Award No. 4816
Docket No. CL-4852

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAIL ROAD COMPANY

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

1. The Carrier violated the provisions of the Baggage and Mail Messengers' Agreement when it without written advance notice, investigation or trial, suspended Louis Bromberg, B&M Messenger, from service on March 22, 1949, and

2. The Carrier shall reinstate Louis Bromberg, B&M Messenger, to his position with seniority and all other rights unimpaired, and shall compensate him for all wage losses, retroactive to March 22, 1949.

EMPLOYES' STATEMENT OF FACTS: Louis Bromberg, B&M Messenger, was verbally notified to report to the Passenger Train Master on March 12, 1949. After reporting to the Passenger Train Master, he was sent to the Carrier's Medical Examiner on March 14, 1949. He returned to work on March 15, 1949 and continued to work until March 21, 1949, when he was again verbally advised that he was relieved from his duties as Baggage and Mail Messenger.

After Mr. Bromberg was told to report to the Carrier's Medical Examiner, the Local Chairman advised him to have a checkup made by his personal physician, which he did on March 13, 1949. After being removed from service, Mr. Bromberg had additional physical examinations made. All are quoted below:

Examination made by	Date	Doctor's Report
Dr. Henry M. Ellen	3-13-49	This is to certify that I have examined Louis Bromberg on 3-13-49 and find him physically fit to continue with his work.

Examination made by	Date	Doctor's Report
Dr. S. Michalover	3-22-49	Weight, 158; Blood Pressure, 140/80; Pulse, 76. No cyanosis. No dyspnea. No dependent edema. Lungs clear throughout. There is no increased venous distention. The heart is not enlarged; sounds are of fairly good quality. There is an occasional extra systole. A moderate systolic murmur is heard over the mitral

"9-A-1. This Schedule of Regulations shall be effective February 1, 1938, and shall continue in effect until changed as hereinafter provided. Should either the Railroad Company or the employes desire to change any or all of these regulations, thirty days notice in writing of the modifications desired shall be given by the party to this Schedule desiring said modifications and conference to negotiate said modifications will be held on a date promptly following expiration of the thirty days unless another date is mutually agreed upon."

This rule prescribes the method to be followed when it is desired to change the Agreement and it is not, therefore, applicable to this case.

The several divisions of the National Railroad Adjustment Board (the Third Division in Award 2144) has in cases of this character, consistently adhered to the principle that it is not expert in medical matters and cannot, therefore, reconcile conflicting medical testimony. In view of this and since it has been conclusively proven that Claimant has not been suspended or discharged from the employe of this Company without due process as provided in the applicable Agreement, it is respectfully submitted this claim should be dismissed.

The Trustees of The Long Island Rail Road Company, Debtor, demand strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper hearing of this matter, and the establishment of a proper record of all of the same.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant is a Baggage and Mail Messenger, 65 years of age, with a service record of 43 years with this Carrier.

On March 6th and 12th, 1949, Claimant's immediate supervisor, the Station Master, noted some peculiarities of appearance and conduct on the part of the Claimant and called the matter to the attention of the Train Master. After an interview with the Claimant on March 12th, the Train Master ordered him to report to the Medical Examiner for a check-up. Claimant was so examined on March 14th and the Examiner reported that he was unfit for service. This report was concurred in by the Chief Medical Examiner and on March 22nd the Claimant was ordered held out of service.

It also appears that the Claimant was examined by his personal physician on March 13 and again on April 7th; also by two other doctors of his selection on March 22nd and 25th, respectively, and all three of these medical men certified that Claimant was able to work.

Finally on June 11th, Claimant was examined by a neuro-psychiatrist, at the instance of the Carrier, and this specialist made a comprehensive report in which he concluded that the subject was unfit for work.

Meanwhile, on March 24th the Organization's General Chairman protested the Carrier's action in taking the Claimant out of service and has continued to do so ever since. In an effort to reconcile these differences, the Carrier proposed on September 12, 1949, that the Claimant be examined by a board of three doctors, one to be selected by the Organization, one by the Carrier, and these two to choose the third, with the understanding that the decision of that board as to the Claimant's fitness for work should be final and binding on all parties concerned. The Organization declined this offer.

The Organization has taken the position throughout the pendency of this dispute that its disposition is governed by Rule 6 of the effective Agreement. It relies upon the guaranteed rights of a suspended or dismissed employe to a fair and impartial trial and the obligation resting upon the Carrier to make a prompt disposition of such matters. We think the Organization is in error in assuming that Rule 6 has any application whatever to this case. By its title and content Rule 6 is limited to matters of discipline, and this is not a disciplinary case. The Claimant has not been suspended or discharged;

neither has he been charged with any misconduct. He has merely been withheld from work on the ground that he is not fit for service. This implies no culpability on his part.

We would not be understood as implying that an employe who is wrongfully withheld from service is left without a remedy. His right to fair and just treatment arises from the Agreement and its numerous provisions relating to the right to work, seniority, and the like. We think that it is inherent in an agreement of this character that an employe who deems himself aggrieved by arbitrary and unreasonable conclusions on the part of his employer, relating to his ability to work, is entitled to an impartial review of such matters; and we would not hesitate to assume such jurisdiction in a proper case. Awards Nos. 1499 and 2144.

On the other hand this Board is not competent to substitute its judgment for that of skilled medical men in determining the question of the physical or mental fitness of an employe to work, especially when such medical men take diametrically opposite views with respect to such a matter, as they did here.

We hold, therefore, that in assuming the applicability of Rule 6 to this case, the Organization misconceived its remedy and that it would be improper for us to order the Claimant reinstated to his position, either with or without compensation for wage losses.

The case will, however, be remanded to the property for the further consideration of the issue of the fitness of the Claimant to be restored to his position, if he wishes such a determination. This will be without prejudice to the right of the Claimant to again come to this Board should he feel that the Carrier has arbitrarily held him out of service, in the light of the facts that may be further developed by the parties. We should perhaps add that in the final analysis the resolution of such a question must necessarily depend upon the professional opinions of qualified medical men. See Award No. 4649.

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 claim for restoration to service with pay for time lost, as prayed for, is denied. The case will be remanded to the parties for a fair and impartial determination of the Claimant's fitness to perform the duties of the position from which he has been withheld.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of March, 1950.