

Award No. 11646  
Docket No. CL-11078

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

David Dolnick, Referee

---

**PARTIES TO DISPUTE:**

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

**UNION PACIFIC RAILROAD COMPANY  
(NORTHWESTERN DISTRICT)**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Union Pacific Railroad that:

(a) The Agreement governing hours of service and working conditions between the Union Pacific Railroad and the Brotherhood, effective May 1, 1955, was violated by the Carrier at Portland, Oregon, on April 3, 1958, in the treatment accorded Mrs. Doris A. Ferguson, Steno-Clerk in the General Office at Portland, by withholding her from service with the Carrier as result of a report from their District Surgeon, Dr. Ralph M. Dodson; and,

(b) Employee Ferguson shall now be re-imbursed for wages lost during the period withheld from service, April 3, 1958 to April 21st, 1958, both dates inclusive, a total of 13 days' wages amounting to \$233.17.

**EMPLOYEES' STATEMENT OF FACTS:** Claimant, Mrs. Ferguson, was employed by Carrier on or about September 26, 1957. She occupied various clerical positions from then to March 7, 1958 on which date she was assigned to position of Stenographer-Clerk in the General Manager's office at Portland, Seniority District No. 84, by Bulletin No. 24, copy of which is attached as Employes' Exhibit No. 1. She was continuously employed from September 26, 1957 to March 26, 1958 without loss of any time due to illness.

On Tuesday, March 25, 1958, Mrs. Ferguson felt ill, although she worked that date performing the normal duties attached to her position from 8:00 A.M. to 5:00 P.M. She called at the office of Dr. Kenneth C. Brown, Union Pacific Hospital Association doctor, at or about March 25th about 4:00 P.M. for treatment. Dr. Brown diagnosed the ailment as irritated throat and low fever and advised her to go home.

Mrs. Ferguson remained home pursuant to Dr. Brown's advice on Wednesday, Thursday and Friday, March 26, 27 and 28, 1958. On Friday, March 28,

was right. The fact that claimant was ultimately returned to work in November does not establish that the opinion of the doctor at El Reno was right and that of the one at Oklahoma City was wrong in June. Admittedly, he was convalescing at the time and it is entirely possible that he underwent sufficient additional improvement between then and November 14, the date the Oklahoma City doctor authorized his return to work."

The Third Division in its Award No. 3619 reached the same conclusion—

"In view of the different medical opinions with respect to Claimant's condition, the issue presented is one which cannot be determined by this Board."

Also pertinent to the matter under consideration is the following excerpt from the opinion of this Division in Award No. 5908 —

"The facts of record indicate that the Carrier has not violated the terms of the Agreement. That the actions taken by the Carrier were based upon the recommendations of competent doctors. The Carrier, under such circumstances, was not only acting within the bounds of their discretionary powers, but was under a moral obligation to the public, other employees, and to the Claimant to take the action that was taken."

Therefore, in summary, the Carrier submits—that the Agreement rules were not violated and that there is nothing more involved here than a question of Claimant's physical qualifications; that the Board should, therefore, dismiss the action; that in any event it must be found that no valid basis for awarding Claimant the payment sought has been established and the claim should be denied.

All data used in this Response to Notice of Ex Parte Submission are of record in correspondence and/or have been discussed in conference with the Organization's representatives.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimant was hired on September 26, 1957. From that date until March 7, 1958, when she acquired and was assigned to a regular position, she worked intermittently a total of approximately fifty-four days.

On March 25, 1958, Claimant felt ill and consulted a doctor. He advised her to go home. She remained at home on March 26, 27, and 28, 1958. On the last date, she again visited the doctor who, after examining her further, advised her that she could return to work on Monday, March 31, 1958. She did so resume her position as Stenographer-Clerk on March 31, 1958.

On Tuesday, April 1, 1958, her supervisor instructed her to report to Dr. Ralph M. Dodson for a physical examination. She submitted to an examination on the same day. The next day, April 2, 1958, she was advised that she was withheld from service because she was "physically disqualified."

About a week later, April 9, 1958, Petitioner's Division Chairman wrote to Carrier's General Manager as follows:

"Referring to your letter of April 2 to Mrs. Doris A. Ferguson, withholding her from service account physically disqualified effective April 3.

Mrs. Ferguson's application was not disapproved prior to 60 days as required in Rule 44. We are, therefore, requesting a hearing per Rule 45, to which Doctors Dodson, Brown, and Mrs. Ferguson's family physician, Doctor Howard E. Haskin, should be invited to give their findings as to Mrs. Ferguson's physical condition.

