Award No. 5729
Docket No. CL-5602

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

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

FRUIT GROWERS EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, (hereinafter referred to as the Brotherhood) that the Fruit Growers Express Company, (hereinafter referred to as the Express Company) violated the spirit and intent of our September 16th, 1949 "Agreement".

1. When it prevented Mr. G. P. Timmons from exercising his displacement rights on the third trick job, at Evansville, Ind., at the Howell Platform.

2. That Mr. G. P. Timmons be placed on the position claimed and be compensated for wage loss sustained from October 9th, 1949.

EMPLOYES' STATEMENT OF FACTS: On September 16, 1949, the Brotherhood entered into an agreement with the Express Company (Employes' Exhibits No. 1 (a) and (b) and (c).) to dispose of all phases of a long-standing controversy involving Mr. G. P. Timmons. Included in the provisions of said "Agreement", are the stipulations that effective September 16, 1949, Management will restore Mr. Timmons to our employes' roster in the Southeastern District with full seniority rights from August 22, 1944, date of his original employment, and that he will be permitted to exercise full displacement rights under the rules agreement on five (5) working days' notice to the employing officer of the position desired.

On October 4, 1949, Mr. Timmons filed his bid on the third trick job, at Evansville, Ind., at the Howell Platform. (Employes' Exhibit No. 2).

On October 5, 1949, as directed by Agent, Mr. C. N. Tait, Mr. Timmons reported at the office of Company Doctor, Dr. F. Minton Hartz, for a physical examination, and under date of October 18, 1949 (Employes' Exhibit No. 3) Mr. D. N. Zirkle, Manager-Personnel and Public Relations, advised the General Chairman, he was found to have an inguinal hernia, disqualifying him for work, and that he was so informed by Agent Tait.

On December 27, 1949, Mr. Harold Chancellor, District Chairman of L. & N. Lodge No. 860, of Evansville, Ind., informed the Brotherhood, by letter, that Mr. Timmons did not have any rupture, and never did have one. (Employes' Exhibit No. 4.)

At a meeting, at Washington, D. C., on January 5th, 1950, with top Express Company Officials, Mr. Zirkle suggested, in view of the conflicting diagnosis

That "No one shall profit by his own fault" is ages-old philosophy and law. Only Mr. Timmons's own faults "prevented him from exercising his displacement right" (acquired and existing only by virtue of said compromise) and from becoming entitled to compensation by "commencing work" on a position so obtained. They were:

Mr. Timmons's own unfitness, failing to pass the physical examination in October 1949, finally and conclusively confirmed (p. 11 supra), per stipulation (p. 10) and

Mr. Timmons's own recalcitrant refusal to commence work in June 1950 upon the very terms of the subsisting compromise which he signed (p. 3 supra), except only that the Company offered (pp. 15-16) to accept for that time (June 1950), without any examination by a physician of its own choice, certificates by others unknown to it, dated May 27. The Company went that length "trusting (pp. 16 and 17) that so doing would end his discontent which had continued nothwithstanding his assent to the agreement for final settlement". Its offer thus to "co-operate with the Brotherhood" (p. 17) was flatly rejected by **Mr. Timmons's own sole election** (p. 16).

The hue and cry about the re-examination by Dr. Hartz and his note and telephone conversation to Dr. Buchholz came too late to be effectual as such. It came after Mr. Timmons, his representative being present, had subjected himself to the re-examination, had undertaken to deliver the note, had taken the calculated risk that Dr. Buchholz might not find the hernia (which result "was to determine his physical qualification for work"), had awaited the result, and had learned that it was not as hoped. Moreover, the belated insinuations of impropriety against Dr. Hartz and Dr. Buchholz stand empty and worthless, without support of a spark of evidence that said telephone conversation contained anything in the slightest degree improper, nor that either physician had any interest in or motive for impropriety. For aught that appears all the physicians were acting professionally; none was partisan nor had any reason to be; none was party to the compromise nor knew its terms, nor did it provide or imply that none should communicate with any other. This Board would not consider dishonorable a member, nor a referee as an eleventh disinterested member, who before or during consideration of a case pointed where strength or infirmity might be found; it will not without clear evidence find guilt in any physician conferring in the like circumstances here.

CONCLUSION

For all the reasons given, the claim should in all things be denied and the Company respectfully requests that the Board so hold.

All relevant argumentative facts and data herein have heretofore been made known to the Brotherhood.

(Exhibits not reproduced).

OPINION OF BOARD: The first question presented in this case, it seems to us, is whether or not Carrier impinged on the displacement right given to claimant in the Agreement dated September 16, 1949, when said claimant sought to exercise such right. The claimant knew he had to present evidence to Carrier of physical fitness before he could exercise his right, see Carrier's Exhibit "A". It is not necessary to decide whether or not Carrier violated the Agreement by requesting claimant to submit to an examination by its designated physician in that it is not shown Carrier acted unreasonably in not accepting claimant's evidence and for the further reason claimant waived his right when he submitted to examination.

The parties by their acts gave further recognition to Carrier's position of physical fitness as a condition precedent to active duty when they agreed to be bound by the opinion of physicians. The record reflects some physicians think

claimant physically able to perform the duties we are concerned with, some do not. We do not think this Board should be called upon to cast aspersions upon members of the medical fraternity, consequently we express no comment relative to the professional ability or other acts on the part of said physicians.

In conclusion this case appears to be one where the claimant rather than the Brotherhood is handling matters. As we read the record claimant himself decided upon the interpretation of the original agreement he seeks to have this Board adopt. We cannot agree with him. We further view this record that Respondent has not receded from its position that claimant may return to work and that his pay will start when he commences work.

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

Claimant may exercise his displacement rights and compensation will begin to accrue when claimant goes on active duty.

AWARD

An Award is entered agreeable to and in conformity with the above and foregoing Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of April, 1952.