Award No. 7392
Docket No. MW-7390

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated Rule 20 of the effective Agreement when it failed to grant Claimant Brouillette a hearing within the time prescribed under the rule;

(2) Claimant Brouillette be reinstated to his position and be reimbursed for all time lost effective November 23, 1953, and continuing until proper adjustment is made.

EMPLOYES' STATEMENT OF FACTS: In February of 1953, Steel Bridgeman Harry J. Brouillette reported to the Carrier's Chief Surgeon for a physical examination. Upon completion of the examination, the doctor advised the Claimant that his physical condition was diagnosed as a heart condition and a peptic ulcer, and recommended that the Claimant remain out of service until his condition improved.

The Claimant then reported to his personal physician and was hospitalized from February 17, 1953, to October 19, 1953, when he was again examined by the Chief Surgeon. At this time, the Claimant advised the Chief Surgeon of his personal physician's opinion that he was physically able to perform the duties of his position. Upon completion of this examination, the Chief Surgeon advised the Claimant that he could return to work, but should not shovel snow, and that the Division Engineer, under whose supervision the Claimant was employed, would be so notified.

Mr. Brouillette then returned to his home, expecting momentarily to receive official notification from either the Division Engineer or the Bridge and Building Supervisor to report for service.

After it had become obvious that the aforementioned notification was not forthcoming, the Claimant, on November 9, 1953, reported to and handed the Chief Surgeon the letter written by his personal physician certifying that he was able to return to work. The Chief Surgeon then reiterated his previous statement that the Claimant was physically able to return to work, having so advised the Division Engineer in a letter dated October 20, 1953, and

Furthermore, the claimant is asking to be restored to service with pay for time lost, etc. This is an impossibility as the man is positively not physically capable of performing the duties of his position; this fact cannot be denied by the Petitioner, and if the Petitioner wishes to challenge this fact, the Carrier will cooperate in setting up a board of three Doctors to verify same.

How can a man be restored to service if his physical condition is not such as will permit him to do so.

Let us assume for the moment that it is ruled that the man is to be restored to service—if this was ordered, it could not be consummated. The man's physical condition is such that the Carrier would not have the right to restore him to service due to the obligation the Carrier has to the public, the man's fellow workers, and the man himself.

Not having the power to do so **now**, the Carrier most certainly did not have the power to do so on November 23, 1953 (date of claim), account of his physical condition. **Consequently, any claim for money payment in this claim should be denied.**

The claim is without merit and should be denied.

All data and arguments herein contained have been presented to the Committee in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: In February of 1953, Claimant was examined by the Carrier's Chief Surgeon and found to have a heart condition and peptic ulcer. He went on sick leave and his job was posted as a temporary vacancy. From February 17, 1953 until October 19, 1953 he was hospitalized under the care of his personal doctor.

On October 19, 1953, he was re-examined by the Carrier's chief surgeon. There is some discrepancy between the submissions as to just what he was told, but we accept the Carrier's version that the surgeon told him he could return to work but could not shovel snow or work on high places. The surgeon sent a written report to that effect to the Supervisor, B & B Dept. Since Claimant was a bridgeman and was required to work on high places, the Supervisor decided that the medical report was unfavorable for his return to work. On October 21st, he called Claimants house and told Claimant's wife that the medical report was unfavorable. Claimant does not mention this telephone call, but it is not specifically denied in the record and we accept as true the Carrier's statement that it was made.

Claimant's version is that he was told by the chief surgeon on October 19th that he could return to work but could not shovel snow. After this interview, Claimant expected to be notified to return to work. When he had heard nothing from the Carrier by November 9, he returned to the chief surgeon with a letter written by his personal doctor certifying that he was able to return to work. The chief surgeon again told him that he could return to work and suggested that Claimant arrange an interview with the B & B Supervisor. The following day, Claimant saw that official and was advised that he would not be returned to work because of the conditions contained in the surgeon's report.

On November 11, Claimant wrote to the B & B Supervisor requesting a hearing on "why I cannot return to work on account of my physical condition." On November 19, the B & B Supervisor advised Claimant by letter that he might have a hearing on November 25. On November 21, the Local Chairman wrote to the Supervisor on Claimant's behalf that Rule 20 of the Agreement had been violated and that it would be a further violation to participate in a hearing on November 25. It was requested that Claimant be

reinstated to service and reimbursed for monetary loss as of November 21, 1953. (The date of the claim was later changed to November 23, 1953)

Rule 20 reads as follows:

"Grievances and hearings

An employe, who is disciplined or feels he has been unjustly treated, will be advised of the cause for such action, in writing, if requested by him or his representative, and, upon a written request, by either, to the Supervisor, within ten (10) days from date of advice of discipline or unjust treatment, be given a fair and impartial hearing within ten (10) days thereafter and a decision shall be rendered within twenty(20) days after hearing.

