Award No. 9975
Docket No. CL-12141

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

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

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4798) that:

(1) The Carrier violated the current Clerks' Agreement when it arbitrarily and capriciously denied Mr. Ray McKenzie the right to return to service on his assigned position of Yard Clerk at Princeton, Indiana on or about January 5, 1959.

(2) Mr. McKenzie shall be reimbursed at the prevailing rate of pay of his Yard Clerk position for all time lost beginning on March 20, 1959 and continuing until such time as he is returned to service on his assignment.

EMPLOYES' STATEMENT OF FACTS: Mr. Ray D. McKenzie was originally employed by the Carrier on February 4, 1957 at Evansville, Indiana, in Seniority District No. 32 which covers the Wansford Yard Clerks, Callers and Yardmaster's Clerks and thereafter transferred to Seniority District No. 37 on September 9, 1957 and thereby held seniority in those two Districts under the provisions of our Agreement.

Mr. McKenzie was found to be afflicted with pituitary tumor and was operated on March 17, 1958 and also operated on for the second time in late 1958 and released by the operating surgeon and his personal physician to return to work on January 5, 1959. Copies of these releases as Employes' Exhibits 1(a) and 1(b).

Claimant contacted his immediate superior, Mr. A. R. Upton, shortly thereafter and advised him that he had been released by his doctors as able to return to work and he was advised that it would be necessary to submit a report direct to Carrier's Chief Surgeon from each of his doctors. Copy of this letter of request as Employes' Exhibit 1(c).

Claimant was then instructed to report to Dr. C. F. Leich for an examination on March 24, 1959 and Form CT-2 was issued over the signature

termine by competent medical authority whether an employe meets those standards. A necessary adjunct to this prerogative is the carrier's right to disqualify for hazardous positions any employe who does not meet the prescribed physical standards.

The carrier's physical standards are the product of years of experience in dealing with the many hazards inherent in the railroad industry. They were established by competent medical men who as a result of years of experience in dealing with persons injured in railroad employment have acquired a special knowledge of the occupational hazards peculiar to the industry together with knowledge of the physical handicaps that render a man unsafe for employment in certain hazardous occupations.

The minimum standards of vision adopted by this carrier for persons employed as yard clerks and others working around moving trains and engines are those recommended by the Medical Section of the Association of American Railroads, representing the cumulative knowledge and experience of the chief medical examiners of the nation's railroads. Obviously carrier's minimum standards of vision are neither arbitrary nor capricious. On the contrary they are based upon intelligent appraisal of the hazards of the industry and a special knowledge, gained from experience of the physical handicaps, that may cause a person exposed to these hazards to suffer grievous injury to himself or others.

It has been found hazardous for employes with limited vision, particularly where there is a limitation in peripheral or side vision, to engage in work where they may be struck by moving cars or engines. The yard clerk position to which claimant had been assigned required such duties. Claimant's vision is permanently impaired to the point where he has practically no vision in one eye with a limitation in peripheral or side vision in both eyes. He does not meet the minimum physical standards for his position and was therefore properly disqualified.

There cannot be any question as to the exact status of claimant's vision. He was examined twice by Dr. Leich, an ophthalmologist, and once by the chief surgeon, also a qualified medical examiner. In each of the examinations it was found that claimant's vision was substantially the same and it was conclusively shown he did not meet the minimum visual standards.

The principle that the burden of proof to support the claim rest with petitioner is found in many awards of the Board. Here claim for re-employment and compensation for time lost is made in behalf of employe who was disqualified by competent medical authority because of his failure to meet the minimum standards as to vision. The record, however, is absolutely void of any evidence or argument to support the claim representing a demand for many thousands of dollars in back pay.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, a Yard Clerk, was employed by Carrier in 1954. In 1958 he suffered a marked loss of vision which necessitated surgery for a cystemic adenoma of the brain which was partially removed. During this time he was on leave of absence. After the operation he reapplied for his position which was denied. This claim was not pursued.

