Award No. 7484
Docket No. CL-7429

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes —

(1) That the Carrier violated the Rules Agreement between the parties, effective September 1, 1952, when on May 10, 1054, it declined Cam G. Baboukas, Unskilled Laborer, Billerica Shops Reclamation Plant, the right to return to his position on May 10, 1954, from leave of absence on account of sickness, but instead required him to submit to a physical examination by its Company physician and as a result thereof permanently removed from his position and have steadfastly declined to recognize the validity of a continuing claim filed by Mr. Baboukas for all wage loss sustained, retroactive to May 10, 1954; and

(2) That the Carrier shall forthwith reinstate Mr. Baboukas to employment in his position of Unskilled Laborer at the Reclamation Plant, which position was held by him when he went on leave of absence due to sickness, and reimburse him for all wage loss sustained for each and every day he is withheld from his position at the rate of $12.712 per day, retroactive to May 10, 1954, and continuing so long as the alleged violation exists.

EMPLOYES' STATEMENT OF FACTS: Sam G. Baboukas, employed as an Unskilled Laborer at the Reclamation Plant, Billerica Stores, Mass., (Service and Seniority Date 7-6-1943) rate of pay $12.712 per day, Monday to Friday, inclusive; rest days Saturday and Sunday, became ill in October, 1952, and acting upon the advice and consent of his attending physician (Edward Saba, M. D., 202 Central St., Lowell, Mass.) reported on May 10, 1954, ready to resume work on his position which he held at the time of going on leave of absence account of illness. Foreman John Neary stated to Mr. Baboukas that before starting work he would first have to see Mr. J. J. McKinnon, Storekeeper. Mr. Baboukas and his representative, Mr. Paul Georges, Local Chairman, discussed with Storekeeper McKinnon Mr. Baboukas' return to his position of Unskilled Laborer at which time Mr. McKinnon stated he could not allow Mr. Baboukas to return to work without first presenting himself to the Carrier's Chief Surgeon (J. R. Knowles, M. D.) for a physical examination.

OPINION OF BOARD: Claimant was ill for a period of time and then returned to the Carrier with a letter from his personal physician which stated that he was in condition to return to work. The Carrier insisted that he be examined by the Carrier physician first and Claimant agreed to do so. As a result of this examination, Carrier's physician decided that Claimant was not physically fit to perform the duties of his job and the Carrier refused to put him back to work. It was Claimant's contention that under the rules of the Agreement, Carrier had no right to require him to submit to a physical examination and a claim was filed on his behalf for a day's pay for each day that he was held off his position, beginning May 10, 1954 the day he reported back to work. Subsequent to the filing of this claim and after further negotiations between the Carrier and the Organization, agreement was reached that Claimant would submit himself to examination by a medical board of three physicians, one to be selected by the Carrier, one by the Organization and the third to be selected by the first two. It was further agreed that Claimant's reemployment would be governed by the decision of the panel.

After this agreement was reached, Carrier's doctor telephoned the Claimant's doctor and as a result of the telephone conversation wrote to the parties to the Agreement that he and Claimant's doctor were in agreement that Claimant was not in condition to do the work of his position and that therefore it was not necessary to appoint a third member of the panel. Claimant contended that this was a violation of the special agreement and renewed his claim that he be reinstated and paid for each day not worked after May 10, 1954. Carrier refused to do this, but on November 15, 1954 offered to set up a new medical board in accordance with the special agreement. Claimant refused this offer and the claim was handled in the usual manner on the property, culminating in a submission to this Board.

To begin with, we do not have before us a question of the meaning of Rule 43(c) of the Agreement because the parties waived the application of that rule by entering into a separate and specific agreement to have the question of Claimant's right to reemployment decided by a medical board of three members. The issue before us is whether this latter agreement was complied with and if it was not, what remedy is appropriate.

We think it clear that the agreement was not complied with initially. While Carrier's contention—that since a majority of two members of the panel were in agreement it would have been useless to appoint a third—seems plausible at first glance, further analysis leads to the conclusion that it is not valid. A panel of three doctors is not similar to a tripartite panel of two partisan members and one neutral such as often comprise the labor arbitration boards to which Carrier seeks to draw analogy. It must be assumed that each doctor on such a panel would be governed in his decision by his professional training, experience and ethics, and would not favor either party. Under such circumstances, it is quite possible that any one member could influence the opinion of one or both of the remaining members. Therefore, there is no substitute for the appointment of all three members and the consequent exchange of views and opinions among them. We find that the agreement was not properly carried out. However, contrary to Claimant's argument, we find no evidence of collusion or any other unethical conduct on the part of Carrier's physician, Claimant's physician or the Carrier itself in this violation. It appears that Carrier's position was taken in good faith after both its physician and Claimant's physician agreed that there was no need for a third doctor. Carrier's good faith was further demonstrated by the fact that when objection was made by Claimant, it offered to set up a new medical board in accordance with the agreement.

In our view, it was incumbent upon Claimant to agree to the establishment of a new medical board and to submit himself to examination by that board, since that was the procedure agreed to by both parties. Since it had been agreed that his reinstatement was to depend upon the decision of such a board, he had no claim to reinstatement without such decision. Claimant was not prejudiced by the improper application of the agreement in

view of Carrier's willingness to apply it correctly when objection was made, except possibly for the period between the improper application and the offer to set up the board in a proper manner. Carrier cannot be held liable for compensation for that period, since the failure to constitute a proper board was not its doing but that of the two doctors. Claimant is not entitled to any compensation subsequent to that time since he had it within his own power to obtain a physical examination of the kind he had agreed to in order to determine whether he was eligible for reemployment. It is obvious that this Division is not qualified to pass judgment on Claimant's physical condition or on whether he is able to do his work. That can and should be done by a medical board, the method which the parties themselves agreed was the proper one.

To summarize our ruling in this case:

1. We do not decide whether or not there was a violation of the Rules Agreement between the parties;

2. We hold that there was a violation of the agreement to set up a special medical board by the failure to appoint a third member thereto;

3. We deny the claim for compensation.

4. On the question of reinstatement, we direct the parties to choose a medical board according to the procedure set forth in their agreement of October 21, 1954 and to abide by the decision of that board.

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

1. That no question of violation of the Rules Agreement between the parties is before us.

2. That the agreement of October 21, 1954 to establish a medical board was violated, as per Opinion.

AWARD

Claim disposed of per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1956.