Award No. 9048
Docket No. CL-11018

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD, NEW YORK AND EASTERN DISTRICT (except Boston and Albany Division)

STATEMENT OF CLAIM: *Claim of the System Committee of the* Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, New York Central Railroad Company, Eastern District (except Boston Division).

1—That Carrier violated the Rules Agreement when, on April 2, 1956, it failed and refused to furnish employment suited to his physical capacity to Mr. Norman W. Pfleger, Baggage and Mail Trucker, Central Terminal, Buffalo, N. Y., and subsequently denied him a hearing for which written request was filed April 2, 1956.

2—That Carrier be required to restore Norman W. Pfleger to employment suited to his physical capacity, and to reimburse him in full for wage loss sustained from April 2, 1956 to and including the date on which the said Rules Agreement violation shall thus have been eliminated.

EMPLOYES' STATEMENT OF FACTS: Norman W. Pfleger entered service April 1, 1942 and has a Class 2 seniority dating of August 11, 1942 on seniority roster covering the Baggage Department, Central Terminal, Buffalo, N. Y.

On October 2, 1943, while operating an electric powered baggage truck up a ramp, a similar truck operated by another employe ahead of Pfleger stalled and rolled backward down the ramp, pinning Pfleger between the two trucks and driving power handle of truck approximately two inches into his groin. This injured cord in his leg and his spinal cord, and incapacitated Pfleger until November 26, 1943.

Pfleger never fully recovered from the effects of the above injury, and subsequently asked on various occasions, as time passed, that he be assigned to lighter work, which requests were unavailing.

Rule 9, which portion concerns the filling of Class 2 vacancies, limited claimant's right to the work because of insufficient seniority.

Your Board has denied claims wherein the rules relied upon when applied to the facts of record did not support the claims; a few such recent awards are:

In Third Division Award No. 8747, without Referee, the Opinion of Board reads as follows:

> "After a full and careful consideration of the entire record we conclude that the rules of the Agreement, relied upon by the petitioner, do not support his claims, either for reinstatement or compensation. The claims, therefore, must be denied."

In First Division Award No. 19003, without referee, the Findings read:

> "Rules relied upon by the petitioner, when applied to the facts of record, do not warrant an affirmative award."

Also see First Division Awards Nos. 18999, 18911 and 18795.

CONCLUSION:

The Carrier has shown:

That claimant was not removed from his position but that he marked off duty of his own volition;

That his request for a hearing was not timely; and

That the rules relied upon do not support the claim.

The claim is without merit and should be denied.

All data and evidence have been made known in conference or through correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant, a Baggage and Mail Trucker at Central Terminal, Buffalo, New York, last worked for the Carrier on April 2, 1956. On that day, according to the Claimant, the Carrier, in violation of the effective Agreement, failed and refused to furnish him employment suited to his physical capacity. It is the Petitioner's view that the Carrier also breached the Agreement by denying the Claimant a hearing requested by letter dated April 2, 1956.

Claimant had been in the Carrier's employ for about sixteen years and while at work early in that relationship, back on October 2, 1943, had sustained an injury to his groin which incapacitated him until his return to service on November 26, 1943. Nearly nine years later, on June 14, 1952, Claimant strained his groin while handling sacks of mail and magazines but appears to have made a complete recovery without loss of time. Shortly thereafter, and continuing for approximately 2½ years until April 1955, Claimant was assigned to lighter work which is referred to as the "Terminal job" by the Petitioner. Apparently, the duties of this work involve operation

of a power driven truck and do not require the same degree of heavy lifting called for by other work performed by truckers.

In April 1955, a Trucker named Craig was assigned to perform the so-called "Terminal job" and Claimant was directed to handle other mail room work. There is no showing that at that time or within seven days thereafter, as required by Rule 23 of the controlling Agreement, Claimant or his representatives filed any **written** complaint, request or grievance. It does appear that during the next few months Claimant repeatedly requested assignment to lighter work and that a meeting was called on September 26, 1955 by the Carrier to consider the matter. At the meeting, which was attended by Claimant, the Local Chairman and representatives of the Carrier, the Local Chairman requested that Claimant be "restored" to the "Terminal job" and the Trainmaster announced that he would notify the Superintendent of his findings and inform Claimant of their decision. However, whatever decision was reached was never transmitted to Claimant or his representatives.

