Award No. 8296
Docket No. CL-8016

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: 1. Carrier violates the Clerks' Rules Agreement when it refuses to permit Employe D. E. Fuoss to return to Carrier service from leave of absence without first submitting to physical examination by a company physician.

2. Carrier shall compensate Employe D. E. Fuoss at the rate of clerical Position No. 868 at Chamberlain, South Dakota, for each day he was denied that position during the period October 15, 1953 to November 16, 1953.

EMPLOYES' STATEMENT OF FACTS: On May 20, 1946 D. E. Fuoss entered the employ of the Carrier at Charles City, Iowa on a non-clerical position and on March 24, 1950 he was the occupant of Position No. 535 at that location. On March 24, 1950, Employe Fuoss was detained from work account illness and immediately notified his supervising officer. All subsequent seniority rosters from July 1950 to January 1954 carried Employe Fuoss with four asterisks preceding his name as provided by Rule 6(b), indicating the employe retained seniority per Rule 25-Leave of Absence (Sickness or Physical Disability).

On October 12, 1953 Mr. Fuoss indicated his desire to return to service but he was denied such right. Copies of correspondence between the Superintendent and Claimant as well as correspondence between the Vice General Chairman and the Superintendent regarding this case follow in chronological order between the period October 12, 1953 and November 3, 1953:

"Charles City, Iowa
October 12, 1953

"Supt. P. J. Weiland
Sioux City, Iowa

Dear Sir:

I desire to exercise my seniority for position 868 at Chamberlain South Dakota leaving Charles City, Iowa Thursday Oct. 15, 1953 on Train No. 11.

/s/ D. E. Fuoss"

OPINION OF BOARD: This docket poses the right of the Carrier to require a physical examination of an employe by its doctor before he may return to work after a leave of absence.

Claimant was first employed by Carrier on a non-clerical position at Charles City, Iowa on May 20, 1946. He had an arthritic condition in his legs at the time, which grew worse to a point where the Carrier felt it necessary to inform Claimant that he was no longer physically qualified to perform his duties and that it contemplated formal action to remove him from the service, but on the intervention of the Organization's Chairman Claimant was allowed to take a leave of absence instead, on March 24, 1950.

On September 28, 1953 after a continuous absence of three and one-half years Claimant advised the Carrier that he was "ready for work" and on October 1 made proper application for position No. 868 at Chamberlain, S. D., as per Bulletin 92.

In response to this Carrier advised Claimant in part as follows:

> "Bulletin 92 was issued and closed without receiving any applications (It was closed on Sept. 25, 1953) for this position. I do not understand that you can make application for this position but if **you desire to exercise your seniority,** please advise of this fact so that we can notify the occupant on this position." (Parenthesis and emphasis supplied)

On October 12, 1953 Claimant wrote the Superintendent as follows:

> "I Desire to exercise my seniority, for position no. 868 at Chamberlain, S. D., Leaving, Charles City, Iowa. Thursday Oct. 15, 1953 on no. II."

in reply to which Superintendent sent telegram to Claimant on October 14, reading in part:

> "It will be necessary for you to submit to a physical examination by company doctor at Mason City before we can permit you to return to service. * * *"

Claimant did not report to the company doctor, but on December 11, 1953 he obtained the following statement from his own doctor:

> "TO WHOM IT MAY CONCERN:
>
> I, Dr. W. P. Palz have been attending the bearer, Dan E. Fuoss, for the past 4 years and have this date discussed with him the possibility of his returning to work for his former employer as station clerk at Chamberlain. He has given me a general outline of the duties required on such a position consisting of general office work, handling of mail, express, baggage & L.C.L. freight and making check of freight cars in yard, and it is my opinion that he is physically capable of performing said duties.
>
> Signed W. P. Palz, M.D.
> Charles City, Ia.
> Dec. 11, '53"

Carrier casts some aspersions on this certificate, but for our purpose the document must speak for itself.

There is nothing in the agreement which gives Carrier specific authority to require the physical examination here demanded, but Carrier insists it was a reasonable demand under the circumstances. Both sides agree that efforts have been made to accept a "neutral doctor" rule in these agreements,

and some agreements do have such a provision, but there is none in the agreement before us.

The rules in this agreement provide how such a situation may be handled. The Carrier should have put Claimant back to work under Rule 25(a) and if it was found he was not physically fit could have removed him under Rule 8.

Our conclusion is that Carrier violated the agreement and that the claim should be sustained.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March, 1958.

DISSENT TO AWARD NO. 8296, DOCKET NO. CL-8016

Here we have a paradoxical situation in which those who purport to have an interest in the Health and Safety of employes they represent, support an erroneous Finding that the Carrier violated the Clerks' Rules Agreement when it refused to permit Claimant to resume active service after more than three and one-half years' sick leave without first submitting to physical examination by a Company Physician in order to establish his degree of recovery and his physical fitness to work without hazard to himself, his fellow employes or the public. The error of this Award is brought into bold relief when viewed in the light of the facts and circumstances.

Petitioner freely admitted in argument on behalf of Claimant that,

> "The Employes want to make it clear that Employe Fuoss is not 100% physically fit. Employe Fuoss knows that as well as anyone."

The statement from Dr. Palz, dated December 11, 1953, was subsequent to the claim period which terminated November 16, 1953. Furthermore, it was not presented to the Carrier until September 28, 1955, nearly two years after the claim period ended. The statement gives no medical report of Claimant's physical condition and that, as well as the fact that Claimant did not report to the Company Medical Examiner, left no apparent reasons for engaging a neutral doctor. The Carrier was entitled to consider the disability as continuing until some competent evidence to the contrary was adduced. No such contrary evidence was extant here.

The majority chose to ignore the principle that it is each Common Carrier's legal and moral obligation to see to it that it utilizes only employes

who are physically fit and able to safely and efficiently perform their duties without hazard to themselves, their fellow employes, or the public in general. It has been well settled by many prior Awards of this Division that an employe may properly be held out of active service pending medical examination for that purpose. Neither Rule 25 (a), nor any other Agreement rule transcends the Carrier's legal and moral obligation; nor does Rule 25(a) require that a physically unfit and unsafe employe first be returned to service and thereafter be removed, as the majority would have the Carrier do. This places the cart before the horse. The absurdity of such procedure is more apparent here because admittedly Claimant was not 100% physically fit. Claimant could and should have submitted to physical examination by the Company Doctor, at no cost to him for Doctor's fees, with the least amount of inconvenience to all concerned and with the knowledge that if found to be physically fit and safe to resume active service, his sick leave would be terminated and Rule 25 (a) then would become applicable in determining which position he might take.

Award 8296 is palpably wrong; therefore, we dissent.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp