# Award No. 8175
# Docket No. MW-7660

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Livingston Smith, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it dismissed Frog Repairer Helper Elbert Sanderson from the service without just and sufficient cause; and failed to render a decision within ten (10) days after completion of the hearing held on January 18, 1954;

(2) Frog Repairer Helper Elbert Sanderson be reimbursed for all wage loss suffered in conformity with the provisions of Rule 1 (c) of Article 4, account of the violation referred to in part (1) of this claim.

OPINION OF BOARD: This claim is presented in behalf of one Elbert Sanderson, and is based on the allegation that the said Claimant was improperly dismissed from service. Reparations are sought to the extent of pay for all time lost, as provided for in Rule 1(c) of Article 4 of the effective agreement.

The parties have submitted this matter as a joint submission. There is no dispute as to the facts. Claimant entered service on October 9, 1944 and except for illness or other absences was so occupied until July 1952. The record indicates that on this date Claimant went on leave and so remained until October 1953. These leaves of absences were due to Claimant's incapacity.

Pursuant to notice duly given Claimant was given a hearing to determine his status. At this hearing medical evidence, that is, physicians' reports based on examination of Claimant on August 20, 1953, and December 7, 1953, were presented. These reports indicated the opinion that Claimant was not fit to perform further service. On the basis of these reports Respondent notified Claimant on February 13, 1954, following hearing on January 18, 1954 that because of his apparent medical disability, he would no longer be permitted to perform service.

During June 1954, Claimant presented a medical report from a physician of his choice. This report was dated June 24, 1954 and was predicated upon an examination of Claimant on June 17, 1954. The gist of this report was to

the effect that Claimant's condition was such that he was then able to return to service.

Upon the presentment of this Medical Report Carrier determined that Claimant should be re-examined by their physicians. This was done on July 13, 1954. In essence, the last mentioned report by Carrier's designated physicians reiterated prior findings that Claimant was not fit to resume service.

It was on the basis of the above conflicting medical reports that the parties agreed to be bound by the determination of a third physician. Said third physician issued his opinion on September 21, 1954, based on an examination given by him on September 10, 1954 to the effect that Claimant suffered from no condition that precluded his return to active service. Claimant was offered the opportunity to return to service on September 29, 1954, but did not return until some three weeks subsequent to this date.

The crux of the Organization's position is that Claimant was dismissed from service without benefit of hearing for which reason he (Claimant) should be made whole for all wage loss from October 2, 1953, such date being the date he returned to service after leave of absence, until September 29, 1954, such latter date being the date opportunity was offered to return to service. It was asserted that the fact that he was able to return to service was verified by both his, and a third, physician.

The Respondent took the position that Claimant's removal from service was not a matter of discipline which required a hearing under Rule 1(c) of Article 4, and that it was fully justified in removing Claimant from service, in view of his past Leave of Absence buttressed by recent medical examinations and reports indicating his unfitness for service.

That Claimant's removal from service was not a discipline matter is obvious. This being true he was not entitled to a hearing within the meaning of Rule 1(c) of Article 4. He was, however, entitled to a hearing under Rule 4 of Article 4. This rule has application to an employe

> "who considers himself unjustly treated in matters other than discipline"

The Claimant's disqualification here certainly concerned "—in matters other than discipline—"; however it is noted that Carrier afforded Claimant full opportunity to prove his fitness for service.

That an employe may properly be held out of service pending medical examination is well settled by prior awards of this Division. The Carrier's action in withholding Claimant from service in the instant case was fully justified by the Reports of its Medical Examiners on August 20, 1953, and December 7, 1953. Claimant was given a prompt hearing after the last examination that is, on January 18, 1954.

It might well be argued that Claimant here is entitled to reparations from the date of the favorable Medical Report by his physician on June 17, 1954, up to the date of his return to service on September 29, 1954, inasmuch as the third Medical Report of September 21, 1954, was likewise favorable and indicated Claimant's fitness not only then but as of June 17, 1954. This would be true except for one fact. Between the examination given Claimant by his physician on June 17, 1954 and his (Claimant's) examination by the third physician on September 10, 1954, which likewise indicated his fitness, the Claimant was during the period intervening subjected to an examination by Carrier's Medical Examiners. This examination occurred on July 13, 1954, and the report based thereon indicated an opinion that Claimant was unfit for service.

It is the opinion of the Board that the conflict of these two medical reports based on examinations of Claimant over a period of approximately thirty days were and are sufficient justification to create a reasonable doubt

in the mind of the Carrier as to the state of the Claimant's health on the date in question.

As we have stated in numerous awards where the question of personal safety exists, a Carrier is entitled to use a high degree of care and to be abundantly precautious.

For the reasons stated this claim lacks merit.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Carrier did not violate the effective Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By ORDER of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1957.