In October 1955, Claimant applied for, at the suggestion of the Carrier's doctor, and received a three-months' leave of absence. Upon returning to work in January 1956, he was used at times on lighter assignments but was gradually required to perform more and more heavy work. On March 27, 1956, the Local Chairman sent the Carrier's Baggage Agent a letter requesting that Claimant be returned to the "Terminal job immediately or we will have to demand a hearing with the Superintendent on the matter." No reply was received to this letter.

On April 2, 1956, the last day on which Claimant worked for Carrier, he was assigned to handle heavy mail sacks in the sorting room and to load them on trains. He remonstrated and requested lighter work, whereupon the Baggage Agent informed him that if he could not do the work assigned to him, he should go home. Claimant then left the operation.

On the same date, April 2, 1956, the Local Chairman, as Claimant's representative, sent the Baggage Agent a letter reading as follows:

> "Please consider this formal personal notice of the grievance of Mr. Norman Pfleger, an employe in your Department.
>
> "We consider Mr. Pfleger entitled to work the Terminal job in the U. S. Mail Room. Your action in depriving him of his regularly assigned position is a violation therefore of the Clerks' Agreement.
>
> "Therefore please arrange for a hearing on the matter in accordance with scheduled requirements."

The Carrier has refused to grant the requested hearing on the ground that Claimant has not complied with the prescribed procedural time limitations. Carrier also contends that Claimant was not deprived of his position and could have returned to work if he so desired. In that connection, we note that Carrier's Superintendent advised the Assistant Chairman in writing on August 29, 1956, that "Insofar as we are concerned, there is nothing to stop him [the Claimant] from returning to his assigned position at any time."

With respect to the merits of the case, the record does not support Claimant's position. There is no evidence that he was entitled to the work

in question and, on the basis of the entire record as it now stands, we can not find a constructive discharge. Moreover, despite his own assertions, it has not been established by competent evidence that Claimant was physically unable to continue in service in his last position with the Carrier.

However, quite apart from the merits, this claim is barred on a procedural count. Rule 23 of the applicable Agreement states:

> "An employe who considers himself unjustly treated shall have the same right of hearing and appeal as provided in Rule 22 if written request is made to his immediate superior within 7 days of the cause of complaint."

An examination of the Local Chairman's above-quoted request of April 2, 1956, for a hearing shows that it plainly relates to a grievance that Claimant is entitled to work the "Terminal job". That "job" was assigned to Craig, another Trucker—an ailing employe, we are told—back in April 1955 and he was still on the "job" on April 2, 1956 and continued in that capacity until his retirement on disability in March 1957. Claimant was given other work upon Craig's assignment in April 1955 to the "Terminal job." Clearly the time to have requested hearing on that point was within seven days of Craig's assignment—not one year thereafter. The time requirements of the Rule are definite and unambiguous and were agreed to by both contracting parties. There is no valid reason why its limitations should not be observed in the present situation. (See Awards 8889, 8724, 8564, 7144, 2574.)

It may be that Claimant's representative wished to complain about something other than the "Terminal job" assignment in his letter of April 2, 1956—perhaps concerning an alleged constructive discharge or discriminatory treatment or that other light work was available to which Claimant should be assigned. However, he did not make any written statement that by any reasonable stretch of construction, could be interpreted as embracing those complaints. He confined himself to a request for a hearing on the "Terminal job" issue. While it is not necessary that a grievance follow any certain form, language or grammatical construction, it is essential that it state reasonably clearly the nature of the complaint; otherwise the Rule 23 time requirement that requests for hearing be filed in writing within seven days "of the cause of complaint" would be meaningless.

We are limited by the record developed on the Carrier's property in this case and, on that basis, including particularly a consideration of the filed grievance in the light of Rule 23, we must deny the claim.

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;

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

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1959.