

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

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

(1) That the Carrier violated the Clerks' Agreement when, on October 18, 1947, William H. Koenig was removed from the service and not permitted to return to duty.

(2) That William H. Koenig be restored to the service and compensated for all monetary wage loss sustained by him by reason of the Carrier's action.

EMPLOYEES' STATEMENT OF FACTS: Prior to and on Saturday, October 18, 1947, William Koenig was a regularly assigned incumbent of position of Baggage man, hours of service 7:30 A.M. to 11:30 A.M., and 12:00 Noon to 4:00 P.M., Tuesday to Saturday, inclusive, relief day Monday, rate of pay Nine Dollars and twelve cents (\$9.12) per day.

While on his lunch period on Saturday, October 18, 1947, Mr. William Koenig was taken ill and lost consciousness. Efforts were made to contact the Company's physician or the Company nurse, and when this failed, an emergency patrol automobile was requested, and by the time of its arrival, William Koenig had partly regained consciousness; however, he was removed to the Hahnemann Hospital. By the time he had reached the hospital, he had fully recovered, and upon examination of a physician at the hospital, he was immediately discharged.

Upon return to the Baggage Room, expecting to resume his duties, Mr. Koenig was not permitted to do so, and the Baggage Agent instructed him to report to the Medical Examiner, which he was unable to do on that date, because of the Medical Examiner's Office being closed until Monday. He reported to the Medical Examiner's Office on Monday, and after examination, was instructed to report back to the Baggage Agent. The Baggage Agent advised Mr. Koenig that the Superintendent had ordered that he (Koenig) should be held out of service.

On October 22, 1947, or two days later, Mr. Koenig personally appealed to the Superintendent, and requested that he be restored to service. This request of Mr. William Koenig was refused by the Superintendent. On the evening of October 27, 1947, Mr. Koenig received a telephone call from the Baggage Agent, instructing him to report to the Superintendent's Office the

Hospital, the diagnosis of an epilepsy is clinically justified by the history and clinical events that have been witnessed. This epilepsy clinically is most likely the result of central nervous system abnormalities. With seizures beginning at this age group this patient is a brain tumor suspect. Vascular or post infectious cortical changes must also be considered as etiological agents. Syncopal attacks resulting from carotid sinus or Stokes Adams Syndrome must also be ruled out. It may be expected that this patient will suffer additional seizures.

Very sincerely yours,

(s) JOSEPH HUGHES
Joseph Hughes, M. D."

As the Clerks' organization did not agree with the diagnosis of the Carrier's Medical Department in Mr. Koenig's case, the Carrier offered and urged a joint medical examination of Mr. Koenig by Carrier's Chief Medical Examiner and Mr. Koenig's doctor, and, if they could not agree, that a specialist in the disease be selected by these two doctors, the expense to be borne jointly by Carrier and the Clerks' organization, to which the Clerks' organization would not agree. Further, a hearing was accorded Koenig to review his physical condition and permit him to present any testimony that he desired, and the Carrier referred the history in Mr. Koenig's case to an authority on epilepsy, who concluded that despite the negative neurological evidence, negative skull x-ray and negative electroencephalogram, that the diagnosis of epilepsy was clinically justified by the history and clinical evidence in this case.

The history and facts in this case show, without doubt, that Mr. Koenig was subject to epileptic attacks and it must be obvious that it would be unsafe to permit him to return to duty.

The Carrier maintains that Rule 43 was not violated and submits that Mr. Koenig was neither suspended nor discharged, both of which are recognized as discipline measures, therefore, hearing on these grounds was not required or necessary. However, a hearing was held on January 28, 1948 to acquaint Mr. Koenig with the medical aspects of his case as developed by Carrier's Medical Department, at which he was afforded the opportunity to present such facts as he desired.

