

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

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

**GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN
RAILROAD CO.; THE ST. LOUIS, BROWNSVILLE AND MEXICO
RAILWAY CO.; THE BEAUMONT, SOUR LAKE AND WESTERN
RAILWAY CO.; SAN ANTONIO, UVALDE AND GULF RAIL-
ROAD CO.; THE ORANGE AND NORTHWESTERN RAILROAD
CO.; IBERIA, ST. MARY AND EASTERN RAILROAD CO.; SAN
BENITO AND RIO GRANDE VALLEY RAILWAY CO.; NEW
ORLEANS, TEXAS AND MEXICO RAILWAY CO.; NEW IBERIA
AND NORTHERN RAILROAD CO.; SAN ANTONIO SOUTHERN
RAILWAY CO.; HOUSTON AND BRAZOS VALLEY RAILWAY
CO.; HOUSTON NORTH SHORE RAILWAY CO.; ASHERTON
AND GULF RAILWAY CO.; RIO GRANDE CITY RAILWAY CO.;
ASPHALT BELT RAILWAY CO.; SUGARLAND RAILWAY CO.**

(Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement beginning November 1, 1945, by failing and refusing to permit Mr. Jourdan Rigby to return to his former position after having been released from military services; also

(b) Claim that the Carrier now be required to restore Mr. Rigby to his former position—Secretary to the Senior Executive Assistant; also

(c) Claim that the Carrier be required to pay Mr. Rigby at the schedule rate of his position for each calendar day November 1, 1945 until he is actually restored to his former position.

EMPLOYEES' STATEMENT OF FACTS: Mr. Rigby entered the service of this Carrier, in the Executive Department, on October 15, 1926, and continued until October 8, 1942, when he entered the armed forces of his country.

On March 29, 1942 Mr. Rigby fell from the roof of his garage and suffered a simple fracture of his left ankle—the small bone being torn loose from the joint. He was in the hospital for about two weeks and returned to work on May 1, 1942.

rier's Exhibit No. 35), "* * * but, if the position has advanced to the activities as represented in Mr. Neff's report, I do not consider him physically qualified to hold this particular secretarial position." The duties required of Mr. Neff's secretary are the same now as they have always been and in Dr. Parsons' opinion Mr. Rigby is not physically qualified to hold the position.

When the employes' contentions as to the nature of the duties required of the occupant of this position become known, the Carrier will be in a position to comment with respect thereto.

OPINION OF BOARD: A chronological statement of the events involved in this claim is important to its understanding and determination.

Claimant entered the service of the Carrier October 15, 1926. He became secretary to the senior executive assistant on January 1, 1936, and thereafter served in that capacity. He suffered a fractured left ankle on March 29, 1942. He returned to work May 1, 1942. On June 1, 1942, he made a road trip with the senior executive assistant. On October 10, 1942, he entered the United States Army as a Captain. On October 12, 1942, Mr. H. R. Safford, senior executive assistant, granted him a leave of absence upon the understanding that he would return to service "in this department" within 40 days from release from military service. On October 10, 1942, Claimant's position was bulletined as a temporary vacancy for the duration of Claimant's service in the Army. Mr. Howard G. Cleveland was assigned to Claimant's position and Cleveland's job bulletined as a temporary vacancy "during service of Jourdan Rigby with U. S. Army." On July 17, 1945, Claimant was granted terminal leave terminating October 14, 1945, on which date he was placed on inactive duty by reason of physical disability. Claimant's physical disability was a result of trouble which he had with the left ankle, resulting in an operation, an infection, and more operations. It is not disputed that he has a permanently stiffened left ankle and walks slightly on the outside of his foot.

On July 1, 1942, an agreement was entered into providing that employes who entered the armed forces should, upon completion of their service, be "restored to **such position**" providing he was "still qualified to perform the duties of **such position**." (Emphasis supplied.)

During Claimant's period of service, Mr. Safford died and Mr. P. J. Neff succeeded him.

The record to this point establishes that Claimant was satisfactorily filling the position of secretary to the senior executive assistant prior to his entering the Army, that it was agreed he could return to that position, and it was bulletined as a temporary vacancy in order to accomplish that result.

On October 15, 1945, Claimant called upon Mr. Neff and asked that he be returned to work in his former position. Claimant states that Mr. Neff said: "I do not wish to make any change on that job," and offered Claimant a Trainmaster's job. Mr. Neff spoke disparagingly of the future of the secretary's job. Claimant disagreed and Mr. Neff said: "I know all that but I'm not going to make any change in the present arrangements." Mr. Neff then urged the Trainmaster's job. Claimant said he did not believe his physical condition would permit his doing the Trainmaster's job. Mr. Neff then said: "If you don't qualify physically for a trainmaster's job then you can't qualify to work for me as a secretary." (Emphasis supplied.) Mr. Neff then sent for the assistant to the senior executive assistant, reviewed the situation with him, and then asked Claimant: "What was wrong with you anyway? Why did the Army discharge you?" Claimant asked Mr. Neff to examine his army papers. Mr. Neff refused and said Claimant would have to submit to a physical examination before he (Mr. Neff) could consider "any sort of job" for Claimant. Claimant states that Mr. Cleveland, who filled Claimant's position, told him on October 17, 1945, "I knew a long time ago that Mr. Neff was not going to let you return to your old job." The above statements are taken from Claimant's Exhibit "D".

