Award No. 2624
Docket No. CL-2691

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier disregarded provisions of Memorandum of Understanding signed at St. Louis, Missouri, September 22, 1942, providing for leave of absence for employes entering military or naval service of the United States, also Section 8 of the Selective Service Act of 1940, by requiring Clerk Kurt H. Baginski, Decatur, Illinois, to submit to a physical examination before resuming service as clerk, upon reporting for work following an honorable discharge from military service.

(b) Clerk Kurt H. Baginski be compensated at daily rate of $5.80 for each of four days, September 27, 28, 29 and 30, 1943, he was not permitted to resume service on his former assignment, account refusal of local management to permit him to resume service without first submitting to a physical examination at the Wabash Employes' Hospital at Decatur, Illinois.

EMPLOYES' STATEMENT OF FACTS: Following an honorable discharge from military service, Mr. Kurt H. Baginski notified Mr. C. A. Johnston, Superintendent, Decatur, Illinois, that he wished to resume service September 27, 1943, on assignment of typist-clerk, position which he held before going into military service. Superintendent Johnston notified Clerk Baginski that he would have to submit to a physical examination, and if qualified by the Doctor, could then resume service. Physical examination blank was furnished Clerk Baginski by the Superintendent with instructions that he report to the Hospital for a physical examination.

Clerk Baginski declined to report to the Association Hospital at Decatur, Illinois, contending that he had been examined by Army Doctors before being discharged from the Army and he had been informed that in view of the Memorandum of Understanding signed at St. Louis on September 22, 1942, a further physical examination was not necessary.

On or about October 1, 1943, Clerk Baginski agreed under protest, to report to the Doctor for an examination, pending further handling of the dispute, with the filing of claim for four days' pay. He was qualified by the Doctor and resumed service on Monday, October 4, 1943, as typist-clerk, rate $5.80 per day, in the local freight office at Decatur, Illinois.

POSITION OF EMPLOYES: It is the contention of the Committee that the Memorandum of Understanding signed at St. Louis, Missouri, on Septem-

The alleged claim presented by Local Chairman Watson in favor of Mr. Baginski for compensation at the rate of $5.80 per day on September 27, 28, 29 and 30, 1943, was declined by the Division Superintendent because the responsibility for Mr. Baginski not working on those dates did not rest with the Carrier.

Copy of the Memorandum of Understanding signed at St. Louis, Missouri on September 22, 1942, providing for leave of absence for employes entering military service or naval service of the United States, is shown and made a part hereof (marked Carrier's Exhibit "A").

Copy of Form 1758, regulations of the Wabash Railroad Company governing physical examination of applicants for employment and for re-examination of employes for promotion or other causes, is shown and made a part hereof, (marked Carrier's Exhibit "B").

POSITION OF CARRIER: The alleged claim set up in the Committee's ex parte Statement of Claim is without basis under the rules of the Schedule for Clerks, effective August 1, 1929. As a matter of fact, there is no rule in that agreement or in any agreement or understanding that restricts the right of the Carrier to require employes to undergo a physical re-examination when in the judgment of the supervisory officer such examination is necessary, and in that connection, attention is invited to the regulations quoted in the Carrier's Statement of Facts.

The regulations governing the physical examination of applicants for employment and physical re-examination of employes in service (Form 1758) have been in effect for many years and heretofore it has never been contended by the Committee that the Carrier was not privileged to require employes covered by the Schedule for Clerks who had been absent from the service for a period of six (6) months or longer to undergo a physical re-examination before resuming service, or at any other time when in the judgment of the supervisory officer, such re-examination was necessary.

As shown by the Carrier's Statement of Facts, the responsibility for Mr. Baginski not working on September 27, 28, 29 and 30, 1943, does not rest with the Carrier, but on the contrary, rests solely with the individual in whose favor a claim has been presented, or with the Local Chairman whose advice it is presumed Mr. Baginski followed in not reporting at the Decatur Hospital for a physical re-examination prior to September 27, 1943, as instructed by the division officers on September 24, 1943.