Under the facts and circumstances set forth in the foregoing, there is no justification for payment of monetary loss sustained by the claimant and Carrier requests the Board to so find and deny the claim in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant William H. Koenig while at lunch on Saturday, October 18, 1947 suffered a seizure and lost consciousness. Attempts were made on the property to secure medical assistance for him but were unavailing. An emergency patrol automobile was secured for him. By the time of its arrival he had partially regained consciousness. He was then taken to a hospital and immediately discharged. Upon return to the Baggage Room where he was employed, he was not permitted to return to duty but was instructed to report to the Medical Examiner. He reported to the Medical Examiner on Monday, October 20, 1947 and after examination, was instructed to report to the Baggage Agent who advised him that the Superintendent had ordered that he (Koenig) should be held out of service.

Employees assert a violation of Rule 43 of the Agreement between the parties effective July 1, 1944 which provides as follows:

"RULE 43—REPRESENTATIVES, INVESTIGATIONS AND HEARINGS

(a) All differences between the Carrier and the employees covered by this agreement shall be handled by the individual employee affected

or the representative as that term is defined in Rule 3 of this agreement.

(b) An employe shall not be suspended (except suspension pending investigation), discharged or have record entered against him without a hearing and investigation which shall be held within ten days of the date charged with the offense or taken out of service. At a reasonable time prior to the hearing he is entitled to be apprised in writing, copy to the Division Chairman, of the precise charge against him. He shall have reasonable opportunity to secure the presence of his representative and actual witnesses of the occurrence under investigation.

(c) The right to appeal to any superior officer is conceded.

(d) An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided in paragraphs (a), (b) and (c) of this rule.

(e) If the decision is in favor of the employe, the record shall so indicate, and if suspended or dismissed, the employe shall be reinstated, and if found blameless, compensated for wage loss less amount earned in other employment.

(f) An employe, on request, shall be given a letter stating the cause of discipline. A copy of all statements made a matter of record at the investigation or on the appeal shall be furnished on request to the employe or his representative.

(g) If an employe is suspended, the suspension shall date from the time he was taken out of the service.

(h) Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there shall neither be a shut-down by the employer nor a suspension of work by the employes."

During the handling of this case on the property, Carrier contended that Rule 43 did not apply. It took the same position in its original submission to this Board. Later, in its rebuttal brief, it contended that section (d) of Rule 43 applies and that that section contemplates that the employe make request in writing for such hearing and no such written request was made. In any event, however, it argues that a hearing was held on the property on January 27-28, 1948. Thus, the primary question to be determined in arriving at a decision in this docket is the correct interpretation of Rule 43.

The record reveals that sometime in 1945 a similar situation arose on this property in connection with the withholding from service of an employe named Arnold. That claim was filed with this Board but was settled and withdrawn. As a part of that settlement, an agreed interpretation of Rule 43 was arrived at as is revealed in letters exchanged between a former Assistant Vice-President of the Carrier and the General Chairman dated December 8, 1945 and December 10, 1945 which are set forth in full in the position of the Employes and which, because of their length, will not be quoted in full herein. It is clear from that exchange of correspondence that the parties agreed that Rule 43 definitely applies to a situation of this kind. The difficulty is to determine whether they agreed that section (b) or (d) thereof applied. If (b) applies, clearly the onus of going ahead with a hearing within a prescribed time limit is upon Carrier. If (d) applies, the employe affected has some responsibility to make known to Carrier what his position is. Unfortunately, the record does not shed too much light on this question for on the property Carrier steadfastly adhered to the proposition that Rule 43 did not apply at all, and nowhere, either on the property or in its submission to this Board, does the Carrier comment upon the joint interpretation contained in the letters aforesaid. Again, the aforesaid letters left open the question with respect to which section of Rule 43 applied. That question must therefore be determined by this Board.

Now then, it is to be noted that the letter of December 8, 1945 to the General Chairman from Carrier's Assistant Vice-President reads in pertinent part as follows:

"In previous conference and correspondence on this subject, you took exception to the fact that no formal hearing had been given Mr. Arnold at any time; that is, there was no hearing conducted where a transcript of testimony was taken, nor did Mr. Arnold have any opportunity to make any statements or give any testimony in his own behalf. We felt at the time that Mr. Arnold had not actually been taken out of service, where it was your position that even though technically he had not been taken out of service at the time, he was held out of service against his wishes and against the position taken by your Organization. You have referred to Rule 43 in your former and present agreement, captioned 'Representatives, Investigations and Hearings,' mentioning specifically section (d) of that rule which provides, 'An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided in paragraphs (a), (b) and (c) of this rule.'