In December of 1958 he underwent a second operation. Thereafter in February of 1959 he again applied for reinstatement, at this time submitting

statements of his operating physician and of an optometrist that he was qualified to return to work. After examination by the Carrier he was again denied reinstatement in a letter of April 2, 1959 which stated that Claimant "is still permanently disqualified for further service on account of physical condition". This letter was accompanied by Form CT-2 dated March 27, 1959 from the Carrier's Chief Surgeon, Ray S. Westline, M.D., which stated the same conclusion.

On May 19 the General Chairman wrote to Mr. Upton, Claimant's immediate supervisor, enclosing the statement of a third Doctor, a Phillip Burns, O.D. and in this letter also called the Carrier's attention to Article 63 of the Agreement. In addition, requested the establishment of a three man medical Board to decide this issue.

Subsequent correspondence was carried on with the Superintendent of the Carrier and later with the Chief Personnel Officer. The claim was again denied, stating in this instance "Claimant's physical condition disqualified him for work performed".

On October 24, 1959 the Claimant was again notified by his Supervisor that "you are still permanently disqualified for further service account physical condition".

On November 6, 1959 the General Chairman again requested a three man medical Board and also raised the question of the applicability of Rule 63.

In the meantime the Organization had also been processing a claim CL-12304 in regard to the Claimant concerning his working relief as a Roundhouse Clerk. These claims were processed under Rule 63. The Claimant's right to their work was also denied, again on the grounds of physical impairment.

This Board has examined many awards handed down by this Division and others involving employes whose health has become impaired during their time of service, however, to a certain extent it finds this case unique.

This Board has held many times that a Carrier has a high duty concerning the question of physical ability of their employes, both as to their own safety and as to the safety of other employes and the general public. (See among others Awards 9046, 235, 6665 and 8394.)

This Board has also stated on numerous occasions, however, that the Carrier does not have the exclusive right to make this alternative.

As stated by Referee Messmore in Award 6942:

> "This Board does not dispute the Carrier's right to require an employe to submit to physical examination in its own interest or in the interest of its employes. Awards of this Division have held that this does not give the Carrier the exclusive right to make the determination as to the fitness to perform services solely upon the advice of its own physician or physicians. See Awards 4649, 362, 728, 875, 2886, 3212, and 6317."

It is true that this Board has stated that where there is no conflict in the testimony by Claimant's Doctors and Carrier's Doctor there is no need

for an examination (See 6665) and if we were considering solely the question of the right of the Claimant to his Yard Clerk job we could be constrained to accept Carrier's position.

The fact, however, is that the statements of Claimant's Doctors indicate that this man's vision was sufficient to qualify him for some jobs on the premises. This in contrast to the position taken by the Carrier on several occasions that the man was still permanently disqualified (emphasis supplied). This being so how could he ever be qualified unless permanently doesn't mean permanently.

The fact, further, is that the Organization advised the Carrier on numerous occasions about Rule 63. Said rule reading as follows:

> "Efforts will be made to furnish employment (suited to their capacity) to employes who have become physically unable to continue in service in their present positions."

This being so the failure of the Carrier to provide for an impartial medical Board deprived him of his right to determine what if any jobs, he was qualified to hold. It is the feeling of this Board that under the terms of the Agreement, Rule 63 puts a positive obligation on the Carrier to make some efforts to furnish employment as effort is defined in Webster's Collegiate Dictionary as "exertion of power, physical or mental". In this case the Carrier exerted no power, not even answering in its correspondence the Organization's contention that Rule 63 was even applicable.

This Board therefore finds that the Carrier violated the Agreement. However, in light of the fact that it does agree that the Carrier was not arbitrary in its refusal to reinstate Claimant to the job of a Yard Clerk it feels the case should be remanded to the property with orders that an impartial medical Board be set up. If the impartial medical Board finds that the Claimant was physically qualified to hold down another position with the Company which under the Agreement he would have been entitled to, then he shall be recompensed at that rate of pay from May 19, 1959 which is the date the Organization first apprised Carrier concerning that it was asserting rights under Rule 63.

