

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: **** for and in behalf of John H. Jones, who was formerly employed by The Pullman Company as a porter operating out of the district of Tampa, Florida.

Because The Pullman Company denied the claim filed by the Brotherhood of Sleeping Car Porters for the return of John H. Jones to the position of porter in the Tampa, Florida, District after his absence from the service on account of illness, and after he had fully recovered from his illness and was okayed by competent medical authorities as being fully recovered and capable of resuming his position as a Pullman Porter.

And further, for John H. Jones to be returned to his position as a porter in the Tampa, Florida, District with seniority rights unimpaired and with pay for time lost as a result of his not being returned to his position as a porter and as contended for in said claim.

OPINION OF BOARD: John H. Jones was employed by The Pullman Company as a porter in December, 1929. During the first few weeks of 1943, and while in service, he suffered at least one and perhaps more attacks which he attributed to a heart condition. Subsequently medical authorities diagnosed his trouble as Meningo Encephalitic Syphilis with Psychoses. On February 22, 1943, Jones requested a lay-off on account of illness which was granted by the Company. March 31, 1943, he was committed to the Florida State Hospital where he remained until September 11, 1944. He was then furloughed from that institution to his wife for a period of one year. October 27, 1945, by legal decree he was found to be of sound mind and restored to judicial sanity.

While he was an inmate of the hospital, the Company was advised by one of that Institution's physicians, a Dr. F. S. Davis, that Jones was disabled for his former occupation and that there was no possibility of his recovery. With this information in its possession the Company removed Jones' name from the porter roster, retired him from its service on April 1, 1944, and thereafter regarded him as a retired employe eligible for benefits under the provisions of its Retirement and Pension Plan.

Following his restoration to judicial sanity Jones made written request of the Company to put him back to work at his old job. Failure to receive a favorable response resulted in the Organization's filing a grievance. Refusal, after a hearing on such grievance, to return Jones to service as a porter resulted in the filing, through proper channels, of the instant claim for his restoration to that position and pay for time lost since January 16, 1946.

At the outset, without questioning its motive or purpose, it can be said that within the meaning of Rule 50 of the current Agreement the Company's action in retiring Jones from its service as of April 1, 1944, was tantamount to suspending or discharging him and, therefore, since it was taken without notice or hearing, cannot be regarded as a bar to the maintenance of the present claim or in any way decisive of its ultimate disposition.

Thus it appears we have for decision whether, in the light of the facts and circumstances disclosed by the record, Jones is now qualified to again assume the duties of his position as a porter. We turn to that record:

On October 30, 1944, Dr. H. Mason Smith, Jones' personal physician, wrote the Company as follows:

"I have recently re-examined John H. Jones whom I treated in the early part of 1943.

At this time he shows a perfectly normal cross section of his mind, which means that he shows no mental symptoms of any kind and is perfectly normal in all of his mental functions.

He was subjected to a lumbar puncture and the spinal fluid was negative for syphilis; the time previously examined, it was positive.

I feel that he is quite competent to return to work as a Pullman Porter."

November 15, 1944, W. D. Rogers, M.D., Chief Physician of the Florida State Hospital, in response to the Company's inquiry said:

"This is to advise that at the time John H. Jones left this institution he was found clear of mental symptoms and his spinal fluid as well as his blood showed no syphilitic reaction.

It is therefore our opinion that John H. Jones may safely resume his work as a porter for the Pullman Company. Advising him, however, that in his own interest he should periodically be examined by a competent physician in an effort to be apprised of possible recurrences in the future."

And on Jan. 1, 1946, Dr. Leland F. Carlton, the Company's own medical expert, in making a report on the same subject had this to say:

"From phys. exam. this man appears to have recovered with no remaining disability. With sp. fluid neg on Sept. 1944 and 45. No recurrence of symptoms he is probably permanently cured but should be observed at regular intervals with spinal fluid exam.

Since his recovery has been over 1½ years working daily the past year No recurrence I can not help but feel that he can return to orig occup."

Faced by the foregoing testimony on the part of medical experts and without a scintilla of evidence in the record tending to disprove their statements that Jones is qualified and competent to return to work as a porter, this Division cannot hold to the contrary. Were we to do so our decision would be as indefensible as the position of the Company which in effect assumes that mental instability once established gives it the right to dispense with the services of an employe notwithstanding a recovery which, under undisputed medical testimony, renders him qualified and competent to again assume the duties of the position he had been obliged to relinquish on account of such illness.

The conclusion just announced is in no sense to be construed as impinging upon the force and effect of the salutary rule, well established by awards of this Division and heavily relied on by the Company (Nos. 235, 875, 728, 2096, 2886, 3212, 3266, 3619), that employers are entitled to be

abundantly precautions and are within their rights in holding employes out of service on grounds of personal and public safety when their action in that respect is founded upon substantial evidence and exercised in the utmost good faith. The trouble is there is no room for the application of that doctrine where—as here—the employer's claim its employe is unfit to return to service is left wholly to speculation and conjecture.

For awards supporting our conclusion and more in point from a factual standpoint than those cited by the Company, see Nos. 1021, 1115 and 1485.

The record made by the respective parties leave this Division with no alternative. Basing its decision upon that record, as it is required to do, it can only hold this porter must be restored to his former position within thirty days from the date of this award with compensation from January 16, 1946, less any sums paid him by the Company since that time and less any and all amounts received by him from other sources since that date for work or services. If on the date of his reinstatement the Company still contends, as it did here but wholly failed to establish, that Jones' mental condition is of such character as to make him unsafe for service, nothing in this award is to be construed as precluding it from instituting a proper proceeding based on that ground under Rule 49 of the current agreement or from holding him out of service after his reinstatement until such proceeding is determined as authorized by Rule 50.

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 facts and circumstances presented by the record, the Carrier violated the agreement in failing to reinstate Claimant.

AWARD

That Jones be restored to his former position as porter and allowed compensation in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of July, 1948.