It is considered that under the proper interpretation of this rule, and the circumstances in this case, hearing should have been accorded Mr. Arnold and in deference to your views, employees involved in any future case where the circumstances are the same will be accorded the right of hearing."

The General Chairman's response in pertinent part reads as follows:

"It is also noted that in the future, employees will not be removed from the service without being afforded their rights under Rule No. 43 of our agreement."

Designedly or not, therefore, the parties ducked a very material phase of the controversy over the applicability of Rule 43 in not making clear whether section (b) or section (d) thereof applied. In the first paragraph of the quoted portion of the Assistant Vice-President's letter, he mentions the General Chairman's specific reference to section (d). The General Chairman in his response made no attempt to correct the impression logically to be drawn from the language of the letter, to wit: that the last quoted paragraph thereof related back to the preceding paragraph indicated that it was section (d) which the Assistant Vice-President conceded was applicable and that thereunder, employees in future cases, where the circumstances were similar, would be accorded the right of hearing. We think it is clear that an employee held out of service because of alleged physical incapacity is not suspended or discharged because of an offense, as the word is used in section (b) of the Rule. The whole context of that section clearly indicates that it is to be invoked in cases of discipline because of an alleged offense. A reasonable view of the Rule itself (conceding its application to cases such as this) indicates that section (d) thereof is the applicable section. We think the conclusion that section (d) applies is inescapable.

This then brings us to the secondary contentions of the Carrier as mentioned above. There is no express requirement in section (d) that a written request for a hearing be filed by the employee. We find no language therein which implies that such was contemplated by the parties in the drafting of the Agreement. Naturally, since the section speaks of "an employee who considers himself otherwise aggrieved," there must be some action on the part of the employee to bring home to the Carrier the state of his feelings with respect thereto and indicate in some manner that he desires consideration of his grievance. The fact that on October 22, 1947 the Claimant personally appealed to the Superintendent and requested restoration to service and that he consulted the Division Chairman who wrote the Superintendent on November 10, 1947 asserting a violation of Rule 43, certainly was sufficient notice to the Carrier that he considered himself otherwise aggrieved and placed the Carrier in a position where it should have accorded him a hearing under Rule 43.

Did the hearing of January 27 and 28, 1948 satisfy the requirements of Rule 43? In our opinion, it did not. The hearing was held after a letter, reading as follows, was addressed to the Division Chairman by the Carrier's Superintendent under date of January 22, 1948:

"With further reference to my letter of Jan. 13, 1948, in connection with case of Baggage-man William Koenig:

In order to provide Baggage-man Koenig with the medical aspects of his case as developed by our Medical Department and accord him an impartial hearing, wish you would arrange to have Baggage-man Koenig at my office at 10:00 A. M., Tuesday, January 27th, 1948.

I am arranging to have a representative of our medical department attend and if you desire, a physician of your choice may be present.

Will appreciate your efforts in arranging accordingly."

The language of this letter certainly is no indication that the hearing was being held for the purpose of determining Claimant's ability or lack of ability to continue to perform the duties of his position. Yet clearly, that would be the issue to be determined were the hearing held pursuant to Rule 43. The Carrier avoided any reference to Rule 43 either in the notice of hearing, in the hearing itself or in the letter of the General Superintendent to the Division Chairman outlining the results of the meeting. As a matter of fact, the Carrier's Chief of Personnel in denying the appeal in this case re-asserted that Rule 43 did not apply. We think these facts fully support our conclusion that Carrier did not comply with the Rule. Because of the failure of the Carrier to comply with the Agreement, a sustaining Award is in order.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 11th day of August, 1949.