

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad Company that: (a) the Carrier violated Rules 11 and 23, of the Telegraphers' Agreement, when on November 9 and 11, 1946, it refused to permit J. B. Bozarth, a regularly assigned employe to occupy his regular position, assigned hours 3:00 P. M. to 11:00 P. M. at Grove Street Tower, Hoboken, and (b) the Carrier shall be required to pay said J. B. Bozarth a day's pay for each of these days.

EMPLOYEES' STATEMENT OF FACTS: An agreement, hereinafter referred to as the Telegraphers' Agreement, bearing effective dates of May 1, 1940 and May 22, 1946, as to rules and rates of pay, respectively, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

J. B. Bozarth entered Delaware, Lackawanna & Western Railroad service November 22, 1943. At or about 11:30 P. M. October 3, 1946, while going from the third to the second floor of the American Hotel, Hoboken, New Jersey, where he lived, he fell and sustained injuries to the extent of a broken right arm and a dislocated right shoulder; these injuries caused his confinement in St. Mary's Hospital, Hoboken, until October 31, 1946.

Mr. Bozarth was released from said hospital on October 31 and on that date he notified Chief Train Dispatcher H. E. Cruser that he would resume duty on his regular position at Grove Street Tower November 2. Resumption of duty was denied unless and until the claimant submitted to a physical examination which was arranged for and took place November 7. Dr. Baker, the examining doctor, and who is a company doctor, pronounced Mr. Bozarth fit to resume duty. Thereupon, Mr. Bozarth notified Acting Chief Train Dispatcher Byrnes of his intention to resume duty November 9, but he was held off duty until November 12, losing two days' work, viz., November 9 and 11. November 10 was the rest day assigned to Bozarth's position.

The Organization filed claim on behalf of Mr. Bozarth for two days' pay. The Carrier denied the claim.

POSITION OF EMPLOYEES: As indicated by the Employees' Statement of Facts, J. B. Bozarth entered Lackawanna service No. 22, 1943, and prior to, during and subsequent to the dates involved in this proceeding he regularly held the second trick "operator" position at Grove Street Tower. See page 13 of the Telegraphers' Agreement. At or about 11:30 P. M., October 3, 1946, Bozarth met with an unfortunate accident while descending from the third to the second floor of his hotel (American Hotel) in Hoboken. His right arm was

Rule Q of the Operating Department reads:

"They (employees) must yield a willing obedience to the orders and instructions of persons appointed over them. * * *

An employe may not change orders to suit himself.

"Orders must be obeyed whatever the subordinate may think of them."

Award 196—4th Division

"It is not for the employe to determine the propriety of instructions."

Award 2863—3rd Division

"The Carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent and to exclude the unfit from service."

M. Ry. Co. v. Rock 279 U. S. 410, 413

"A carrier is held to a very high standard of care in the handling of trains. In the exercise of this care it must employ only competent personnel. Public policy forbids the interpretation or recognition of any rule which lessen the duty of exercising the high standard of care required on the railroads."

Award 9954—1st Division

See, also, **Award 2096**, Third Division.

"When an illness (sic, accident) has intervened and it is apparent that the return of an employe to his work may constitute a serious hazard to himself or others, the carrier acting in good faith has the right to require a physical examination."

Award 1047—2nd Division

From the foregoing it is apparent that the Carrier had the duty to require a physical examination and had the right to select the doctor to make it. Bozarth sought to defeat this right and duty by changing the name of the doctor and misleading the doctor who examined him. We do not think it necessary to point out to this informed Board the consequences which would follow condonation of Bozarth's conduct, which, it is submitted, estops him from the assertion of any claim in the premises.

Respectfully submitted that the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The decision of this case must rest on the application to the facts presented, of Rule 23 of the controlling Agreement, effective May 1, 1940, as amended by Agreement between the parties, dated November 20, 1946, but in the Memorandum of said Agreement, made effective as of March 1, 1945. It is known as the "Guarantee Rule", and, in its amended form, reads as follows:

"A regularly assigned employe shall receive one day's pay within each twenty-four hour period, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than eight hours as per location, except on his rest day when occupying positions covered by Section 1 of Article 8, or on his rest day and holidays when occupying positions covered by Section 2 of Article 8."

Article 4 of the Agreement, providing that "Employees will not be required to suspend work during regular hours or to absorb overtime", is cited

in argument; but we cannot see that this rule can have any possible application to this dispute.

The claimant entered the employ of the Carrier, as an agent and operator, on November 22, 1943, and in the performance of his duties at Grove Street Tower, Hoboken, New Jersey, was required to manipulate two levers, operated from towers, and which manipulated switches and signals, and thus controlled the movement of trains, within the limits controlled by the tower, and his assignment was important and exacting.

