NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25345

THIRD DIVISION

Docket Number MS-25216

George S. Roukis, Referee

PARTIES TO DISPUTE: (James W. Little
(Burlington Northern Railroad Company
(Formerly Fort Worth and Denver Railway Company

STATEMENT OF CLAIM:

"Petitioner seeks award of back pay, reinstatement of seniority rights, an additional day's pay at the rate of his rightful seniority position for the period of March 31, 1978 to this date or the date of this Board's final decision and other such further relief to which he may be justly entitled based on four claims: three against Respondent Burlington Northern Railroad Company, (hereinafter referred to as 'Respondent BN'), and one against Respondent Brotherhood of Railway, Airline and Steamship Clerks, (hereinafter referred to as 'Respondent BRAC' or 'union').

The claims are as follows:

I. That Petitioner, then a clerk for the Respondent BN (Fort Worth and Denver Railway Company), was wrongfully found medically unfit and refused permission to return to work during the period December, 1977 through March 31, 1978;

II. That Petitioner was wrongfully discharged from service by Respondent BN on March 31, 1978;

III. That Petitioner was wrongfully refused the opportunity and permission to 'mask up' as available for work and service with Respondent BN by agents or employees of said Respondent during the period December, 1977 through August, 1982;

all in contravention of the rules of agreement then in force.

Further, Petitioner claims:

Iv. That Respondent BRAC, though charged with representing Petitioner in disputes with Respondent BN, wrongfully refused or negligently failed to provide adequate representation to Petitioner in his claim and grievance against Respondent BN, and that said lack of representation may have served to irreversibly prejudice Petitioner's right of redress and appeal regarding his wrongful termination and refusal of return to service against Respondent BN.

Petitioner or his representative have made all of the materials herein cited available to Respondents, where Respondents may have previously been unaware of the materials existence, except where materials have heretobefore been privileged, and all said materials have been made part of the questions in dispute. (See Attachment 'A')"

OPINION OF BOARD: In this dispute, Petitioner asserts that Carrier wrongfully found him medically unfit and refused him permission to return to work during the December, 1977, through March 31, 1978, period. His seniority with the Fort Worth and Denver Railway Company commenced on April 30, 1977. He avers that Carrier's action manifestly contravened the applicable rules of the Controlling Agreement as evidenced by its failure to provide him an investigation or review forum to demonstrate his medical fitness and denied him an opportunity to earn a livelihood. He contends that despite his name appearing on seniority rosters, Carrier precluded him from marking up as available for work and service.

Carrier asserts that the claim is procedurally defective since Petitioner failed to file and progress the claim in accordance with Section 153, First (i) of the Railway Labor Act, as Amended, Rule 38 of the Controlling Agreement and Circular 1 of the National Railroad Adjustment Board. In effect, it argues that the claim was not handled and conferenced in the usual manner, antecedent to its submission to the Third Division. Instead, Petitioner through his Attorney first filed a continuing claim on December 14, 1982, with the President of the Fort Worth and Denver Railway Company. It is Carrier's position that Petitioner's failure to comply with the dispute settlement provisions of the applicable Rules Agreement as defined and constrained by the Railway Labor Act, as Amended, invalidates the standing of his claim. It cited Andrew v. Louisville & Nashville R.R. 406 U.S. 320 (1972) as a controlling authority and numerous rulings of the Third Division. See Third Division Award Nos. 23579, 19790, et al.

Correlatively, as to the substantive merits of the dispute, Carrier maintains that consistent with its duty to determine the physical qualifications of its employes, it has the right to rely upon the advice of its physicians to ascertain whether an employe is physically qualified to return to work. In the Case of Claimant, Carrier argues that following his physical examination on January 30, 1978, by Dr. M. K. Armstrong, but before Chief Surgeon W. P. Higgins advised Carrier to keep him out of service because of his back's condition, Claimant obtained employment with the Santa Fe Railway Company on February 26, 1978. Carrier opines that the reason Claimant did not challenge its medical findings and its ancillary refusal to allow him to return to work was because he found employment elsewhere.

In our review of this case, we concur with Carrier's position that the claim is procedurally defective. It was not initiated, progressed and appealed in the manner required by the Railway Labor Act and it was improperly submitted to the Board. Section 301.2(b) of the Rules of Organization and Procedure issued by the National Railroad Adjustment Board as Circular No. 1 on October 10, 1934, expressly denies Divisional jurisdiction where a petition has not been handled in accordance with the provisions of the Railway Labor Act. The petition herein is palpably invalid 'and it is dismissed. Claimant did not make reasonable efforts to resolve the dispute pursuant to the required claim settlement procedures and standards.

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 claim is barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1985.