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

That the parties waived oral hearing;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 this dispute be remanded to the parties in accordance with Opinion.

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June, 1961.

DISSENT TO AWARD NUMBER 9975, DOCKET NUMBER CL-12141

This Board's Circular No. 1 provides for the "Form of Submission" and thereunder states: —

> "Statement of Claim. — Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired."

Petitioner clearly stated in the prescribed form that the Carrier violated the current Clerks' Agreement when it arbitrarily and capriciously denied Claimant the right to return to service on his assigned position of Yard Clerk. That is the question which was referred by petition to this Division.

In light of the fact that the Opinion in Award 9975 states this Board "* * * does agree that the Carrier was not arbitrary in its refusal to reinstate Claimant to the job of a Yard Clerk * * *," the claim should have been denied. The Railway Labor Act does not confer a right upon the Board to substitute a claim for Petitioner's and remand it with orders to carry out certain conditions which are foreign to the current Agreement between the parties.

For this reason, among others, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENTS TO AWARDS NOS. 9975 and 9976, DOCKET NOS. CL-12141 and CL-12304

The Dissenters are here engaged in what Referee Carter termed "super-technicalities" in Award 3256. In Award 5330, Referee Robertson rejected a similar contention by stating in part, here pertinent, that:

> "* * * Full opportunity for conference on the alleged Agreement violation resulting from the protested assignments was had by both parties and they were discussed at more than one conference in the last step in the grievance procedure. * * * In this respect the comment of Referee Carter in Award 3256 is pertinent:
>
> > '* * * it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. * * *.'"

The records in Dockets CL-12141 and CL-12304 clearly show that Rule 63 was placed in issue by the Organization and conferences were had thereon. Consequently, Rule 63 was properly before the Division when it disposed of the two disputes by the adoption of Awards 9975 and 9976. It is interesting to note that the Dissenters have here taken the opposite view to that taken

by them in their "Reply to Labor Member's Dissent to Award 9189, Docket CL-8708", wherein they took the position that all rules of an agreement were properly before the Board for consideration, even though such rules were not pertinent to the issues raised by the parties on the property.

Rule 63 was placed in issue on the property and thereby became a part of the two disputes to be determined by the Board. In fact, the claim in Docket CL-12304 was predicated solely on Rule 63, and being a companion case to Docket CL-12141, i.e., the circumstances involved therein arising from the same alleged violation of the agreement, it was proper for the Board to dispose of both claims by joining them together.

Apparently, the Dissenters are of the opinion that the Board may decrease its jurisdiction by the promulgation of "Rules of Procedure" (see Circular No. 1), and thereby evade the jurisdiction placed upon the Board by the Railway Labor Act, as amended. Section 3 First (h) of the Act provides, in part:

> "Third Division: To have jurisdiction over disputes involving station, * * *, clerical employees, freight handlers, express, station, and store employees * * *."

It will be noted that the Act confers jurisdiction in the Board over "disputes" and not over "claims" as the Dissenters would have us believe. Furthermore, Rule 63 is not "foreign to the current Agreement between the parties". It is one of the Rules of the Agreement that Petitioners alleged were violated. Rule 63 was placed in issue on the property and it was proper for the Board to consider such Rule in its determination of the dispute. Pleas based on "super-technicalities" will not change that fact.

It should also be noted that the issues raised by the Dissenters in their Dissents was at no time raised by the Carrier on the property, or in its submission to the Board. It was first raised by a Carrier Member in panel argument before the Referee. Consequently, it was inadmissible at that late date and the Dissenters have so recognized in their Dissents to Awards 8299 and 9988, regardless of whether their contentions were meritorious under the circumstances presented therein.

/s/ J. B. Haines
J. B. Haines
Labor Member