# Award No. 6652

# Docket No. CL-6604

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**LeRoy A. Rader, Referee**

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## PARTIES TO DISPUTE:

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

## THE PENNSYLVANIA RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that: Shelby Suddeth, Trucker, Freight Station, Indianapolis, Indiana, Southwestern Division, be permitted to return to service with all rights unimpaired and be compensated for all monetary loss sustained dating from May 10, 1950, until adjusted. (Docket W-713.)

**EMPLOYES' STATEMENT OF FACTS:** This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case holds a position, and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1952, covering Clerical, Other Office, Station and Storehouse Employes, between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Title 1, Section 5, Third (e), of the Railway Labor Act and which has also been filed with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

This dispute was progressed to the General Manager of the Western Region by means of a joint submission. The General Manager is "the chief operating officer of the Carrier designated to handle such disputes". [Railway Labor Act, Title 1, Section 3(i).] This joint submission is attached as Employes' Exhibit "A" and will be considered as a part of this Statement of Facts.

The Claimant, Shelby Suddeth was a regularly assigned trucker at the Indianapolis Freight Station, Indianapolis, Indiana, on May 10, 1950, assigned to duty as a chore boy operator.

The Claimant holds a seniority date on the Indianapolis Division Group 2 Seniority Roster, having 34 years of service.

made repeated attempts to accord him just and fair treatment by endeavoring to have the Claimant examined by a Board of Doctors or have him placed on a suitable position under the provisions of Rule 3-G-1.

It is, therefore, respectfully submitted that the Claimant is not entitled to any compensation under the provisions of the applicable Agreement; nor is he entitled to be returned to service until such time as the Employes agree, without reservations as to the granting of compensation for all time lost, to the appointment of a Board of Doctors to review his physical condition —and then only if the doctors' report indicates that he is fit to return to service on his regular position—or until the Employes agree to the placement of the Claimant on a suitable position under Rule 3-G-1.

Without abandoning its position in this case, as set forth above, the Carrier desires to state here that if the Board should find that the Claimant has been improperly held out of service since May 10, 1950, which the Carrier denies, any award of compensation for "monetary loss sustained" should take into account any earnings of the Claimant in outside employment during the period it may be held he was entitled to be in active service with the Carrier. This principle has been well established by your Honorable Board. (See Awards No. 5862 and 15765 of the First Division, and Award No. 1608 of the Third Division.)

**III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, Is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

**CONCLUSION**

The Carrier has shown that the Claimant was properly held out of service because of his physical condition; that his possible return to service has been prevented by the refusal of the Employes to accept the reasonable procedures suggested by the Carrier to settle the controversy; and that the applicable Agreement has not been violated.

It is, therefore, respectfully submitted that the claim here before your Honorable Board is without foundation under the applicable Agreement and should be denied.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim comes to the Board on a joint statement of facts and in brief, the question presented relates to the physical condition of the Claimant to perform the duties of a position which he had

filled for many years prior to injury sustained in March of 1950. The claim filed requests that Claimant be permitted to return to service with all rights unimpaired and that he be compensated for all monetary loss sustained dating from May 10, 1950, until adjusted.

The record reveals that heavy lifting was part of Claimant's job and his injury was to the lower back by reason of lifting a 100 pound bag of feed. The record also shows that by reason of this injury Carrier paid him in May 1950 the sum of $575.50, this sum in payment for time lost from April 5, 1950 to and including May 9, 1950. Claimant at this time signed a release and Petitioner states this was done on the strength of Carrier's Medical Department declaring Claimant fit to resume his duties.

The controversy from this point on relates to Claimant's actual condition and as to whether or not he was physically fit to perform his duties.

