

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19983  
Docket Number MS-20198

Frederick R. Blackwell, Referee

(Hugh R. Worman

PASTIES TO DISPUTE: (

(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM: This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on March 31, 1973, covering an unadjusted dispute between me and the Louisville and Nashville Railroad Co., involving the question:

Whether or not the employee, Hugh R. Worman, was wrongfully discharged from his job as a clerical employee of the Louisville and Nashville Railroad Co. on July 16, 1968. The employee who, at that time, had been an employee of this Company for approximately 17 years was forced to be off work from early June, 1967, until February 20, 1968, because of illness. At that time he was reinstated as a clerical employee with the Louisville and Nashville Railroad Co. and worked until July 16, 1968, at which time he was wrongfully discharged. In spite of numerous requests, he was denied a hearing for the purpose of ascertaining whether or not he was, in fact, wrongfully discharged, in violation of Sec. 19 A of the Agreement between the employee and the Brotherhood of Railway and Steamship Clerks, Freight handlers, Express and Station Employees, of which he was a member.

OPINION OF BOARD: Claimant, a yard clerk at Nashville, Tennessee, was removed from service due to physical inability to do his job. Carrier's letter removing him from service, dated July 17, 1968, reads as follows:

"Confirming conversation with you in my office on July 16, this is to advise that due to your physical condition preventing you from properly performing your duties, you are being removed from the service until such time as your condition is improved to the extent that you are physically and mentally able to do so.

"Your name will be carried on the seniority roster until you reach the age 65, and if and when your condition improves to the extent that you can meet our requirements prior to that time, you will be restored to service."

Upon receipt of the above the claimant filed a continuing claim for lost wages which was declined on July 22, 1968. The Organization then appealed the denial, initially on the ground that claimant had not received a Rule 19 hearing (discipline) and, subsequently, on the additional ground that claimant had not been examined by a doctor prior to his removal from service. Carrier's response was that the hearing requirement was inapplicable, since discipline was

not involved in the removal, and that several doctors, including Carrier's doctor, had examined claimant and reported on his condition. The Carrier also established that, beginning in 1964, claimant had a health status which resulted in absences from work and two leaves of absence involving several months each. Apparently, as indicated by the correspondence on the property, the Organization and the Carrier both ultimately saw the issue as a matter for resolution by medical opinion. The correspondence also shows that, while several medical reports were submitted in behalf of claimant's ability to return to work, the Carrier viewed such reports as not germane to claimant's condition which, according to claimant's own therapist, was caused by "nerve stress and tension". The last report submitted in claimant's behalf, based on a June 26, 1970 examination by Dr. Russell D. Ward, stated that: "Strictly from a physical standpoint, I find him to be essentially in good health." The Carrier's view of this report, as found in a July 29, 1970 letter of Mr. J. B. Clark, Assistant Vice-President, Personnel and Labor Relations, is as follows:

"Dr. Ward's statement, 'Strictly from a physical standpoint, I find him to be essentially in good health,' is encouraging. However, Mr. Worman was disqualified not because of his physical condition but because of severe nervous or mental condition. Dr. Ward gives no indication that he now considers the psychiatric condition improved; he merely states that he gathers Mr. Worman is not now taking medication for it.

It is further noted that Mr. Worman advised Dr. Ward that he is working regularly in the factory of the Avco Corporation and 'believes that he feels better doing factory work than he did doing office work.' Therefore, it seems that if he is actually happier doing factory work than he was doing office work, it would be extremely unwise to change his occupation, at least until such time as his emotional behavior has become recognizably stable.

Quite frankly, we find nothing in Dr. Ward's report for June 26 which would appear to justify consideration of Mr. Worman's being returned to active service at this time and your request for such action must be respectfully declined."

No response was made to the Vice-President's letter, nor was there any further handling of any kind until March 1, 1973 (2½ years later) when claimant's attorney filed a notice of intent to submit the claim to this Board.

The claimant, through his attorney, treats the matter as a discharge case and asserts that he should be restored to service with back pay, because he was not given a hearing as required in such cases. Carrier says there has been no discharge and, hence, no hearing was required, and that, in any event, the claimant is barred by the time limit provisions in Rule 20(c) which require a claim to be submitted to this Board within nine months of the denial of the claim at the last appeal level on the property.

Obviously, the  $2\frac{1}{2}$  years which expired between the last handling on the property and the filing of notice of intent with this Board is well outside the nine months period prescribed by Rule 20; consequently, this Board is barred from considering the claim on its merits. We would nonetheless call attention to the following portion of Carrier's July 17, 1968 letter which removed claimant from service.

"Your name will be carried on the seniority roster until you reach the age 65, and if and when your condition improves to the extent that you can meet our requirements prior to that time, you will be restored to service."

It is apparent from the foregoing text that claimant has not been discharged from service as a disciplinary measure and that his employee status with Carrier has not terminated. Claimant is still on the seniority roster and he may call upon Carrier to return him to duty at any time prior to age 65, if medical professionals, competent to speak on his condition, establish that he is fit to return to service. Thus, had we reached the merits in this case, we could have afforded no relief as claimant's return to work depends essentially upon his medical advisers and whether his condition improves.

In view of the foregoing we shall dismiss 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 oral hearing;

That the Carrier and the Employee 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

The claim is barred by the time limit provisions.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 12th day of October 1973.