Award No. 10110
Docket No. CL-9907

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 4-A-3 and 6-A-1 (a), when it denied Cali Milasinovic employment as a Trucker at Eleventh Street Station, Pittsburgh, Pennsylvania, Pittsburgh Region, on December 30, 1954, and subsequent dates.

(b) Cali Milasinovic, Claimant, be compensated for all lost earnings beginning December 30, 1954, and all subsequent dates until adjusted. (Docket C-787)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

On and prior to December 30, 1954, the Claimant, Cali Milasinovic, had seniority on the Group 2 Seniority Roster, Conemaugh Division (now part of the Pittsburgh Region), in the capacity of Trucker at Pittsburgh Eleventh Street Freight Station.

It is respectfully submitted, therefore, that the claim is without foundation under the applicable Agreement and should be denied.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

All data contained herein have been presented to the employe involved or to his duly accredited representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Mr. Cali Milasinovic, the Claimant, was born on March 7, 1885. He entered the Carrier's employe on May 11, 1906 and was continuously employed until December 30, 1954, when he was relieved of his work duties following a medical examination on December 29, 1954.

The Claimant worked as a Trucker at the Eleventh Street Freight Station, Pittsburgh, Pennsylvania. His tour of duty was from 8:00 A. M. To 5:00 P. M. — Monday through Friday with Saturday and Sunday as rest days.

Mr. Milasinovic had been off duty from November 26, 1953 until September 28, 1954 due to an on-the-job injury. Dr. Frank A. Leonardo attended the Claimant and submitted a "To Whom it May Concern" Report dated April 30, 1954 — indicating that the Claimant "could return to work if given a light job that did not require his doing heavy work or lifting."

Prior to returning to work on September 28, 1954, the Claimant obtained a "Certificate of Ability" or "Return to Duty Card" from one of Carrier's physicians.

"The Foreman in charge of the platform at Eleventh Street Freight Station questioned Claimant's ability to perform the duties of his position of reading marks and loading and trucking freight; also the imminent possibility of personal injury or injury to other employes due to his physical condition. Claimant was examined by the Carrier's Medical Examiner on December 29, 1954, and was found not qualified to continue to perform the duties of trucker, and has not worked since that date."

On January 3, 1955, and on February 2, 1955, the Claimant was respectively examined by Dr. W. H. Tomaseski and Wilson Dougherty. Both Doctors indicated in their written reports that the Claimant was able to perform the duties of a freight handler and trucker.

On September 22, 1955, a Medical Board examined the Claimant and submitted separate medical reports. The Board was comprised of Drs. W. H. Tomaseski (Organization), William R. Eaton (Carrier) and C. C. Yount (Neutral).

The Medical Board's findngs were not significantly favorable to either party. Neutral Doctor Yount did, however, state that "I would estimate the percentage of his functional disability overall at about 30% . . ."

Subsequently, the Carrier on two occasions recommended to the Organization that a Board of Specialists examine the Claimant, but the Organization refused to accede to Carrier's recommendations.

The Organization contends that the Claimant — based on the statements of Drs. Tomaseski and Dougherty and the individual reports of the Medical Board — was qualified to perform the duties of his position and he was, therefore, improperly withheld from service.

The Carrier contends that the Claimant — based on the examinations of the Medical Board and their own Medical Examiner — was not qualified to perfrom the duties of his position and he was, therefore, properly withheld from service.

The Organization alleged that the Carrier violated Rules 4-A-3 and 6-A-1(a) both of which rules are set forth below:

> "4-A-3. (Effective September 1, 1949) The working days per week for regularly assigned employes shall not be reduced below five unless agreed to by the Management and the General Chairman, except that this number may be reduced in a week in which holidays occur by the number of such holidays. This rule (4-A-3) does not prohibit the abolition of a position at any time."

> 6-A-1 (a) Regularly assigned employes notified or called to perform work between their regular work period and not continuous therewith will be allowed a minimum of three hours at the pro rata rate for two hours work or less; time held on duty in excess of two hours to be paid for at the rate of time and one-half. Regular employes so called who are unable, because of being called, to cover their regular assignment will be paid not less than they would have received if they worked their regular assignment."

We do not believe this is a disciplinary case because the facts of record do not indicate that the Carrier took disciplinary action against the Claimant. Therefore, neither Rule 6-A-1(a) nor Rule 4-A-3 is applicable.

It is not denied that the Carrier had the right:

1. To give employes medical examination;

2. To remove an employe from service for physical or health reasons: provided the Carrier does not act in an arbitrary or capricious manner and that the facts justify the Carrier's action. Therefore, the question to be resolved is: Did the Carrier act in an arbitrary capricious or discriminatory manner?

In Award 8394 — Referee Bailer stated:

> "The Carrier is charged with the responsibility of maintaining safe and efficient operations of its facilities. It has a heavy obligation to provide for the safety of its employes and of other persons entrusted to its care. In a matter such as the instant case, this Board should not set aside Management's judgment unless there is a showing of action that is arbitrary, capricious or evidentiary of bad faith. No such showing is made by the record before us. Thus the claim must be denied."

In Award 6652 — involving the same parties as in the instant case — Referee Rader wrote as follows:

". . . the inability of the parties to meet on common ground and dispose of this claim prior to this time we view as inexcusable. We consider that the Organization has taken a too technical stand in refusal to permit the medical examination suggested and believe it to be in the best interests of Claimant to have such examination to prevent further injury which might result, as stated in the report of the specialists, above set out, to him and fellow employes. We remand with the suggestion that attention be given this case on the property which it appears would be in the best interests of all concerned."

It is our determination that this case could have and should have been settled on the premises. That it wasn't — is not the fault of the Carrier, because the Carrier on two occasions recommended that the Claimant be examined by a Board of Specialists. On each occasion, the Organization refused to accept the Carrier's recommendations.

The record does not support the Organization's claim that the Carrier's actions were arbitrary, capricious and discriminatory, as well as contrary to the provisions of the Rules Agreement.

Accordingly, the claim is denied.

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 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

Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of October, 1961.