

Award No. 6539
Docket No. CL-6629

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
WESTERN WEIGHING & INSPECTION BUREAU

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

(a) The Bureau violated and continues to violate the Rules of the Clerks' Agreement through its action in declaring Mr. Chas. O. Morlan disqualified from the position of Loss and Damage Inspector at Denver, Colorado on or about October 23, 1950.

(b) Mr. Charles O. Morlan be reinstated to his position of Loss and Damage Inspector which was assigned to him by bulletin October 11, 1933.

(c) Mr. Charles O. Morlan be compensated for the difference between what he earned on Position No. 74, Transit Clerk, rate \$10.42 per day that what he would have earned on his regular Position No. 69, Loss and Damage Inspector, rate \$13.49 per day from October 23, 1950 until this violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Mr. Charles O. Morlan entered the service of the Bureau at Denver, Colorado on July 17, 1922 as an extra Inspector and has continued in the Inspection Department until October 23, 1950 when he was removed arbitrarily by the Bureau.

On or about October 4, 1950 Mr. Morlan was called into District Manager H. W. Steinmetz' office and was advised by Manager F. A. Piehl that unless Morlan retired by November 1, 1950 he would be taken out of service (Employees' Exhibit 2). On or about October 5 Mr. Morlan was threatened by District Manager Steinmetz with insubordination if he (Morlan) did not make his decision that day whether or not he would retire, and Mr. J. R. Hailey, District Inspector, in charge of the Inspection Department, indicated if Mr. Morlan would retire that it would be an honorable retirement (Employees' Exhibit 3).

Manager F. A. Piehl's letter of October 9 reported Mr. Morlan's work of poor quality, leaving no alternative than to remove Morlan as a Loss and Damage Inspector (Employees' Exhibit 4).

Employees' Exhibit 5 shows the General Chairman proposed to the Bureau Manager that if the conditions were as he reported them that an investigation should be held first before the Bureau took any action.

All data contained herein has been presented to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: It may be conceded that this case started out as a discipline case, because when claimant was on October 23, 1950, transferred from his position as Loss and Damage Inspector to that of Transit Clerk he was advised that his work was no longer satisfactory. He was removed without an investigation, but at his request an investigation was held, and the transcript thereof covers over fifty pages of testimony most of which consists of a discussion of the propriety of the reports that claimant had submitted prior to his transfer to the Transit Clerkship. The hearing was held on November 7, 1950, but prior thereto the Manager of the Respondent Bureau had written the Organization's General Chairman stating that it had been suggested to claimant that he retire because of his age, but because claimant refused to retire that it would be necessary to "assign him temporarily to position of Transit Clerk, under Rule 49, pending an agreement between ourselves as provided therein to effect this change."

We mention this to show that from the very start that the Bureau would rely on Rule 49 in the event that claimant did not resign.

Because of the view we take of this case it is not necessary to determine whether the evidence established claimant's failure to properly perform his duties as Loss and Damage Inspector, in light of the General Chairman's proposal at the hearing "If there is no objection Mr. Morlan will submit to a physical examination and if it is your desire have this become a part of this transcript."

This proposal was accepted. A physical examination was held on November 15, 1950, and the report on file with us shows a pulse of 80-irregular volume, blood pressure 194/100, large inguinal hernia, hypertension, marked tremor both hands, examination by neurologist probably justified, concluding with the statement that the examination shows C. O. Morlan "to be physically disqualified for the position of inspector."

While it appears that claimant has continued to work at his job as transit clerk up to the present time without missing a day, it does not necessarily follow that would have been true if he had continued to work as inspector which he himself described as "rather strenuous work."

Claimant contends that the Bureau cannot invoke Rule 49 so as to transfer him to another job without concurrence of the General Chairman. Section (b) of Rule 49 reads "If an employee becomes incapacitated or is unable to properly fill the position to which assigned, he will be assigned to the furloughed list and retain his seniority, as provided in Rule 10, Paragraph (g) or if competent, he may by agreement between the Management and General Chairman, exercise seniority in the same manner as provided in Rule 12.

It must be obvious that any agreement between the Management and the General Chairman does not become necessary until the claimant's competency is established. In this case the only medical evidence in the transcript of the hearing furnished at his own suggestion says that he is "disqualified" which for the purpose of this case must be construed as synonymous with "incompetent."

The Organization says that claimant did submit himself to physical examination to two other doctors whose "reports did not agree with the Company's doctor's report" but those reports are not in this record, and when claimant offered to submit himself to examination during the hearing, there was no limitation as to what doctor was to make the examination, nor is there any suggestion that Dr. Stuver was incompetent, or prejudiced because he was the Bureau's doctor.

Of all of the awards submitted by either side in this case, there is only one that comes close to the problem before us and that is Award No. 2144, which holds that a Carrier does not have the right to discharge an employe, solely on the advice of its own surgeon.

However, it will be noted that the Carrier in Award No. 2144 had no such rule as Rule 49 in the Agreement before us, and while the Organization contends that the Bureau may not invoke it here, because of its alleged refusal to negotiate, the Bureau was under no obligation to negotiate until claimant showed he was "competent." The least he could have done was to furnish the Bureau the Medical Reports which he said he had as was done in Award No. 2144.

Our conclusion is that the Bureau had a right to invoke Rule 49 in this case and did not violate any rules of the Agreement, and that therefore the claim must be denied.

(Page references relate to original document.)

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 involving herein; and

That the Bureau did not violate the Agreement.

AWARD: Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Signed) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of March, 1954.