We think it noteworthy that the Carrier refers repeatedly to this Exhibit in its various submissions; that Mr. Neff and Mr. Cleveland remained in the Carrier's service and actively participated in this controversy, yet at no place does the Carrier deny the truth of these statements, save as to one immaterial detail in which it is asserted that Claimant was offered the position of assistant trainmaster and not trainmaster.

October 18, 1945, physical examinations were had. Dr. Howard, the chief consulting surgeon, reported that "I could pass him for any position that did not necessitate his getting off, at any time, of a moving train, or using his foot excessively," that he would pass him for a clerical position, but that he (Claimant) had no elasticity in his left ankle and was not so good a risk as the usual case of a low amputation with an artificial foot. October 24, 1945, Dr. Tackaberry found Claimant "qualified for limited service because of lameness from old ankle injury." On December 7, 1945, Dr. Parsons examined Claimant and reported "he is perfectly physically able to perform the duties required of a secretarial or desk job."

The three medical reports indicate only that Claimant was being examined for positions generally and not the one in question. During and following these various examinations offers were made of different positions other than the one Claimant left to enter the armed services.

On November 19, 1945, the Organization entered into the discussions on behalf of Claimant. On November 21, 1945, Mr. Neff wrote the general chairman that Claimant had been examined and had been "disqualified for duties such as those he performed prior to his military service" and referred the Chairman to Mr. Roll, the Chief Personnel Officer. The discussions continued. On February 8, 1946, the General Chairman advised Mr. Roll that the matter would be submitted to the Adjustment Board. Mr. Roll replied to that letter on February 13, 1946, reminding the General Chairman that Claimant had been offered a "position paying a good salary" and regretting that it had not been disposed of on the property.

This would seem to have put the matter where it was ready to be submitted here. However, under date of February 27, 1946, Mr. Roll secured from Mr. Cleveland, the incumbent of the position involved, a statement which appears as Exhibit 28, setting out what "the present executive" required be done by a secretary, and what he had done at different times, duties which it would obviously be difficult for Claimant to perform. This statement was sent to Dr. Howard with a statement that the Organization was going to carry the case to this Board and asking his advice as to how Claimant could measure up to the requirements set out by Mr. Cleveland, in view of Claimant's physical condition. The Doctor replied on March 9, 1946, that he did not approve the Claimant for the position because of a great deal of walking and getting off moving trains.

March 27, 1946, Mr. Neff wrote a letter to Dr. Parsons outlining his requirements for the position in question. On March 29, 1946, Claimant set out in a letter to Dr. Parsons as to the work of the position involved during the time he performed it. Dr. Parsons advised under date of April 16, 1946, that if Claimant's statements of the duties was operative, Claimant was physically qualified, but "if the position has advanced to the activities as represented in Mr. Neff's report," he was not physically qualified. (Emphasis supplied.)

We are of the opinion the claim should be sustained, and that for these reasons: Prior to Claimant's entering the military service, he was doing the work of this position in a satisfactory manner. His job was kept open for him by bulletin until he returned. He was promised the job when he returned. No other construction can be placed on those events.

It is undisputed that Mr. Neff had determined before Claimant's return that Claimant was not to be reinstated in his position as secretary to the senior executive assistant. Mr. Neff so advised the Claimant when he returned, and told him he could not have his old job, and stated that he was

not going to disturb the present arrangements in his office and offered him another position—all before raising any question of Claimant's physical qualifications or knowing the extent or permanency of the disability. The extent and permanency of Claimant's disability were not disclosed by physical examination until after Mr. Neff had refused to restore Claimant to his old position, and when disclosed it was as a result of examinations taken to determine Claimant's qualifications to hold some other job.

So far as this record disclosed, Claimant's physical condition to perform the job in question was first weighed by a doctor after the Organization had notified the Carrier that it would bring the issue here for determination. The Carrier then for the first time put in writing what it considered the duties of the job through the statements of Mr. Neff and Mr. Cleveland, and submitted that to the doctor. These two statements cover the duties of the job during the period subsequent to Claimant's occupancy, and indicate that in part at least they were created by the particular methods Mr. Neff used in performing his duties outside his office. The Carrier made no showing as to the duties of the job while Claimant occupied it. The Claimant made such a statement. It is not challenged. The doctor says he is qualified to do now what he did before his Army service, but is not qualified to perform the "advanced" duties attaching to the job as Mr. Neff required.

We think that the federal legislation, the Agreement of July 1, 1942, the letter of Mr. Safford of October 12, 1942, the bulletining of the position as "temporary" during Claimant's service in the Army all contemplate that Claimant was to be permitted to return to the position and that it would have substantially the same duties, responsibilities, and pay, as the one which he relinquished temporarily. This record shows without dispute that Claimant "is still qualified to perform the duties of such position."

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 Carrier has violated the Agreement by refusing to permit Claimant to return to his former position; the Agreement requires that he be restored thereto; and the Carrier is required to pay Claimant the salary of the position retroactive to November 1, 1945, when he requested re-employment and reported ready to work.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of March, 1947.