Award No. 16116
Docket No. CL-16855

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

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PARTIES TO DISPUTE:

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

DETROIT AND MACKINAC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6230) that:

(1) The Carrier violated the current Clerks' Agreement, effective September 1, 1949, and as revised March 15, 1966, when on July 12, 1966, it refused to permit Employe Earle Crown, Storekeeper at Tawas City, Michigan, his right to work his position because of "a physical report."

(2) Carrier further violated the Clerks' Agreement and acted in an arbitrary, biased and a discriminatory manner when it held claimant out of service on basis of a medical report only; yet at no time has any complaint been made as to his ability to perform the work assigned to his position, from the time first assigned, up to and including July 11, 1966, last day he worked, and

(3) That Mr. Earle Crown shall be restored to service, with full seniority rights to his assigned position and all other rights restored and compensated at Storekeeper rate, effective July 12, 1966, and continuing thereafter until such time as he is restored to service, and

(4) The Carrier shall be required additionally to compensate Mr. Earle Crown for all monetary losses sustained for work and/or compensation he would have been entitled to and/or perform, had he not been improperly denied his right to return to service, and

(5) Mr. Crown shall be additionally compensated at the legal Michigan State percentage interest rate on all monies and/or benefits which would have been paid him effective July 12, 1966, and continuing thereafter until this claim is adjudicated.

EMPLOYES' STATEMENT OF FACTS: Earle Crown was first employed by this Carrier in the Texas Station Office, Texas City, Michigan, September 28, 1953. On September 28, 1954, he was awarded the position of Storekeeper, Tawas Shop which he occupied until July 11, 1966.

On April 14, 1966, Mr. Crown was requested by Mr. J. E. Daugherty, Superintendent, Mechanical Maintenance, to take a physical examination at 6:00 P. M., Friday, April 15th, 1966, at Jones Clinic in Bay City, Michigan, some sixty-five (65) miles distance, which would have required a round trip of some one hundred and thirty miles driving for claimant.

Carrier withdrew this request after they were advised Claimant would be entitled to overtime pay for time involved plus travel expenses, as Carrier did not imply it would furnish transportation. (See Employes' Exhibit A.)

Nothing further was said until Claimant was sent April 21, 1966 for examination, which was taken by Claimant, and on July 11, 1966, he was advised "you will be held out of service effective with the end of tour of duty July 11, 1966." (See Employes' Exhibit B and C.)

In addition to the merit of this case, it is position of the Organization that Carrier has violated the time limit rule in that it has not, as of this date, given its decision in writing, in reply to our letter of October 5, 1966. (See Employes' Exhibit H.)

For your ready information and reference, copies of the entire exchange of correspondence, on this claim, between the representatives of the Carrier and the Organization, are attached hereto. (See Employes' Exhibits A through P.) (Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** Following careful consideration by the Company, Earle Crown was withheld from his job as Storekeeper on the advice of the Company Doctor for his own safety and the safety of others working with or near him.

**OPINION OF BOARD:** Claimant in the instant case was held out of service effective with the end of the tour of duty July 11, 1966 as a result of a physical examination conducted by a Company physician. The claim involved was submitted to the Carrier by letter dated October 5, 1966. The Petitioner, on behalf of Claimant, assumes the position that Carrier has violated the time limit rule in that it has not given its decision within the prescribed sixty day time limit.

Carrier, in addition to defending its decision in this matter on the merits of the case, answers the aforesaid procedural defect by alleging that its officer did reply to the original claim by "speed memo" dated October 10, 1966. A review of all the documentary exhibits submitted by the Organization in their original Ex Parte submission, which purportedly is the complete file in this case, thus evidencing the full handling of this matter on the property, does not contain the "speed memo," which Carrier alleges it sent to the Organization. The correspondence does contain a brief letter from Carrier to the Organization stating that the "speed memo" of October 10, was intended as a denial of the claim. The reply to this letter from the Organization states that the "speed memo" was never received by either the Claimant or the Organization.

Adhering to the best evidence rule, the Carrier should have submitted the "speed memo" in its original Ex Parte submission, but it failed to do so. It does submit what purports to be the "speed memo" in question with its rebuttal brief. Neither the original "speed memo" nor a copy of it was submitted to

the Organization on the property even after the Carrier had been placed on notice that the Organization had not received it and were charging Carrier with a violation of Rule 47, the time limit rule.

We therefore will sustain the claim as presented.

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;

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of March 1968.

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