

Award No. 11172

Docket No. CL-13488

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK CENTRAL RAILROAD COMPANY
(EASTERN DISTRICT, BOSTON AND ALBANY DIVISION)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, (GL-5156) that:

(1) The Carrier violated the current Clerks' Agreement, effective January 1, 1957 as amended, when on November 16, 1961 it required Mr. A. Betti, Foreman at Worcester, Mass. Freight House, to take a physical examination, and further violated the aforementioned Agreement, when on December 11, 1961, it dismissed Mr. A. Betti from the service following hearing conducted on December 4, 1961, for alleged insubordination due to his refusal to affix his signature to Part 3 of the Physical Examination Form CS-6; and

(2) That Mr. A. Betti shall be restored to service, with seniority unimpaired, and compensated a full day's pay at the Foreman rate of pay of \$20.778 per day plus any subsequent increases of a general character, effective December 11, 1961, and continuing thereafter until such time as he is restored to service, with seniority unimpaired and all other rights unimpaired; and

(3) Mr. Betti shall be additionally compensated for any and all overtime that he might otherwise have received, plus reimbursement for any expenses incurred due to cancelling of his Health and Welfare Policy with Traveler's Insurance Co. effective December 11, 1961 and continuing until such time as he is fully re-instated thereunder; and

(4) Mr. Betti shall have all pass rights, vacation rights, and any other rights restored and shall be re-imbursed for any losses thereunder effective December 11, 1961 and continuing thereafter until said rights are restored, this to include any losses due to cancellation of insurance coverage; and

(5) Mr. Betti shall be additionally compensated at the legal Massachusetts State percentage interest rate on all monies

The dispute arose in May, 1961, when the Carrier notified Claimant through his immediate superior, Agent Smith, that he would have to **take the "re-check" physical examination.** Claimant requested a hearing on grounds (a) that under the agreement (Memo. April 1, 1961) it was not "apparent" that an examination was necessary; and (b) that it was improper to require him to sign the medical report form in blank **before** he was examined. The report of this hearing merely sets forth Claimant's objections. It makes no recommendations for disciplinary or other action. Claimant did, however, report for the physical examination which was not given because he refused to sign the form. No charges were filed against Claimant at that time.

In September, 1961, another hearing on a charge of insubordination was conducted following Claimant's refusal, (on advice of counsel not to sign "anything"), to sign Part 3 of the form at the request of Agent Smith. No disciplinary action was taken as a result of this hearing nor apparently was any decision rendered on the charge of insubordination.

Finally, on December 4, 1961, a hearing was held on a charge of insubordination for Claimant's refusal to sign Part 3, (again on advice of counsel), after having been examined by a physician on November 16. As a result, the disciplinary action complained of was imposed on December 11, 1961.

Insubordination is a serious offense in this industry and often results in severe punishment—dismissal from service and loss of valuable seniority and other rights. The Board, therefore, has a duty to review the record with great care to make sure that one charged with the offense has been afforded due process according to those provisions of the agreement designed to insure a fair and impartial adjudication of the charge. We also must decide whether the discipline imposed was justified in terms of the offense found to have been committed.

Review of the evidence of record here has created substantial doubt that the discipline finally imposed was justified in view of the way in which the handling of the case on the property was bungled. The Board is, as always, reluctant to interfere with the undisputed right of a Carrier to assess and administer discipline. Here, however, the record shows a consistent pattern of errors of omission and commission on the part of the Carrier substantial enough to support Petitioner's allegation that Claimant should not have been dismissed from service on December 11, 1961.

The first of these errors occurred in May, 1961, when Claimant questioned Carrier's right to re-examine him, and was granted a hearing under the discipline rule (Rule 43). The report of that hearing is in evidence. It is nothing more than a mere recital of Claimant's objections. No recommendations were made; no warning was given; no further action was suggested. When Claimant reported for the physical examination, he refused to sign the examination report. The physician did not, therefore, examine him, but no charge of insubordination was preferred nor was any other disciplinary action taken.

Not until September, 1961, nearly four months after the first incident, was another attempt made to obtain Claimant's signature on the report form. This time the request was made by Agent Smith, Claimant's immediate superior, in the presence of witnesses. Again a hearing was

held—this time on a charge of insubordination. No decision was rendered; no discipline was assessed. The record is completely devoid of any reasons why no decision was handed down, despite the fact that Carrier must have known that Rule 43(b) requires such action within seven days after the hearing has terminated. This Board has held that failure to do so amounts to exoneration of the accused. (Award 2590; Blake.) We agree.

At this juncture, then, Claimant could reasonably have relied on what had transpired as permission to continue to refuse to sign the form. Yet when he was requested to do so by the examining physician two months later in November, and refused, again he was charged, tried, and, this time, convicted of insubordination.

The Board is of the opinion that these procedural errors are sufficient to set aside the discipline of dismissal from service but there are other mitigating elements present which augment our conclusion. This Claimant had been in the Carrier's service for some twenty (20) years. There is no showing that he had ever been insubordinate or a trouble-maker during this entire period of service. His repeated refusal to sign Part 3 of the form was obviously motivated not by a desire to defy authority but by fear that his rights under the pending suit might be jeopardized, relying fully on the advice of his attorney. If, as the Carrier asserts, the sole purpose of requiring his signature was to identify Claimant as the person examined, he and his representative offered to comply by furnishing other proof of identity. What Claimant clearly wanted to avoid was supplying evidence which he thought, rightly or wrongly, might be used against him in the future. Significantly, however, he at no time refused to take the physical examination when ordered to do so. The Board believes that within the context of the peculiar circumstances of this case, Claimant's fears were neither unreasonable nor unfounded. We further believe that these considerations were not given sufficient weight when dismissal from service was deemed an appropriate punishment.

In view of the foregoing, the Board concludes that the discipline imposed was not justified and that the claim, as modified herein, should be allowed.

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 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 extent indicated in Opinion.

AWARD

Claim sustained to extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1963.