No such employe will be dismissed without a fair and impartial hearing held in accordance with the first paragraph of this rule. An employe may, however, be held out of service pending a hearing."

The merits of the controversy—that is, whether Claimant's physical condition actually disqualified him from performing the duties of his job—are not before us. The claim is grounded entirely on the procedural point that the rule requires a hearing within ten days after a written request by an employe who feels he has been unjustly treated; and that here Carrier set the hearing for some fourteen days after it received the request. This was a violation of the rule, according to Claimant, and the remedy for such violation is reinstatement to his position with reimbursement for all time lost.

The Carrier has raised several defenses to the claim. First, that the claim is barred by laches; second, that the rule does not apply to instances of physical disability, but only to discipline cases; third, that even if the rule applies, Claimant lost the right to a hearing thereunder because he did not request one within ten days of advice of unjust treatment as required by the rule; and last, that in any event the Carrier cannot return Claimant to service until it has been demonstrated that the condition which originally led him to go on sick leave has been corrected.

We do not think that the claim is barred because eight months elapsed between final handling on the property and submission to the Board. Nor can we agree that Rule 20 did not entitle Claimant to a hearing if he felt that he was unjustly treated by virtue of not being returned to service. The rule is very broad and requires only that the employe "feel" that he has been unjustly treated in order to entitle him to a hearing if he takes the proper steps under the rule.

The third contention raised by Carrier is a substantial one if the rule is to be construed as strictly as Claimant would have it. Although the rule leaves it entirely up to the employe to decide if he has been unjustly treated it is not left up to him as to **when** he was unjustly treated. He must request a hearing "within ten days from date of advice of unjust treatment". This can only mean within ten days of the action taken by carrier which the employe thinks is unjust. Whereas what an employe "feels" is unjust is subjective with the employe, the Carrier action which is the subject of this "feeling" can be viewed objectively and the time when it occurred is a proper subject of consideration and decision by this Board. On the view of the facts which we have taken, there is a very real question as to whether Claimant's request for hearing was timely under the rule. The "advice of unjust treatment" might well be found to be the initial interview with the surgeon on October 19 or the telephone call on October 21.

However, we do not think that the basis of decision in the case properly rests on either the technical position taken by Claimant in presenting the claim or on the technical point raised by Carrier in its defense. The purpose of the rule is clear. It is to assure an employee who is disciplined or who feels that he has been unjustly treated by the Carrier, an opportunity to be heard

—that is, to present his side of the story—within a reasonable time after the discipline or unjust treatment. It is for his protection. It is to prevent arbitrary action by the Carrier by bringing the reasons for and the circumstances surrounding the action out into the open in a hearing, where they will be subject to review by higher authorities including this Board.

There is nothing in the record to suggest hat Carrier attempted to avoid giving Claimant a proper hearing. Upon receipt of his request, it scheduled a hearing for 14 days later. It was not made clear in the request that Claimant felt "unjustly treated" and that the request was being made under Rule 20, so that it is possible that the 10 day period of that rule may not have entered Carrier's thinking in setting the date. Upon receiving notice of the hearing, Claimant did none of the things which a person really desiring a prompt hearing would normally do. No request was made of Carrier to change the date of hearing to conform to the rule, although there was still time for this to be done. The claim was actually filed before the ten-day period relied on had elapsed. No explanation was sought as to why the hearing was set after the ten-day period. Instead, an immediate claim for reinstatement was filed based upon the technical violation. No showing is made that Claimant was prejudiced in any way by the scheduling of the hearing on the 25th. It can only be concluded that Claimant, rather than seeking to have the rule enforced, sought instead to capitalize prematurely upon its non-enforcement.

To sustain this claim on the technical ground relied on, would subvert the basic purpose of the rule—to afford hearings to employes in Claimant's situation. It would thwart the intent of the rule rather than enforce it. This is particularly true in view of the fact that the whole controversy was whether Claimant had recovered from a physical disability which had admittedly kept him hospitalized for eight months. Such a controversy is subject to resolution by well-established objective methods—examination by impartial doctors. The record shows that Carrier, since the date of claim, has offered to give Claimant such an examination but he has preferred to base his rights upon the technical ground of the claim in this case. The purpose of the rule is to discover the truth, not to avoid it by seizing upon technical deficiencies which, as in this case, are irrelevant to the accomplishment of this purpose.

For the reasons stated above, 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 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 the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 27th day of July, 1956.