The submission of this alleged dispute to the Board is without question an attempt on the part of the Committee to obtain a new rule in a manner contrary to the provisions of Rule 24 of the existing agreement and Section 6 of the Railway Labor Act, which would restrict the right of the Carrier to require employes who had been absent from the service for a period of six (6) months or longer to undergo a physical re-examination prior to resuming service, and therefore, involves a request for a new rule. As the granting of new rules does not fall within the province of the Board, the contention of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: The parties agree this claim involves a question of first impression before this Division and express grave doubt as to whether it has been passed upon by other divisions of the Board. We shall, therefore, go into more than usual detail in stating the facts in order there may be a crystal clear understanding of what we have here submitted for our consideration.

Controlling facts as we view them are: Following an honorable discharge from military service, Kurt H. Baginski, Clerk, rate $5.80 per day, notified the Superintendent at Decatur that he wished to resume service on September 27, 1943, on the position which he held with the carrier before entering such service. The Superintendent advised Baginski he would have to submit to a

physical examination, and if qualified by the doctor, could then resume service on his old position. He was furnished an examination blank with instructions to report to the carrier's hospital for physical examination. This Baginski declined to do, contending he had been examined by Army doctors before being discharged from military service and that in view of the Memorandum of Understanding of September 22, 1942, a further physical examination was not necessary. On or about October 1, 1943, Baginski agreed, under protest, pending further handling of this dispute, to undergo the physical examination ordered by the carrier. Baginski was qualified by the carrier's doctor through a physical examination and resumed service on his position on October 4, 1943. He claims four days' pay, viz., September 27 to 30, 1943, inclusive, for having arbitrarily been held from service by the carrier during that period, contrary to the provisions of the Memorandum of Understanding previously referred to.

This Memorandum of Understanding, bearing date of September 22, 1942, superseded a previous Memorandum of Agreement between the same parties, bearing effective date of October 1, 1940. Section 3 of the Agreement just mentioned reads:

> "3. Employes returning from military or naval service will be required, before being permitted to re-enter the service of the Wabash Railway Company, or its successors, to pass a satisfactory physical examination."

Pertinent portions of the Memorandum of Understanding applicable in this case, hereafter in the interest of brevity referred to as the Memorandum, and which was in effect when Baginski sought to resume service with the carrier on his former position, on September 27, 1943, read:

"MEMORANDUM OF UNDERSTANDING

"Pursuant to Federal legislation (i. e., Public Resolution No. 96, of the 76th Congress, and the Selective Training and Service Act of 1940) any employe of this Company who has established a seniority date and who shall be ordered or inducted into the land or naval forces in accordance with such legislation, or has enlisted in the land or naval forces after the declaration of the existence of an emergency by the President of the United States on September 8, 1939, shall, upon completion of such service in the land or naval forces, be restored to such position with this Company (including rights to promotion), to which his accumulated seniority entitles him, all in accordance with the then existing rules of the schedule agreement, the same as if he had remained in the service (such right to be exercised by the individual within five days from his reporting for duty), provided, upon completion of his service he receives from the Government a certificate as provided by the law, or other proper evidence of release, is still qualified to perform the duties of such position, makes application for return to service within forty days after he is released from such training and service, and provided this Company's circumstances have not been so changed as to make it impossible or unreasonable to return him to his former position or a position of like seniority, status and pay; provided, that in connection with voluntary enlistments in the regular land or naval forces, the above will apply only to the first period of such enlistments.

"The general purpose hereof is to provide that all such persons who return to the service of this Company in accordance with the provisions of the paragraph above, shall be considered as having been on leave of absence or furlough during their period of training and service, shall be restored to service without loss of seniority, and shall be entitled to participate in the insurance or other benefits offered by this Company pursuant to established rules or practices relating to employes on furlough or leave of absence."

Unless it be because of the phrase "is still qualified to perform the duties of such position" Baginski met all the requirements of the Agreement above referred to and quoted in part. He entered the service of the carrier on September 8, 1941, and established a seniority date under the terms of the Clerks' Agreement of August 1, 1929. He was inducted into the armed forces of the United States on or about December 10, 1942, the last day he performed service for the carrier and was subject to the terms of the Memorandum which was then in effect. He had completed his service in the land or naval forces and was honorably discharged therefrom and he presented his honorable discharge to the carrier.

