

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

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

The Carrier violated the Clerks' Rules Agreement when it removed Willard F. Marcks from service and denied him an investigation. Therefore, the Carrier shall now be required to:

1. Reinstate Employee W. F. Marcks on position he occupied on March 26, 1954.

2. Compensate Employee W. F. Marcks for all loss sustained from March 26, 1954 until he is returned to Carrier's service.

EMPLOYEES' STATEMENT OF FACTS: Employee W. F. Marcks entered service of the Milwaukee Road on January 5, 1948 and was assigned to position of helper in the Car Department at Milwaukee Shops, Milwaukee, Wisconsin. He occupied that position for a short period when he was assigned to position of crane operator in the Car Department, which position he held until May 14, 1949. Mr. Marcks did not work for the railroad from May 14, 1949 until he was reemployed in the Car Department at Milwaukee Shops as Carman Helper as of May 12, 1953. He occupied the latter position until he was affected by force reduction on July 24, 1953. He later entered service of the Store Department at Milwaukee Shops as a laborer and has a seniority date on the roster covering District No. 118 of that department as of August 19, 1953.

In the early part of 1954, Employee Marcks, at the request of officers of the Store Department, went to the Milwaukee Hospital where he submitted to a physical examination by Doctor Thatcher, a physician for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The employee states that at the conclusion of the examination the doctor in charge advised that there was no defect of any kind; however, there was no written report furnished to Employee Marcks concerning his physical condition.

After starting work on March 26, 1954, Employee Marcks was called into the Storekeeper's office and was handed a letter from the General Storekeeper

this condition is known to those who have the responsibility for the safest possible operation.

The Carrier's position in this case is not intended to reflect any unsympathetic attitude toward Claimant Marcks but we certainly have to be realistic about a case of this kind and as we have indicated above, it is the Carrier's position that it has fully and properly discharged its obligation in this case and that the employes' request that Claimant Marcks be restored to service in the Store Department at Milwaukee, Wisconsin is not a proper one under the circumstances and we respectfully request that the claim be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: We must first dispose of the preliminary portion of Organization's claim that:

"The Carrier violated the Clerks' Rules Agreement when it removed Willard F. Marcks from service and denied him an investigation."

Under date of March 26, 1954 Carrier's General Storekeeper advised Claimant Marcks as follows:

"As a result of recent physical examination, this is to notify you that I have just received advice from the Chief Surgeon to the effect that you are disapproved for service. I must necessarily advise you therefore that you are effective at once disapproved for service."

Organization's Shop Chairman, on April 19, 1954, advised Carrier, after citing Rule 22, that

"Employee W. Marcks and the local Committee feel that W. Marcks has been unjustly treated and thereby request that an investigation will be held and to determine why W. Marcks has been taken out of service."

Under date of April 22, Carrier denied, and continued to deny, Organization's request for an investigation, on the grounds that Marcks "has not been disciplined or dismissed."

Rule 22(g) specifically provides:

"(g) An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation, hearing and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within thirty (30) days from cause of complaint."

Admittedly Organization's request for such an investigation, dated April 19, 1954, was well within the 30 days period from March 26, 1954.

The only qualification necessary was that the employe "Consider himself unjustly treated."

Evidently Claimant Marcks felt he was "unjustly treated". His Organization so advised Carrier well within the time limit.

Carrier's defense to the contrary, we must and do hold that Carrier violated Rule 22(g) when it, by General Storekeeper G. V. Ireland, stated, under date of April 22, 1954, that Claimant Marcks was "not entitled to a hearing under the schedule rules and I must necessarily decline your request."

We have noted, and agree with Carrier's observation that the investigation "would serve no useful purpose whatsoever because * * * his disapproval from service is based on his physical condition". This does not, however, relieve Carrier from the obligations of Rule 22(g) of this Agreement.

With respect to the balance of the claim we observe argument made on behalf of the Organization that certain of Carrier's data were first made known to Organization when they appeared in Carrier's ex-parte submission.

We also note argument on behalf of Organization that much of Carrier's supporting evidence is conflicting; that despite Claimant's physical condition, which by Carrier's evidence has existed for years, he was hired January 5, 1948 and, according to Organization, "voluntarily" left Carrier's service May 14, 1949; was rehired in the same department May 12, 1953 and "laid off" July 24, 1953, only to be hired in Carrier's store department August 19, 1953. He worked there until his "disapproval for service" March 26, 1954.

Under normal circumstances we would apply the procedural rules of this Board to Carrier's evidence.

The circumstances in this case are not normal. Circular 1 to the contrary, we cannot close our eyes to the fact that Claimant's physical problem is that he is subject to epileptiform seizures. We must and will recognize this fact for one reason, and one reason only: Claimant's life and the lives of those with whom he may be working are involved. The value of one human life, or the protection of one human life from the hazard of injury, transcends all the procedural rules this Board may ever write.

Irrespective of how lax Carrier may have been before March 26, 1954 on hiring or rehiring of Claimant, or how inconsistent some of its evidence may be of incidents and injuries involving claimant prior thereto, the fact remains that on the morning of March 26, 1954 Carrier had before it two medical reports—one from Dr. Donald S. Thatcher and the other from Dr. H. W. Hefke and Dr. F. J. Millen covering examinations of Claimant Marcks, indicating a history of epileptiform seizures since about the age of 14. The details of these reports are of no concern. We lack the knowledge and authority to pass upon them.

Upon the advice of its Chief Surgeon, Dr. R. Householder, Carrier disapproved Claimant for service on the basis of

"History of attacks of epileptiform seizures while on duty and corroboration by electroencephalogram findings under date of March 9, 1954."

To sustain part one of the claim that the Carrier shall now be required to

"reinstate Employee W. F. Marcks on position he occupied on March 26, 1954,"

would be to knowingly and willingly subject Claimant and those with whom he may be working to the hazard of injury. This we will not do.

Carrier had the perfect right to place him in a "disapproved for service" category on the basis of the evidence and advice in its possession. Claimant Marcks was not "removed from service", as Organization claims.

Organization stated Claimant's name "was removed from the next issue of the (seniority) roster covering District No. 118, which was posted in July 1954" as proof he was "discharged" instead of "disapproved for service" as Carrier contends. Carrier contends his name was omitted "through error" and was restored on the next published list. In the absence of evidence to the contrary we must assume his name continues to appear on the list.

With respect to part 2 of the claim that Carrier

"Compensate Employee W. F. Marcks for all loss sustained from March 26, 1954 until he is returned to Carrier's service,"

it must be noted that this Award holds Carrier violated Rule 22(g) only by failing to grant Claimant an investigation. We have not held that Carrier's disapproval of Claimant for Service was not justified in view of the medical evidence and advice of its Chief Surgeon. There is no evidence before us that such action on Carrier's part was violative of the Agreement.

It is most unfortunate that Claimant Marcks was subject to epileptiform seizures. There is no evidence that Claimant's name does not continue to be carried on Carrier's seniority list. Should Claimant's physical condition change to the point where Carrier and its Chief Surgeon are satisfied his return to employment would cause no hazard to himself or others, he can be returned to employment in accordance with the applicable provisions of the Agreement.

But we can find no justification to sustain Part 2 of this claim because Claimant's loss of earnings in this case is not attributable to Carrier's violation of Rule 22(g), directly or indirectly.

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 Employees involved in this dispute are respectively Carrier and Employees 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 was violated to the extent indicated in Opinion.

AWARD

Claim that Carrier violated Rule 22(g) of the Agreement in denying Claimant an investigation is sustained.

Parts (1) and (2) of Claim are denied for the reasons set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 7th day of February, 1958.