

Award No. 8535

Docket No. CL-8252

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY (Wheeling and Lake Erie District)**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

1. That the Carrier acted arbitrarily and in contravention of the agreement when on Thursday, September 2, 1954, it refused to permit Mr. L. A. Young, Clerk-Caller, Ironville Roundhouse, to resume work on his regularly assigned position and unnecessarily delayed authorization of Mr. Young's return to service until September 16, 1954, and

2. That Mr. L. A. Young be paid for each work day occurring during the period September 2, 1954 and September 13, 1954, both inclusive, at the rate of pay attached to the position to which he had previously been assigned in accordance with his seniority rights.

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, as representatives of the class or craft of employees in which the claimant in this case holds a position, hereinafter referred to as the "Brotherhood" and the New York, Chicago and St. Louis Railroad Company (Wheeling and Lake Erie District), hereinafter referred to as the "Carrier".

Prior to and on March 15, 1954, Mr. L. A. Young was regularly assigned as Clerk-Caller, Ironville Roundhouse, having a Thursday through Monday work week with Tuesday and Wednesday rest days.

On Monday, March 15, 1954, the last work day of that particular work week, Mr. Young gave Mr. J. F. Brown, Roundhouse Foreman, a note advising that he was going into the hospital the next day, March 16th, which was one of Mr. Young's rest days, but that he did not know the exact extent of his

With respect to the Employees' claim of unnecessary delay: In the handling on the property, the Employees contended that the claimant, following Dr. Muhme's examination on August 30, 1954, submitted a regulation form to his local supervisor approving him as being qualified to return to service. The Carrier wishes to point out that this form is not a Carrier form and does not approve the claimant's qualification to return to duty. The form is personal to Dr. Muhme and was issued by him to the employe for the sole purpose of advising the Carrier that the employe had presented himself for and undergone an examination on a certain date. There is nothing on this form that indicates the results of such examination, nor that it is issued for that purpose. The Carrier also judges from the claim and the handling on the property that the Employees take exception to the fact that Dr. Muhme did not take the X-rays at the examination made on August 30, 1954. They contend that not qualifying the claimant on August 30, 1954, sending him to X-ray specialists, and not notifying him of his being qualified until September 16, 1954 was an unwarranted and unreasonable delay. The Carrier maintains that it acted in good faith and that the time consumed in determining the claimant's fitness to return to work was not unreasonable or excessive. It is common knowledge that it is a prevalent practice to have specialists take X-rays. It is also necessary in certain circumstances that the X-ray pictures so taken be referred to other competent medical authorities for diagnosis and opinion. That this at times occasions some delay in qualifying employes is freely admitted, but the Carrier submits that the period of ten working days in this instance was neither unwarranted nor unreasonable in view of the claimant's voluntary absence from duty of 5½ months, his particular case history, and especially when considered with the fact that he chose to be unavailable for service for four working days even after being notified that he had been qualified.

Particular attention is also called to Carrier's Exhibit "B" and the fact that the claimant was drawing sick benefits from the Railroad Retirement Board for each day he is now claiming penalty pay from the Carrier.

There has been no showing by the Employees that the Carrier acted arbitrarily in this matter. No rule of the agreement has been violated. There was no unnecessary delay in authorizing claimant's return to service. The Carrier has shown that it acted within its reasonable discretion, that the claimant was compensated under the Railroad Retirement Act for his disability time under a law governing and contemplating such a situation and that the penalty requested is unwarranted. The claim is without merit and should be denied.

All data contained herein has been presented to or is known by the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Young held a position of Clerk-Caller at Ironville Roundhouse (Toledo, Ohio), being regularly assigned Thursday through Monday, with Tuesday and Wednesday as rest days. On Monday, March 15, 1954 Claimant advised his Foreman he was "taking a sick leave absence effective 3-16-54" (Carrier Exhibit A), that he was entering the hospital for a series of tests, and that he did not know how long he would be off duty. On March 17 it became apparent that surgery was necessary for correction of a spinal condition resulting from a prior operation in 1951. Claimant advised his Foreman to this effect.

On August 30, 1954 Claimant informed his Foreman that he would report for duty on his regular second trick Clerk-Caller assignment on Thursday, September 2. The Foreman replied that Claimant would have to undergo a physical examination by Carrier's physician at Toledo, Dr. O. K. Muhme. The latter examined the Claimant the same day, August 30, and forwarded his report to Carrier's Medical Director at Cleveland. Meanwhile, the Foreman advised Claimant he could not return to service until the Medical Director's approval had been secured. The Medical Director then requested that an X-ray examination be taken of Claimant's spine, this being performed by a Specialist at Toledo on September 3. On September 4 the Specialist sent the X-ray films and a report to Dr. Muhme, who forwarded same to the Medical Director at Cleveland. It appears that the latter then requested a Cleveland Specialist to review the results of the examination conducted by the Toledo Specialist. Carrier states it was not until September 14 that the Medical Director was in a position to make a decision regarding Claimant's qualifications to return to service.

On Thursday, September 16, 1954 Carrier telephoned Claimant's home to notify him to return to work. Being out of town at that time, Claimant did not report for work until Monday, September 20. The claim is for pay for the period from Thursday, September 2 through Monday, September 13, 1954, the next two days being Claimant's rest days.

Organization contends that under Rule 25 Claimant was entitled to return to his former position following his leave of absence (or to exercise the option provided therein) and that there is no agreement rule requiring employees to submit to a physical examination either following a leave of absence or at any other time. Organization points out that Claimant nevertheless cooperated with Carrier's requests for examinations. It is asserted, however, that Carrier did not exercise due diligence in approving Claimant's request to return to work, thereby causing unnecessary delay which created financial loss for the employee.

The Agreement is silent with respect to the matter of physical examinations for employees. We therefore must hold that the requirement of such examinations is within the discretion of the Carrier. Quite aside from the fact that this discretionary authority exists, however, the record indicates the decision to require a physical examination in the subject instance was entirely reasonable under the circumstances. Claimant had been absent due to illness for extended periods since 1951. He had undergone an operation for double hernia and two spinal operations. In less than three years his absences for medical reasons had totalled approximately 14 months. Carrier was entitled to assure itself that Claimant was physically fit to resume his duties.

The only question remaining to be decided is whether Carrier exercised undue delay in giving its medical approval for Claimant's return to service. Management may not delay unreasonably in reaching its decision regarding the physical fitness of an employee who has been on leave due to illness. In the light of all the facts of this case, however, we are of the opinion that Carrier did not indulge in unreasonable delay. A denial award is warranted.

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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1958.