

Award No. 7204

Docket No. CL-7225

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: Mr. Rex A. Flewelling, Relief Clerk, Phoenix, Arizona, be restored to service on his assigned position with all rights unimpaired and compensated for all wage loss sustained retroactive from November 6, 1953.

EMPLOYEES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its Employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, bearing effective date of October 1, 1940, which Agreement, reprinted January 1, 1953, including revisions (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. A copy of the Agreement is on file with this Board and by reference hereto is made a part of this dispute.

2. Mr. Rex A. Flewelling (hereinafter referred to as the Claimant) entered the service of Carrier on February 14, 1937, and since then, for more than fifteen (15) years, has performed service on various positions properly rated and classified under the Agreement.

At the time the instant dispute arose, November 6, 1953, and for approximately three (3) years prior thereto, the Claimant occupied a regular five (5) day relief assignment, Thursday through Monday, at Phoenix, Arizona, scheduled to perform service as follows:

Day	Position	Assigned Hours	Daily Rate of Pay
Thursday	No. 29, Assistant Chief Clerk	8 A. M. to 4 P. M.	\$15.72
Friday	No. 29, Assistant Chief Clerk	8 A. M. to 4 P. M.	15.72
Saturday	Interchange Clerk	6 A. M. to 2 P. M.	14.99
Sunday	Interchange Clerk	6 A. M. to 2 P. M.	14.99
Monday	No. 3, Assistant Chief Clerk	12 MN. to 8 A.M.	15.72
Tuesday	Rest Day		
Wednesday	Rest Day		

Moreover, the Board has ruled that where the time lost by the employe has been by virtue of his own voluntary action, and no rule of the controlling agreement makes any provision for payment of the compensation claimed, the Division has no right or power to go beyond the terms of the existing agreement. This very adequately covers, and applies to, the claim at issue.

The carrier here asserts that the claim in this docket is, in its entirety without basis or merit, and therefore respectfully requests that it be denied.

CONCLUSION

All data herein submitted have been presented to the duly authorized representatives of the petitioner and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute concerns the request of Claimant Rex A. Flewelling that he be restored to his position of Relief Clerk, Phoenix, Arizona, with all rights unimpaired, and with compensation for all wages lost, retroactive to November 7, 1953, such date being the time Claimant alleges that he was improperly removed from service.

The revised Agreement between the parties bears date of January 1, 1953.

Claimant possesses seniority dating to February 14, 1937.

Under date of October 19, 1953, over the signature of B. B. Kimball, Trainmaster, Claimant was advised as follows:

"PERSONAL

Mr. R. A. Flewelling, Yard Clerk
Phoenix

Please arrange to call at this office, at your earliest opportunity, to see me on a personal matter.

Also please arrange to call on Dr. Ketcherside, for a physical examination, soon, advising this office when you have done so.

B. B. Kimball"

Claimant was granted his request to lay off on November 5 and 6, 1953. During the evening of November 6, Claimant was advised on the telephone by the Chief Clerk that he was being withheld from service by reason of his (Claimant's) failure to comply with the above request that he call on the Carrier's physician for physical examination. The Organization insists that the Respondent did not have the right to summarily hold the Claimant out of service for a physical examination by reason of the fact that neither existing laws, agreement provisions, or custom and practice make the taking of physical examinations a condition precedent to continued employment, particularly when, as here, at the time in question he was still in service, not having been ill, confined in a hospital or under the care of a physician.

It was further pointed out that Claimant submitted statements from two physicians certifying his physical well being; and that the Organization's request, that a panel of physicians (three in number, one impartial, if the other two were in disagreement) determine Claimant's true physical condition, was denied by the Respondent.

It was further contended that the withholding of any employe from service was improper without an investigation, which in this instance had never been held as required by Rule 46.

Respondent countered with the assertion that the Investigation Rule (46) was not applicable here since Claimant had neither been discharged nor disciplined. It was pointed out that Claimant's supervisors had reason to believe, and did believe, that he (Claimant) was not presently in good health; and that he was held from service only because of his (Claimant's) failure to comply with instructions to report for examination, and determination of the status of his (Claimant's) health.

The question at issue here concerns neither a matter of discipline nor discharge. The state of Claimant's health is not subject to determination under Rule 46 or any other Rule of Article IX of the effective Agreement. (Award 4816) There is evidence of record that the appearance and manner of work performance of and by the Claimant was such that his supervisors questioned his then physical fitness.

The Board held in Award 235 that:

"It seems to us that where the question of personal safety is involved, the Carrier is entitled to be abundantly precautionous * * *."

Admittedly the Agreement here is silent on the matter of requiring physical examinations as a condition of continued employment. In Award 362 this Board said:

"* * * Such silence, however, cannot reasonably be construed either as authorizing the carrier to request physical examinations under any and all circumstances or as prohibiting the carrier from requesting such examinations under any and all circumstances. * * *"

The Organization admits that the Claimant voluntarily elected not to comply with instructions concerning a physical examination. However, we conclude that he considered the Respondent's request in this regard as being reasonable.

In Award 362 this Board further stated:

"* * * The fact that the complainant submitted medical certificates from his personal physicians was in itself an acknowledgment that the requirement of a physical examination was reasonable, * * *"

We conclude and so find and hold that this fact precludes the Board from ordering the Claimant reinstated to his position with compensation for wage loss. However (as the Respondent admits) the fact that the Claimant was withheld from service did not affect his accrued seniority. If the Claimant wishes to return to his position, he should so notify the Respondent. If his return to service is conditioned upon his submitting to a physical examination by the Carrier's physician, he should so submit. In the event Claimant is not satisfied with the findings and conclusions of the Respondent's physician, he should secure an examination by a physician of his own choice; the physicians of each of the parties acting as a panel of two doctors, who, if not in accord as to the Claimant's physical condition, should agree on a third physician with the findings and determinations of a majority of the panel of three physicians being final and binding on all parties as to Claimant's physical fitness to resume service.

In so disposing of this matter (that is establishing a panel of physicians) we are following awards of all Divisions of this Board so numerous as to preclude need of citation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing thereon;

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

Claim disposed of in accordance with the above Opinion.

AWARD

Claim disposed of in accordance with the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1955.