrangements were made by Pierce prior to June 3rd, to enter the military forces, including proper receipt of leave of absence from the Carrier in accordance with the Memorandum of Understanding between the parties of October 1, 1942, and the terms of the Rules' Agreement.

Upon undergoing physical examination by the military doctors, Pierce was rejected from military service, whereupon he returned to Ogden, and on June 14, 1942, attempted to report and resume work on his position with the Carrier. Pierce was then and there notified that he must report to the Carrier's doctors for re-examination before he would be permitted to resume work. He was re-examined on June 15, 1943, after which he was advised he was disqualified for return to service because of a long history of a mega-colon.

June 23, 1943, without having been permitted to resume employment Pierce was given a hearing on charges of having given false information on making application for employment and when initially examined by the Carrier's physician with respect to his then existing physical condition. Except as this action indirectly evidences the Carrier's real reason for not permitting him to resume the duties of his former position, this fact is of little importance since it concedes in its submission such hearing failed to develop the accused had properly given false information at the time he was employed and was, therefore, not subject to dismissal on that account.

Two days after the investigation just referred to Pierce was notified by the Carrier's General Yardmaster as follows:

> "This is to advise that you have been rejected in physical re-examination for return to service as jumbo clerk at yard office, and it will be necessary for you to obtain permission from the medical department before you can be allowed to return to service with the O. U. R. & D. Co."

Later the Carrier's Chief Surgeon advised the Employes' General Chairman and the Carrier's officers he would recommend to the Management that Pierce be returned to service at once provided he would sign a waiver for his congenitally diseased colon.

On August 27, 1943, the Carrier's Superintendent wrote the following letter to the Employes' General Chairman:

> "Referring further to case of John M. Pierce, Jr.
>
> "While Chief Surgeon, Dr. Spencer Wright does not consider Mr. Pierce's condition such as to create any hazard and that he may be able to render reasonably efficient service for some unknown period of time, he does not believe he should seek any benefits of the Hospital Department for his congenital abnormal colon. As previously stated, had we known of Mr. Pierce's abnormality at the time of his physical examination for entrance to service, he would never have been qualified.
>
> "I am agreeable to return him to service with the understanding that the Hospital Department will not be called upon to assume the responsibility or expense for treatment of ailments growing out of his abnormality.
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> "With your concurrence to the above understanding we will permit Mr. Pierce to return to service."

Subsequently, the parties made no further progress in adjusting their differences. With the facts as heretofore related the instant claim was filed and in due time and manner has reached this Division for decision.

There is in existence between the parties a Memorandum of Understanding and a negotiated Agreement.

Pertinent portions of the Memorandum read:

"It is mutually understood and agreed that:

"Pursuant to Federal Legislation (i. e., Public Resolution No. 96, of the 76th Congress, and the Selective Training and Service Act of 1940) any employe of this Company who has established a seniority date and who shall be ordered or inducted into the land or naval forces in accordance with such legislation, or has enlisted in the land or naval forces after the declaration of the existence of an emergency by the President of the United States on September 8, 1939, shall, upon completion of such service in the land or naval forces, be restored to such position with this Company (including rights to promotion), to which his accumulated seniority entitles him, all in accordance with the then existing rules of the schedule agreement, the same as if he had remained in the service (such rights to be exercised by the individual within five days from his reporting for duty), provided, upon completion of his service he receives from the Government a certificate as provided by the law, or other proper evidence of release, is still qualified to perform the duties of such position, makes application for return to service within forty days after he is released from such training and service, and provided this Company's circumstances have not been so changed as to make it impossible or unreasonable to return him to his former position or a position of like seniority, status and pay; provided, that in connection with voluntary enlistments in the regular land or naval forces the above will apply only to the first period of such enlistments.

"The general purpose hereof is to provide that all such persons who return to the service of this Company in accordance with the provisions of the paragraph above, shall be considered as having been on leave of absence or furlough during their period of training and service, shall be restored to service without loss of seniority, and shall be entitled to participate in the insurance or other benefits offered by this Company pursuant to established rules or practices relating to employes on furlough or leave of absence."

Rule 47 of the current Agreement provides:

"Exercising Seniority—On Return From Temporary Absence:

"Employes assigned to other than permanent positions and/or returning after leave of absence may return to former position, or may upon return or within three days thereafter exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner."