Will you kindly advise if this hearing will be held."

Carrier's General Manager replied on April 11, 1958, in part, as follows:

"Since the matter in controversy here deals with the question of physical qualification, I am wondering if it is the committee's desire for a hearing to be conducted in the same manner as where disciplinary matters are involved, or is it the desire of the committee that an impartial medical board be established to pass on the question of Ferguson's physical qualifications, as provided in the company's physical examination rule, revised July 1, 1949."

The record shows that arrangements were thereafter made for Dr. Gregg Wood to examine Claimant, and if thereafter the question of her physical fitness remained unresolved, that a three men medical board be constituted to make final determination.

Claimant was examined by Dr. Wood on April 18, 1958, who found that she was physically qualified and she was, accordingly, returned to work on April 22, 1958.

Claimant now requests that she be paid \$233.17 for thirteen days of wage loss because of "Carrier's action in unilaterally withholding" her from service (Emphasis ours).

Petitioner argues that Claimant was not withheld from service, but that she was dismissed from service in violation of Rule 45 which reads, in part, as follows:

**"Rule 45. Adjustment Procedure.**

(a) No employe will be disciplined or dismissed without a fair hearing by his supervising officer. Suspension in proper cases pending a hearing which will be held within seven days of the time charge is made or employe suspended, will not be considered a violation of this principle. At a reasonable time prior to the hearing the employe will be apprised of the precise charge against him; in cases of unsatisfactory service or incompetency, all charges to be investigated will be stated. The employe will have reasonable opportunity to secure the presence of witnesses and the right to be represented by the duly accredited representative."

This position is based principally upon a letter dated May 22, 1958, from Carrier's General Manager to Petitioner's Division Chairman which, in part, reads as follows:

"It has been the custom for some time past for Dr. Dodson to examine applicants for employment in clerical capacities and, in

view of his record as a competent medical examiner, I necessarily uphold his findings that Ferguson, as of April 1, 1958, did not meet the Company's physical requirements for employment. The fact that a different physical condition was found to prevail on examination at a later date does not discount the correctness of the first examiner's earlier findings." (Emphasis ours.)

The mere fact that Claimant had acquired permanent seniority status under Rule 44 does not deprive Carrier of the right to have employees examined to determine their physical fitness to continue in their employment. If an employee is then withheld from service because he has been found to be physically unfit, a disputed physical disability is handled under Carrier's Physical Examination Rule 54 fully set out in the record. It is necessary only to determine that Carrier's action was not arbitrary or capricious. The record in this case shows that Claimant's re-examination by Dr. Wood was in accordance with this Rule 54.

Furthermore, all of the correspondence between the parties treats the issue as a wrongful withholding from service and not as a dismissal from service. On April 2, 1958, Claimant was notified in writing that:

"It will be necessary, effective April 3, to withhold you from service account physically disqualified;"

Petitioner's letter of May 7, 1958, referred to the fact that Claimant "was withheld from service as a result of a physical examination by Dr. Dodson. . . ." Again on May 16, 1958, Petitioner wrote requesting compensation "for wage loss from April 3 to April 22, when she (Claimant) was held out of service. . . ." Nowhere in the record, except by reference to Rule 45, is there any direct charge that Claimant was dismissed from service.

Rule 45 provides for procedures when employees are discharged or disciplined. Claimant was not discharged or disciplined, and, therefore, this Rule is not applicable. Carrier's Physical Examination Rule 54 provides for procedure to be followed when an order withholding an employee from service because of some physical defect is challenged by the employee.

There is nothing in the record to show that Carrier's action in withholding Claimant from service was malicious, arbitrary or capricious. Dr. Dodson is a highly regarded, qualified physician. Carrier had every right and reason to rely on his judgment and findings. Whether his judgment was wrong is not an issue before us. The fact is that when Petitioner first presented the claim Carrier suggested and subsequently did have Claimant re-examined.

We are not competent to judge whether or not the findings of Doctors Dodson and Wood are conflicting. We are not qualified to determine the adequacy of either examination. In good faith Carrier had a right to rely on Doctor Dodson's recommendations. There is no challenge of Carrier's good faith.

**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 Carrier did not violate the Agreement.

**AWARD**

Claim is denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of **THIRD DIVISION**

**ATTEST: S. H. Schulty**  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1963.