On October 3, 1946, he suffered an injury, not resulting from his employment. This injury was a broken right arm and a dislocated right shoulder. The Carrier says that it was reported that he had also suffered a head injury, but this report has not been substantiated. He was hospitalized, and remained in that state until October 31, 1946, when he was discharged. Subsequent to his discharge he was given the following certificate, by a hospital physician, dated November 5, 1946:

"This is to certify that Mr. Bozarth was a patient at St. Mary's hospital and is now able to perform his duties as a telegrapher but should not undertake any labor which requires weight lifting."

On October 31, 1946, claimant reported to the Carrier that he was ready to return to work on November 2, following, but was not permitted to return to work on the date suggested. On November 7, 1946, he was instructed by Carrier Superintendent White to report to Dr. Stuart, a company doctor, and given a written order on said date, which, as originally written, reads:

"Doctor W. C. Stuart

Mr. John B. Bozarth employed as Towerman Operator reports to you for physical examination.

W. G. White
H. E. C."

This order was not presented to Dr. Stuart, who lived in Hoboken, where claimant resided; but was changed by someone, not known, by striking out the name "Dr. W. C. Stuart" and inserting in said order, immediately following the name marked out the name "Dr. Baker". In the changed form, the order was then presented to Dr. A. L. Baker, also a company doctor, located at Dover, New Jersey, some thirty-nine miles from Hoboken, on November 7, 1946, by whom he was examined on that date. What happened on that occasion can best be stated in Dr. Baker's own language. He says:

"Mr. Bozarth came to my office on November 7th, 1946, requesting me to examine his arm and see if he was able to return to work. He said he had two levers to pull and he said he could use his one arm to do this work.

"It was my opinion that he could do this. He did not state anything about an examination to determine his physical fitness to remain in service. He did not tell me he had had a skull injury. My examination covered the fact that I thought he was able to work at his usual occupation as a result of his arm injury only."

It should be noted that the order, under which Dr. Baker acted, called for a "physical examination", and such examination was, on November 22, 1946, given claimant by the same Dr. Baker, presumably on the Carrier's direction.

Following this first examination by Dr. Baker, claimant reported for work on November 8, 1946, and presented a formal certificate from Dr. Baker, stating that he had examined claimant on November 7, 1946, and that, "* * * I believe he can return to work." He was instructed to report to Chief Dispatcher Crusier on the day following. This he did, but was not returned to work on November 9, or 11, the 10th being Sunday, and his day

of rest. On November 12, 1946, he was permitted to return to work without further examination as to physical fitness.

We are clearly of the opinion that the failure of claimant to follow instructions, and report to Dr. Stuart for a physical examination, caused all the confusion, resulting in his being delayed for two days in returning to work. We do not know what prompted the Carrier to instruct the claimant to report to Dr. Stuart; but, whatever the reason, claimant chose to go out of his way to disobey instructions, and this action on his part might well have caused the Carrier to delay his return to work, pending further inquiry as to his fitness for work. Who changed the order addressed to Dr. Stuart is relatively unimportant. If claimant, or someone for him, made the change, he must abide the consequences. The order could not have been changed without his knowledge, for it was in his control until delivered to Dr. Baker; and if, as suggested, Dr. Baker made the change, he could not have done so until the claimant had disobeyed instructions in presenting it to him, rather than to Dr. Stuart, as he was instructed to do. In whatever way we view the matter, claimant was clearly at fault, and he cannot complain of consequences resulting from his own wrong. Had he obeyed instructions, it is not probable that the confusion and delay would have resulted.

Attention is called to the fact that Dr. Baker was a company doctor, and the inference is that an examination by him served the Carrier as effectively as if Dr. Stuart had made the examination and report. This may be true, but the Carrier had the right to expect that its instructions would be followed; and when presented with a situation where it was manifest that its instructions had been disregarded, and with no explanation thereof, its delay in returning claimant to work is easily accounted for. The Carrier should not have been expected to overlook the situation thus created.

It is true, that on November 12, 1946, claimant was returned to work without further physical examination, and, presumably, on Dr. Baker's report; but the fact that on November 12 the Carrier was then willing to waive the irregularity created by claimant's conduct does not serve to make the waiver retroactive to November 9, and thus save the claim.

For the foregoing reasons, we are of the opinion that there has been no violation of the Agreement and that the claim should be denied.

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 Employee involved in this dispute are respectively carrier and employee 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 there has been no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1948.