A careful analysis of the factual situation which we have detailed at some length for that very reason makes quite obvious the contentions of the respective parties. Summarized, under existing facts the Carrier contends the Memorandum and Rules permitted it to impose conditions under which it would put Pierce back to work at his old position, while the Petitioner insists that he was entitled to be restored to it on June 14, 1943, the day he reported back for service, without compliance with the Carrier's unilaterally imposed requirements.

Resort to the Memorandum discloses that Pierce, with one possible exception to be presently discussed, possessed all the necessary qualifications contemplated by its terms. On the date of leaving its service he was an

employe of the Company with an established seniority date. He had been ordered into the Armed Forces of his country and procured a leave of absence from his employer. He had completed the service required by his Government and had proper evidence of his release, and, while still qualified to perform the duties of his position he had made application within the time provided for return to service at a time when his employer's circumstances had not so changed as to make it impossible or unreasonable to restore it to him. The possible exception to which we have referred is that the Memorandum does not cover those who are ordered to report for service unless they are fortunate enough to possess the necessary physical qualifications to permit them to actually be sworn in and become members of the Armed Forces of their country. We dismiss the possibility of such exception without fear of challenge. In our opinion the Federal legislation which prompted the execution of the Memorandum and others similar to it, as well as those agreements themselves, contemplated the inclusion of all those called for service under the Selective Training and Service Act, irrespective of whether after they had been ordered to report for duty, they were rejected or accepted for active service. So regarded it follows that Pierce was within the purview of the terms of the Memorandum when he made his application and he should have been restored to his former position with all its rights and privileges.

Questions pertinent to the right to demand restoration without the taking of a physical examination or the manner in which it is to be determined an employe is still qualified to fill his position are not present in this case as they were in Award 2624, and the difficulties and problems to which reference was made there are not encountered. There the employe refused to take a physical examination and it was contended, although refusal was not predicated on that ground, that by reason of his service in the Armed Forces he was not still qualified to perform the duties of his position. Here the employe submitted to the examination and it is apparent from the record, if in fact not conceded by the Carrier, the physical condition of which it seeks to take advantage and relies on as sustaining its action actually existed prior to the leaving of its service. The employe's situation in that respect had not changed and he was just as qualified to resume the duties of his position as he was to fill them on the date his leave of absence became effective.

In our opinion there is another reason why Petitioner's claim must be sustained. Rule 47 permits an employe returning after a leave of absence to return to his former position. Pierce had a leave of absence and sought to be restored to the place he had vacated. The Carrier refused him that privilege. The rule, in our opinion, requires restoration to the position with rights unimpaired as of the date the leave of absence was granted without imposition of any limitations or restriction such as the one imposed in this case by the Carrier.

It is argued the Carrier has never refused to restore Pierce to his former position but on the contrary has at all times been ready to do so upon waiver by him of any right he might have as an employe to require its Hospital Department to resume the responsibility and expense of treatments for ailments growing out of his congenital abnormal colon, and that on that account neither the Agreement nor rule have been violated. This argument overlooks the fundamental requirement that on return from service, as contemplated by the Memorandum, or from leave of absence, as provided by the rule, an employe possessing other necessary qualifications shall be restored to his position with pre-existing rights unimpaired. Whatever rights or privileges Pierce may have had to hospitalization by virtue of his original employment were of no present concern to either him or the Carrier in determining whether he was entitled to restoration to his position under the terms of either agreement. They were matters to be disposed of in the future. The Carrier could not superimpose questions pertaining to them upon him in determining his rights at that moment and if it did he was

not compelled to accept them, but could insist upon proper performance. In our opinion under the circumstances disclosed by the record, the conditional offer to put Pierce back to work, when unaccepted by him, was tantamount to a refusal to do so, and the Carrier is as much bound by its action as if it had made an outright refusal in the first instance.

With respect to compensation to be allowed it is noted the claim is for wage loss from June 14, 1943. Therefore, recovery under the claim is limited, from that date to the date Pierce is given an opportunity to return to service, in such amount as the parties may determine is the difference between wages actually received by him during such period and wages which he would have received had he been restored to his position with 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 the Carrier in refusing to restore J. M. Pierce, Jr. to his former position violated both the Memorandum of Understanding referred to in the Opinion and Rule 47 of the current Agreement.

AWARD

Claim sustained as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1945.