

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes—

(1) That the Carrier violated the Rules Agreement between the parties, effective September 1, 1952, when on May 25, 1954, it declined Miss Maude P. Grady, Clerk, Consolidated Office, Greenfield Mass., the right to return to her position in that office following her return from leave of absence on account of sickness, which action on the part of the Carrier had the effect of permanently removing her from her position; and

(2) That the Carrier shall forthwith restore Miss Maude P. Grady to her position of Clerk in the Consolidated Office, Greenfield, Mass., and compensate her for all wage loss sustained as a result of its action, taken in violation of the Rules Agreement between the parties, at the regular weekly rate of her position (\$74.44), commencing May 25, 1954, and continuing for each day thereafter that she is withheld from returning to her position.

EMPLOYEES' STATEMENT OF FACTS: Miss Maude P. Grady (Service and Seniority Date 9-28-1918) holds a regular bulletined position of Clerk in the Consolidated Office at Greenfield, Mass., with assigned hours, 8 A. M. to 5 P. M., (one hour lunch period), Monday to Friday, inclusive; rest days, Saturday and Sunday; rate of pay, \$74.44 per week.

On March 16, 1954, Miss Grady was struck by an automobile on Main Street in Greenfield, Mass., sustaining a fractured ankle and other injuries. She was confined as a patient in the Franklin County Hospital for a period of eleven (11) days and on April 16, 1954, the cast was removed from her ankle at the North Adams Hospital, following which she convalesced at the home of her cousin, Mrs. Margaret Connors, residing at 35 Southworth Street, Williamstown, Mass.

On May 10, 1954, Mr. R. H. Billings, Chief Clerk of the Consolidated Office, called Miss Grady on the telephone to inquire as to when she would be able to return to her position at which time she informed Mr. Billings that with the treatments she was taking, she expected that her ankle would

to resume her regular position as File Clerk which does involve stairways in the handling of files, etc., therefore, the Carrier should not take the risk.

We discussed fully Clerks' Rule 43 captioned 'Health and Safety'. Certainly we have the 'safety' angle here and the Carrier knowingly could not very well allow Miss Grady to resume work in view of the Chief Surgeon's report.

Of course, Miss Grady's age of 65 last January (1954), does not tend to help her physical condition. The Greenfield, Mass. office forces over the past years have been most generous, realizing her physical condition, by assisting her, obtaining files, etc., to save her using stairways. Of course, it means some disruption of the force to take one away from own work. Therefore, it is plain that it could not continue by having Miss Grady as a File Clerk simply remaining at her desk. No arbitrary or capricious stand taken here by Superintendent.

While it was some years ago she was in an automobile accident in which she suffered a broken pelvis, which contributed to her lameness, in 1947, she fell when walking from the Greenfield office building, breaking knee cap on left knee, also there was the occurrence of the most recent unfortunate accident on March 16, 1954 when she was hit by an automobile.

In our conference, Rule 43 was discussed at considerable length. However, the Carrier did have the right to have Miss Grady examined by a Company Surgeon and that took place with findings as previously outlined in this letter.

While I was willing, and so stated in our conference, that the only way to settle this case is to agree upon a neutral competent physician to make further examination, and this you declined.

Therefore, in view of all the facts and circumstances in this case, I have no other alternative than to decline this claim.

Yours very truly,

(Sgd.) J. W. BRACKETT
Chief of Personnel"

As to what has taken place in this case, it is abundantly clear that the claim should be denied.

All factual data and arguments herein have been brought to the attention of Petitioner.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, a clerk with some thirty-five years of seniority, received a fractured ankle in an automobile accident on March 16, 1954. After a period of hospitalization and convalescence, she arranged with the Chief Clerk to return to work on May 24, 1954. However, on May 18, she was informed that the Carrier required her to be examined by its Chief Surgeon before returning to work. The examination took place on May 24 and resulted in a report by the Chief Surgeon that Claimant's ankle had healed, but other physical disabilities predating the injury to her ankle made her a risk to the Carrier if her work involved climbing stairs and being on her feet handling files. As a result of this report, Carrier refused to put her back to work and so notified the Organization, concluding the notice with this sentence: "Under the circumstances of this case, the provisions of Rule 43(c) of the Clerks' Agreement must apply, and we therefore await your position in the matter."

Rule 43(c) reads in part:

"Employees will not be required to submit to a physical examination unless it is apparent their health is such that an examination should be made for the purpose of informing them of their disability, if any exists, in order that they may take treatment to improve their condition. An employee will not be permanently removed from his position because of mental or physical disability without examination and recommendation made by a Company physician. Before taking action on such recommendation it will be communicated to the duly accredited representative of the employees, and if any exception is taken by such representative to the recommendation of the Company physician, the representative of the employees and designated officer of the Railroad will agree upon some competent physician to make further examination and case will be disposed of in accordance with the findings of the physician so selected. . . ."

Claim was filed on May 29, 1954 for a day's pay for May 25, 1954 and all subsequent dates Claimant is held off her position.

This case turns entirely on the proper interpretation of the first sentence of Rule 43(c). If, as Carrier alleges, it had a right to require Claimant to submit to a physical examination, it was Claimant who failed to follow the rule—by refusing to agree to a further examination by an agreed upon physician. If, on the other hand, as contended by Claimant, Carrier had no right to require her to submit to a physical examination, holding her out of service as the result of that examination was a violation of the Agreement.

The rule states that employees will not be required to submit to a physical examination—except under certain conditions. It then goes on to state the conditions—if it is apparent their health is such that an examination should be made for the purpose of informing them of their disability, in order that they may take treatment to improve their condition. It is obvious that the rule does not allow the Carrier to insist upon a physical examination in order to inform itself of an employee's disability. It is also clear that some defect in the employee's health must be apparent, not suspected, in order for him to be required to undergo an examination. In this case, the requirement of an examination was imposed on May 18, six days before any Carrier representative had seen Claimant after her accident. Her condition, whatever it was, could hardly have been apparent to the Carrier. In addition, the record shows that she had been hospitalized and under the care of at least two physicians; she was certainly informed of her condition. Under the clear language of this rule, Carrier had no right to require Claimant to submit to a physical examination.

Carrier cites a number of Awards which hold that Carriers, in the absence of a specific rule, have an inherent right to require a physical examination where the safety of the employee is involved. We do not quarrel with those Awards. But this Carrier has bargained away its rights by limiting its authority to require physical examinations to the narrow area and for the narrow purposes set forth in Rule 43(c). We must enforce the Rule as it is written and sustain the claim. We do not consider that the submission by Claimant to the examination on May 24 constituted a waiver of her rights under Rule 43(c), as did the special agreements entered into in Awards 7484 and 7485 involving these same parties.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 5th day of December, 1956.