It should be here noted that when Baginski first sought to resume service his request was denied by the carrier for the following reasons which we quote from its own statement of facts:

> "In keeping with the regulations quoted above, and in view of the fact that Mr. Baginski had been discharged from the Army on account of his physical condition, he was advised by the Superintendent on September 24, 1943, that it would be necessary for him to report to the Hospital at Decatur for a physical re-examination before resuming service."

The regulation referred to was one adopted unilaterally by the carrier prior to the effective date of the Memorandum. It reads in part as follows:

> "All employes who have not performed service for the Company for a period of six months or longer on account of reduction in force, or for any other reason, will be required to take a re-examination before resuming work. Employes in all classes will be required to take re-examination when in the judgment of supervisory officer or doctor such re-examination is necessary. All employes who have suffered severe injury or illness must be examined before they re-enter the service."

Also to be noted is the fact the carrier did not predicate its refusal on the basis Baginski was not still qualified to perform the duties of the position but predicated it on other grounds not to be found in the Memorandum.

Summarized, the petitioner's position is as follows: The provisions of the 1940 agreement which permit the carrier to require employes returning from military or naval service to pass a satisfactory physical examination before resuming their former positions has been superseded by the Memorandum which agreement also nullifies the earlier regulation promulgated by the carrier; the Memorandum requires employes to resume their former positions without undergoing any physical examination; the carrier violated the terms of the Memorandum and the provisions of Section 8 (b) of the Selective Service Law, Public No. 783, 76th Congress, when it refused to permit Baginski to resume service when he sought to do so on September 27, 1943, and it should now be required to compensate him for the days he was arbitrarily withheld from service as stated in his claim.

Likewise summarized, the carrier's position can be thusly stated: There is no rule in any agreement or statute restricting the right of the carrier to require employes to undergo physical examinations when in the judgment of the supervisory officer such examination is necessary; its regulations, as well as the Selective Service Law, permit it to require such examinations under the circumstances stated; the submission of this claim to the Board is an attempt on the part of the Committee of the Brotherhood to secure a new rule in the agreement contrary to Rule 24 of the Clerks' Agreement and the provisions of Section 6 of the Railway Labor Act; Section 8 (c) of the Selective Service Act expressly recognizes established practices applicable to employes on leave of absence and therefore permits the application of its promulgated regulation; no rule, statute or contractual obligation was violated by its action.

In passing we pause to note a proposition advanced on behalf of the respondent to the effect the 1940 Agreement was not superseded by the Memorandum. That contention is startling in its significance and we frankly concede if it could be substantiated would be entitled to great weight in our deliberations. However, as heretofore indicated we have eliminated it from consideration and hold such Agreement was superseded by the Memorandum. Our action is impelled by carrier's supplemental statement No. 1 in which the following statement appears:

> "In 1942 representatives of the eastern, southeastern and western railroads met with representatives of the standard Railway Labor Organizations and entered into an understanding with respect to leave of absence for employes who enter military or naval service of the United States. That Memorandum of Understanding was subsequently adopted by the Wabash Railroad and as the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes was party thereto, it was agreed to place the same in effect in lieu of the agreement dated October 1, 1940 submitted to the Board by the Committee as Employes' Exhibit 'B.' The primary purpose was to have a uniform understanding on all railroads and it was for that reason, and not on account of the provisions of paragraph 3 of the Memorandum of Understanding, effective October 1, 1940, that the Committee desired to place the Memorandum of Understanding signed at St. Louis on the 22nd day of September 1942, in effect."

Having conceded the Memorandum was put into effect "in lieu of" which by all well recognized definitions means "in place of" carrier cannot, irrespective of the purpose for such action, now be heard to deny or go behind that admission.

In the light of what has been related what is to be said for the contentions advanced by both claimant and respondent?

