

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the rules of the Clerks' Agreement when it denied Mr. W. L. Chadwick the right to return to service on November 30, 1950.

(b) The Carrier violated the rules of the Clerks' Agreement when it denied Mr. W. L. Chadwick the right to return to service on June 25, 1952.

(c) Mr. Chadwick shall now be reimbursed in the amount of \$85.00 to cover the unnecessary expense he was put to for the examination he was required to have in June 1952, by Dr. Bromberg in Sacramento, account being held out of service by the Carrier on the contention that he was unfit to perform his duties.

(d) Mr. Chadwick shall now be reimbursed for all wage loss sustained during the periods November 30, 1950, to February 23, 1951, inclusive, and June 25 to August 8, 1952, inclusive.

EMPLOYEES' STATEMENT OF FACTS: Mr. W. L. Chadwick, with a seniority date of October 20, 1944, was holding the position of Trainmaster's Clerk at Keddie, California, with the rate of pay of \$12.50 per day, when he was picked up at his hotel room at Quincy, California by law enforcement officers on December 20, 1949, and a week later, on December 27, 1949, he was committed to a state institution for the mentally ill at Stockton, California. Mr. Chadwick was released from Stockton State Hospital on November 15, 1950, and inasmuch as his father had died during his confinement he requested and was granted a short leave of absence in order to wind up the affairs involved in his father's estate.

On November 17, 1950, Mr. Chadwick called on the Carrier's Chief Surgeon at San Francisco, Dr. G. F. Cushman, and requested a clearance to return to work. At that time Mr. Chadwick was advised that it would be necessary for the Carrier to secure his case history from Stockton State Hospital before releasing him to go to work.

second was made by Dr. R. J. Simmons on July 31, 1952, and copy of his report is attached as Carrier's Exhibit "F". Both of these physicians concluded that claimant was employable **at the time they examined him**, and, consequently, claimant was returned to service on both of these occasions. However, it is significant to note that both of these doctors found that claimant was suffering from a mental disturbance that was likely to recur although in remission at the time of the examination. Thus, though the actual findings of both neutrals were that claimant was employable **at the time they examined him**, nevertheless their findings provide further support for Carrier's position that there was nothing arbitrary or unreasonable in the original suspension from service by the Superintendent. Further, both neutral doctors concur in the opinion that the mental disease from which claimant suffers is of a recurring type and therefore that attacks such as he had experienced in the past could very possibly occur in the future.

Part (c) of the instant claim (see Employee's Statement of Claim above) is for the expenses sustained by claimant for an examination by a doctor (Dr. Bromberg) selected by Claimant to challenge the opinion of the Company doctor that he (claimant) was not employable. There is absolutely no basis for this claim inasmuch as Rule 55 very plainly states that such expenses will be borne by the employee.

To summarize, Carrier asserts that it has shown (1) that the suspensions of claimant from service in 1950 and again in 1952 were proper under the provisions of Rule 55 which explicitly recognizes Carrier's right to make such a suspension under the circumstances of this case, (2) that there was nothing arbitrary or unreasonable in either suspension, and therefore (3) that Rule 55 was not violated and there is thus no basis for the instant claim for pay for time held out of service. Further, Carrier states that there is no basis under the rule for part (c) of this claim inasmuch as Rule 55 plainly states that the expenses for the physician selected by the employee shall be paid for by the employee.

All of the above has been presented to the Organization. Unless requested by the Employees, oral hearing is waived by Carrier.

(Exhibits not reproduced.)

OPINION OF BOARD: The principal rule of the Agreement relied on by Petitioner in support of this claim is Rule 55, which reads as follows:

"When the head of a department considers that an employee is physically unfit to perform his duties or that his physical condition materially increases risk of accident to himself or to fellow employees, he may require the employee to submit to a physical examination by a company physician. Such employee will not be permanently removed from his position until it is definitely determined that he is unfit to perform his duties. General Chairman will be notified immediately whenever an employee is suspended from his position because of physical or mental condition.

"In the event of a dispute in which, within 30 days, the conclusion of company physician is challenged by another reputable physician (selected and paid for by the employee), the employee shall be examined by and his medical history made available to a third, or neutral reputable physician (selected jointly by Carrier and Brotherhood within 30 days from date of challenge). The expense for the neutral physician will be borne jointly by the Carrier and Brotherhood. The dispute will be disposed of on the basis of the concurring opinion of at least two of the three physicians referred to in this paragraph. If the conclusion, after either or both of the above procedures, is that the employee is unfit to perform his duties, Rule 56 will be complied with, if possible. * * *

Also cited are Rules 50, "Leave of Absence" and 29, "Promotions, Assignments, and Displacements".

Rule 55 must be considered to be a unique rule and therefore, by reason of its special significance must be concisely construed.

There is no question on this record that Claimant had a long record of difficulty with his mental health and that he did not reveal previous difficulty on this score in his original application for employment. However, when Carrier discovered such fact it did not release Claimant from service by reason thereof but continued him in his position. By such act on Carrier's part it must be found that this defect was waived.

It is apparent also from the record that Carrier assumed in both instances, where the provisions of Rule 55 were invoked, that Claimant would be found unfit for employment, however, in both instances the finding of physicians selected in accordance with the provisions of Rule 55 found that Claimant was employable and could perform the duties of a position with which he was accustomed. And in both instances Carrier anticipated a finding against Claimant and dropped him from employment prior to the final decision of the physician's board appointed.

Carrier in support of its position cited the health record of Claimant and many awards of this Division. The difficulty with Carrier's position as we view it is the failure to abide by the provisions of the special Rule 55 set out above. The many instances cited by Carrier do not excuse it from proceeding in accordance with this rule and abiding by all of its provisions. And in not so doing Claimant was improperly removed from his position.

It is concluded that Claims (a), (b) and (d) should be sustained on this record. On Claim (c) the rule sets out the method of paying for physicians services and this part of the claim is denied.

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

That the parties waived hearing on this dispute; and

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 the Carrier violated the Agreement as to Claims (a), (b) and (d), not as to Claim (c).

AWARD

Claims (a), (b) and (d) sustained, Claim (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1956.