Award No. 1487
Docket No. SG-1496

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of M. F. Whitaker for wages lost from February 8, 1940, to May 1, 1940, account being improperly held out of service during that period."

EMPLOYES' STATEMENT OF FACTS: "On July 19, 1937, while working as an assistant signal maintainer, Mr. M. F. Whitaker suffered a back injury lifting one of the Carrier's track motor cars. He was taken to a company doctor for treatment and returned to work after being off duty two and one-half days.

"In order that the Carrier might prevent having this become a reportable accident, it returned Whitaker to work on his regular position after his two and one-half days' absence and placed another employe on the job with him to perform his duties. This employe (Paul Dilger) remained with Whitaker for a period of two weeks, after which Whitaker was able to resume his regular duties.

"Whitaker continued to work as an assistant signal maintainer until October 18, 1937, when, under the provisions of the current signalmen's agreement, the Carrier forced him to assume a position of signal maintainer. From that time until February 8, 1940, the date he was removed from the service, he worked various positions of signal maintainer and assistant signal maintainer due to fluctuation in forces.

"During the early part of the year 1940, Mr. Whitaker conferred with Mr. W. C. Finck of the Carrier's claim department concerning the further handling of his injury case. Shortly thereafter Whitaker was sent to the office of the Carrier's Chief Surgeon at Cleveland, Ohio, for a physical examination. The examination developed that his tonsils were bad and the doctor suggested that he have them removed. The doctor did not inform Whitaker that he was unable to work and would be removed from the service but did advise him not to do any heavy lifting. During the time he was being held out of service he had his tonsils removed.

"On February 6, 1940, Mr. Whitaker was called to the office of Division Engineer, Mr. B. Blowers and in the presence of Mr. J. H. Storms, Signal Supervisor, was informed that inasmuch as there were no positions in the Signal Department which did not require heavy lifting, he would be removed from the service on February 8, 1940.

"Prior to the time Whitaker was dismissed from the service there was no investigation held and he was not given an opportunity to have a repre-

"4. The examining surgeons were in agreement that Whitaker's condition was not due to accident in July, 1937, but rather was due to a toxic condition which had been brought about by diseased tonsils."

OPINION OF BOARD: This is a claim for wages lost from February 8, 1940, to May 1, 1940, on account of the employe "being improperly held out of service during that period." The grievance was, however, presented by the Committee on the basis that the employe was wrongfully dismissed from the service of the employer. The discrepancy in the scope of the claim as submitted and as presented to the Board in argument is not however of importance.

The Committee relies on Rule 54 which provides for certain procedure before an employe can be "disciplined or dismissed." A similar rule has however been held applicable only in cases of discipline. See Award 676. Clearly, the case now before the Board is not one of discipline. It is also suggested that the carrier violated Rule 56 in not assigning to the employe other work which he was able to handle; but in the view which we take of the facts there was no breach of this Rule. There is, strange to say, in the Agreement, effective November 1, 1935, between the employes of this department and the carrier, no specific rule as in other similar agreements providing for a remedy by the employe in a case of wrongful dismissal other than for discipline. It is, however, assumed by the carrier that there is a remedy. In fact to hold otherwise would be contrary to the whole spirit of the Agreement, and it is obvious that, if the carrier has an absolute power of dismissal, Rule 54 is superfluous. We shall, therefore, treat the case on the theory that for a wrongful dismissal or for an unwarranted lay-off, an employe has a remedy.

The claimant while on duty suffered injury to his back, July 19, 1937, and subsequently returned to his work. Whether he was returned in 3 days with a helper in order that the carrier would not have to report the injury as claimed by him is not, in the view which we take of the case, a matter of importance. He continued his work as an assistant maintainer, as a maintainer, then as an assistant maintainer, and then as a maintainer.

In November or December, 1939, Whitaker conferred with W. C. Finck of the carrier's claim department relative to the injury which he had suffered more than 2 years previously with which he was having some trouble. The carrier made arrangements for him to be examined by a Dr. Lippincott who recommended that he be sent to a specialist. January 8, 1940, at the instance of the carrier he was examined by Dr. Spaulding in New York whose opinion was that his condition was due to diseased tonsils and advised that they be removed. On recommendation of the claim department he was subsequently examined by Chief Surgeon Dinnen at Cleveland on January 11, 1940, who recommended that he should not be assigned to work which required heavy lifting. The carrier claims that pursuant to Rule 56 the employe was offered a position as a crossing watchman, which position, at that time, he was not ready to take. On February 6, 1940, the Division Engineer advised Whitaker that he follow Dr. Spaulding's recommendation and have his tonsils removed. On the same day, according to the employes' statement, he was called to the office of the Signal Supervisor and was told that as there were no jobs in the Signal Department which did not require heavy lifting he was through as a signalman, and he went out of service February 8, 1940. What happened thereafter is important as showing the interpretation which the parties themselves put on the then status of the employe. February 12, 1940, Whitaker had his tonsils removed and left the hospital the next day. March 2, 1940, he advised the carrier of what he had done and according to the carrier's statement said that he was not ready at that time to decide about the position of crossing watchman, that his back still bothered him. March 13, the carrier paid him $50 for living expenses on account of any claim for his injury of July 19, 1937. On March 21, 1940, a regular position as signal maintainer at Passaic Junction on the N. Y. S. & W. Railroad was advertised. Whitaker applied

for the job, was examined by Chief Surgeon Dennin at Cleveland, April 26, 1940, was found qualified, took the position and, started work May 1, 1940.

The Committee argues that Whitaker was removed from his position not because of his physical condition but for the purpose of intimidating him because of his efforts to secure compensation for his injury. The record does not sustain this charge. On the contrary, it appears to us that the decision of the carrier that Whitaker should cease work February 8th was on the whole accepted by the claimant as a proper decision. He made no protest. He was operated on, reported to the carrier subsequently his condition, and apparently when he felt able applied for the new position which had been advertised. Whether or not the position of crossing watchman was offered to him February 6, 1940, is immaterial for he wisely decided to accept the advice of the carrier to go to the hospital for an operation. In our opinion the claimant has no just cause to complain because of his treatment by the carrier.

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 employe involved in this dispute are respectively carrier and employe 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 provisions of the Agreement in the action which it took.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of June, 1941.