The Selective Service Law as we view it is not determinative of the rights of the parties except that it may be said to indicate intention on the part of the Congress of the United States to make it as easy as possible for servicemen to return to work. Moreover, incorporated within the four corners of the Memorandum is to be found in substance the provisions of the Act which might be applicable to the instant controversy. It is our province to deal with contractual relations existing between employe and carrier, not to attempt to prejudge the effect of provisions of an Act subject to the jurisdiction of the Federal Court. For that reason we shall not presume to pass upon the effect of the term "is still qualified to perform the duties of such position" as it is found therein. We shall, however, at the risk of being presumptuous venture the opinion that the language to be found in 8 (c) of such Act, and relied upon by the carrier in support of its position, refers to rules and practices applicable to insurance and other benefits rather than to rules and practices pertaining to examination requirements for honorably discharged members of the armed forces who seek to return to work.

Nor do we believe the unilateral regulation promulgated by the carrier is applicable to this dispute. It was enacted long prior to the Memorandum and must yield to its terms when rights of members of the armed forces who seek to resume positions are in dispute.

The conclusions heretofore announced leave the rights of the parties to be determined from what is to be found in the Memorandum. However stated, all other contentions advanced by them now revolve around the proposition of whether the carrier violated or conformed to its provisions in requiring Baginski to undergo a physical examination under the facts appearing in the record.

From here we proceed on a premise which we believe to be universally recognized by courts and all other tribunals possessing judicial and quasi-

judicial powers, that however desirable, it is not the function of such bodies to speculate on or determine what the result might be under a fictitious or theoretical state of facts. Our obligation is to confine our deliberations to the issues presented by the factual situation we have before us.

If we are correct in our interpretation of the evidence Baginski was refused his old position and required to take a physical examination before he would be accepted on the grounds (a) there was a Company regulation requiring him and all other employes who had not performed service for six months to take a physical examination and (b) he had been discharged from service in the armed forces on account of his physical condition. We cannot say that either or both of these grounds given by the carrier and relied on by it in defense of its action was in compliance with the language of the Memorandum requiring it to restore him to his position if he was still qualified to perform its duties. So apparent it seems almost unnecessary to make it is the statement that a discharge from the Army because an individual's physical condition does not permit him to perform the arduous duties required of a soldier is in itself no justification for a conclusion he is not still qualified to perform the duties of the position he formerly held as a civilian. To say the least compliance would have required, a question which we do not here determine, the refusal to have been based upon the plain and unequivocal ground to be found in the language of the Memorandum just quoted. That was not done. In the light of such facts we feel so far as the instant claim is concerned, that we can do nothing but hold the carrier violated not only the spirit and intent but the express provisions of the Memorandum. It necessarily follows claimant must be compensated for the four days intervening between the date he sought to resume his position and the date on which he took it over after having submitted to a successful physical examination.

This Board is fully aware that its decision does not reach an issue, sought to have determined by both parties to this controversy, of whether the Memorandum requires discharged members of the armed forces to be allowed to resume their positions without being required to take a physical examination. Otherwise stated, whether it permits the carrier to require physical examinations in all cases irrespective of whether it has bona fide grounds for believing the serviceman is still qualified to perform the duties of the position he left when he entered the service. Be that as it may we do not believe the pertinent facts presented to us present that question or permit its determination under the rule we are restricted to the factual situation which confronts us and are not permitted to speculate or theorize. There will be time enough to decide such an issue when a case is presented under circumstances where the carrier has refused to permit an employe to go back to work without a physical examination based on the sole ground contemplated by the language of the current Memorandum. For the reasons given we feel it would be improper and do not pass upon such question in this proceeding.

If permitted to digress from the field of fact to the realm of theory we would feel constrained to say that a case based on facts permitting a determination of the issue just referred to will present many problems and difficulties which might well be, in the interest of all parties involved, determined through the medium of negotiation.

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 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 under the factual situation presented by the record the carrier violated provisions of the Memorandum and compensation is allowed in the amount set forth in the claim.

AWARD

Claim sustained as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1944.