

Award No. 4595
Docket No. CL-4589

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement.

1. When at Allouez Ore Docks, Allouez, Wisconsin, they refused to allow Jacob Karsluk to return to work on the ore docks on April 9, 1948, as his seniority entitled him to.

2. That Jacob Karsluk be reinstated to service as of April 9, 1948 and compensated for each and every day thereafter for all wage loss sustained, until such time as he is reinstated to his former position as ore dock employe.

EMPLOYEES' STATEMENT OF FACTS: On February 17, 1947, Jacob Karsluk applied under the Railroad Retirement Act and was granted a pension effective October 11, 1947. Since that time, Mr. Karsluk has regained his health and is physically fit, according to his own physician, and willing to work. On April 9, 1948 Mr. Karsluk applied for work at the Great Northern Ore Docks, and was ordered to report to the Great Northern Doctor for a physical examination. This doctor also found him fit to work.

When he returned to the Carrier's docks and attempted to commence work, he was told he could not work as he was receiving railway disability annuity. The matter was then taken up with the Carrier's Superintendent, Mr. C. O. Hooker at Superior, Wisconsin, requesting that Mr. Karsluk be put to work immediately.

On May 19, 1948, the Superintendent wrote our Division Chairman at Superior the following:

"Great Northern Railway Company
Office of Division Superintendent
Superior, Wisconsin
May 19th, 1948-a

"Mr. E. J. Ovesen
Division Chairman
1207 N. 13th Street
Superior, Wisconsin

Dear Sir:

Regarding the letter written by you to Mr. T. J. Greene about the re-employment of Jacob Karsluk, #84, on the 1948 Ore Dock seniority roster.

"We are agreeable to permitting Mr. Karsluk to go to work as a janitor, as suggested by you, which work would be of such a nature as to eliminate the hazards, particularly to himself and possibly to others, which exist due to the known fact that he has been subject to spells of dizziness.

"I presume that the position of janitor has been bulletined during the period Mr. Karsluk has been on leave of absence and it is my understanding that it is filled by a junior employe and that, therefore, Karsluk could properly be permitted to displace the man now holding this position."

"However, in order to preclude any possibility of error in this respect I would suggest that Division Chairman Denewith get in touch with Mr. Hooker and arrange for Karsluk's return.

Yours truly,

/s/ M. C. Anderson
Assistant to Vice President"

The Superintendent then discussed this matter verbally with this claimant's Local Chairman on the morning of October 1, 1948 and it was agreed that this claimant be returned to service as a janitor as of that date and this claimant was so assigned. This was later confirmed by the Superintendent and the Local Chairman in a letter written by the Local Chairman to the Superintendent dated October 11, 1948.

This Carrier has shown that it was willing to cooperate with the claimant's representatives in giving this claimant employment suitable to his physical condition. The Carrier has shown good faith in this matter and should not now be penalized because of showing that good faith. This claimant is of foreign birth, does not read or write the English language, and the Carrier desirous of protecting his physical and financial interests, has allowed him to acquire a job due to his seniority in a location that is not hazardous to him. It apparently is the position of the claimant's representatives that this employe must be returned to his former position and, irrespective of his physical condition, be allowed to perform service which it has been clearly shown is of a nature such as to create a definite hazard to his life due to his recurring attacks of dizziness. This claimant, of his own volition, requested retirement and was granted a complete annuity. He gave as his reason for this retirement his physical condition and the Carrier was in no way responsible for this request for retirement and it was upon the information that this Carrier furnished the Railroad Retirement Board relative to this claimant's physical condition that the full annuity was granted. The Carrier holds that it has been conclusively shown that the medical record of this man discloses a condition (recurring attacks of dizziness due to high blood pressure) which fully justifies its refusal to permit this man to work on the open dock at least 75 feet above the water and further holds that it has shown that this refusal is not based upon any personal reason as related to this individual since it placed as janitor, a position in which the hazards attendant upon open dock work do not exist.

Therefore, we hold that your Board cannot do other than deny this claim.

OPINION OF BOARD: On November 5, 1947 the claimant requested an indefinite leave of absence, on account of being unable to perform his duties as an ore dock laborer because of sickness, which was granted. He applied for and was granted a full disability annuity by the U. S. Railroad Retirement Board. On April 9, 1948 he requested reinstatement to his former position of ore dock laborer which request was declined.

The Organization contends that he was then physically able to return to his former job and that the Carrier violated Rule 18 when it held him from service "without investigation". That rule by its term is applicable to cases of discipline and dismissal and hence contemplates some affirmative action by the Carrier. In this case the claimant was out of service at his own request

and that rule clearly has no application to requests for return to service under such circumstances.

Rule 22 of the Agreement relates to leaves of absence and, while it contains no specific provision as to return from an indefinite leave of absence for sickness or disability, we believe that when it is considered in connection with the seniority rules that it contemplates the return of one on such a leave to his former position upon removal of the disability.

Where one upon such leave has applied for and been granted a full disability annuity under the law, it is our opinion that the Carrier which formerly employed him is entitled to consider the disability as continuing until some evidence to the contrary is adduced. The claimant did not offer any such evidence when making his request for reinstatement but either requested an examination by or was directed to submit to an examination by the Carrier's doctor. That examination was marked "highblood pressure and heart disease" and "approved if able to perform duties satisfactorily to superior officers".

That being only a qualified approval the Carrier still had the responsibility and function of determining whether the claimant was "able to perform (his former job) duties satisfactorily" to it. It declined to reinstate him. On September 10, 1948 the Organization for the first time requested that consideration be given to placing the claimant in a lighter job such as janitor. Pursuant thereto he was so placed on October 1, 1948.

So far as this record indicates the Organization first produced a doctor's certificate from the claimant's doctor as an exhibit to its reply to the Carrier's rebuttal brief. That certificate is dated September 10, 1948 and states that claimant had been a patient since October 9, 1947, just prior to his taking a leave of absence and applying for an annuity. It also stated that "his general condition has not changed an awful lot if any since that time" and "he appears physically able to do manual labor at this time". It is interesting to note that the date of that certificate is also the date of the request to place the claimant as a janitor which was granted.

Certainly no evidence has been presented to justify a holding by us that the claimant was able to perform the duties of an ore dock laborer on April 9, 1948, nor is it our function to determine the physical capability of the claimant to do such work. Instead it is our sole function to determine whether the Agreement has been violated. Award 2144.

Finding no violation of any rule of the Agreement by the Carrier, the claim must be denied.

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 Employees 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 Carrier did not violate the Agreement.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 18th day of October, 1949.