On May 9, 1950, Carrier's Medical Examiner at Indianapolis issued a Certificate of Ability or Return to Duty card, and this after concurrence of the Chief Medical Examiner of Carrier. This entitled Claimant to return to work on his former position, if available, in accordance with the provisions of Rule 2-A-7 of the applicable Agreement, and if not available, this rule provides he shall exercise his seniority under Rule 3-C-1. On presentation of the Certificate of Ability by Claimant on May 10, 1950 to the Freight Agent, that official refused to permit him to return to work and claim was filed, which was denied and the record shows numerous conferences held subsequent thereto in which this matter was discussed but no favorable decision was reached by which action Claimant contends violation of the Agreement.

On behalf of Respondent Carrier it is shown that on April 5, 1950 the Freight Agent conducted an investigation and at its conclusion informed Claimant that until "our Medical Examiner can give you a Return to Duty I cannot permit you to work." On May 9, 1950 Carrier's Medical Examiner, Dr. Black of Indianapolis, issued a certificate of ability to the effect that Claimant could resume work on May 10, 1950. The Superintendent, however, because of previous report of Claimant's own doctor and other doctors requested additional proof of Claimant's present condition which resulted in the Chief Medical Examiner referring Claimant to a specialist, Dr. De Palma and his conclusions were as follows:

> "It is my belief that at the time of the accident, this patient sustained a herniated disc which was responsible for the sciatic syndrome which persisted for six or seven weeks. According to his story, it is evident that the disc has receded and the patient has been relieved of all distressing neurological symptoms. At the present time he shows no evidence of a herniated disc, and has made a complete recovery.
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> "One must always bear in mind, however, that once a disc has herniated, there is always the possibility that a recurrence may be precipitated by strenuous laborious work. Therefore, I do not think that this man should engage in any type of employment which will predispose him to a recurrence, and so do not recommend his being returned to his former occupation."

After several conferences at which no agreement was reached, a Carrier representative proposed that a Board of Doctors be appointed to determine that physical status of the Claimant for work at his former position, that of Mobilift Operator, to which the Organization did not agree. There followed several other conferences and correspondences with like result and on January 24, 1952 Carrier asked the General Chairman if he would be agreeable to the placement of Claimant on a position suitable to his physical condition under Rule 3-G-1 of the Agreement, and the General Chairman replied that he had no objection to such an arrangement if Claimant was compensated for all time lost, to which Carrier would not agree. And later on February 25, 1952, Carrier again made the offer for appointment of a Board of Doctors

to determine Claimant's condition, and again on June 20, 1952, similar offer was made by Carrier.

Petitioner relies on Rule 2-A-7 "returning from leave of absence" and Rule 6-A-1 (a), Discipline. The latter rule, we believe, does not meet the situation here presented as we do not construe the facts of record to show that disciplinary action was taken in this case.

Numerous awards are cited by both parties in support of the positions taken. Petitioner relies on the Certificate of Ability and refuses apparently to accede to any further medical advice on the subject.

In view of the medical reports made, taking all of the same into consideration, we believe that the refusal of the Organization to consider the suggestions of Carrier relative to additional examinations with a view to placing Claimant in another position under Rule 3-G-1, was not warranted. Also, we believe and reaffirm the position taken by the Board in Award 5815 (without a referee) in which we said:

> "That claim for restoration to service with pay for time lost, as prayed for, is denied. We remand the case to the parties for an impartial examination by competent medical authority, or authorities selected by agreement between the parties to this dispute to determine Claimant's physical fitness to perform the duties of a Bar Attendant."

Likewise, in the instant case the inability of the parties to meet on common ground and dispose of this claim prior to this time we view as inexcusable. We consider that the Organization has taken a too technical stand in refusal to permit the medical examination suggested and believe it to be in the best interests of Claimant to have such examination to prevent further injury which might result, as stated in the report of the specialist, above set out, to him and fellow employes. We remand with the suggestion that attention be given this case on the property which it appears would be in the best interests of all concerned.

**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 Employes involved in this dispute are respectively Carrier and Employes 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

Claim remanded in accordance with Opinion.

## AWARD

Claim remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of May, 1954.