

**Award No. 11492**

**Docket No. CL-11015**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**Preston J. Moore, Referee**

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**PARTIES TO DISPUTE:**

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC  
RAILROAD COMPANY (LINES WEST OF MOBRIDGE)**

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

(a) Carrier violated rules of the Clerks' Agreement when it arbitrarily held Albert R. Davey from Service as Warehouse Foreman at Missoula, Montana.

(b) Carrier shall compensate Davey for wage loss sustained representing a day's pay (8 hours) at rate \$2.2645 per hour or \$17.116 per day March 28 through April 8, 1958 — 8 days — total wage loss \$136.93.

**EMPLOYEES' STATEMENT OF FACTS:** Albert R. Davey's seniority dates from November 17, 1919. He was displaced in a force reduction account abolishment of the cashier's position to which he was assigned in the Missoula, Montana freight office on March 14, 1958. He promptly filed notice of intent to displace Mrs. Hamilton on position of Rate Clerk, effective Monday, March 17, 1958. He was denied this opportunity to assert his seniority rights over a junior employe until he broke in and demonstrated his ability to handle the job. During period March 17 to March 21, 1958, he broke in on the Rate Clerk's position without pay and on the latter date notified the Agent that he would displace Mrs. Hamilton effective Monday, March 31, 1958. Later on in the same day, he withdrew entirely his request to exercise his seniority by displacing Mrs. Hamilton.

March 26, 1958, Davey exercised displacement rights by filing notice of desire to displace Warehouse Foreman Massing effective Friday, March 28. On the same date, March 26, 1958, he bid on Position No. 1, Warehouse Foreman, advertised in Clerks' Notice No. 25 dated March 21, 1958.

March 27, 1958, he was notified by Trainmaster Mealey on the telephone that he would be required to take a physical examination before he would be allowed to displace the Warehouse Foreman. The claimant, Mr. Davey,

the Board is of the opinion that the Carrier was justified in its action."

The Board also held in Award 728 that:

"The carrier's liability for the safe operation of its transportation facilities makes it responsible for the fitness of its employees to hold their respective positions. While this liability does not give a carrier a license to hold employees out of service at will, where it acts in good faith and upon facts that justify such action it is clearly within its rights under the prevailing agreement."

Further, in Award 362 the Board held:

"The age and physical build of the complainant, the evidence as to the character of his illness, the protracted period of that illness, the knowledge of the carrier's officers concerning his physical condition, and the nature of the duties to be performed by him—all these factors clearly support the contention that the requirement of a physical examination was a reasonably necessary precaution."

Attention is also invited to Second Division Award 1397 in which the Board held:

"In light of the record before it the Division cannot conclude that the carrier acted arbitrarily or unjustly. Under the circumstances it was rightfully entitled to know the extent of claimant's recovery and the degree of remoteness or probability of recurrent attacks after an undisputed illness of a serious character theretofore first manifested in August, 1944. See Awards 472, 481, 998, 1134 and 1288."

Also, in Award 839, the Second Division held:

"The evidence of record supports the following conclusions that in the circumstances of this proceeding it was neither unreasonable nor beyond the authority of the carrier to require a physical examination of the claimant; that the examination was made in good faith on behalf of the carrier, in the interest of safety; . . ."

It is the position of the Carrier that under the circumstances in this case its action in requiring Claimant Davey to submit to a physical examination to determine his fitness to safely perform the duties required of the position of Warehouse Foreman was fully justified and required in good faith.

All basic data contained herein has been made known to the employees.

(Exhibits not reproduced.)

**OPINION OF BOARD:** On March 26, 1958, a bulletin advertised a position of Warehouse Foreman (R-12). Claimant bid on the position and was awarded the assignment. It was later cancelled. The reason given by the Carrier was the "physical condition of the Claimant." The Carrier required a physical examination by Carrier's local physician. That report is set forth below:

"Missoula, Montana

March 31, 1958

"James F. DePree, M. D.  
Milwaukee Hospital Assoc.  
1656 Medical & Dental Bldg.,  
Seattle 1,  
Washington

"Re: A. R. Davey, Missoula  
Application — Warehouse  
Foreman position

"Dear Doctor:

"I examined Mr. Davey on March 29, 1958, as you had requested by phone. General physical findings were good. Blood Pressure 130/76; P. 80; lungs clear; heart normal size and sounds of good quality with no murmurs and no arrhythmia. Abdomen was normal; no hernia; and extremities were normal.

"Upon examination of his back I found no limitation of motion; no percussion tenderness; and no pain on extreme flexion of back or thighs on trunk. An X-ray of the lumbar spine, one view, A.P. was taken and nothing abnormal noted.

"Mr. Davey states that he has had no trouble with his back for two years. He does some garden work, including spading, without any difficulty. Also, he was hunting deer last fall and managed to lug and drag a fair sized deer to his car in the hills without any difficulty.

"It is my opinion that he might be able to handle the proposed job without any trouble, but I would suggest a complete examination ('C') and a complete set of spine X-rays along with a waiver signed by Mr. Davey.

"Yours,

"/s/ I. J. Bridenstine  
I. J. Bridenstine, M. D."

"Copy to  
S. E. Herzog, Supt.  
Deer Lodge, Mont."

The local physician recommended a complete examination. This was completed and Claimant was allowed to fill the position on April 9th. This claim was filed for 8 days lost as a result of the physical examinations.

This Board has held that when the Agreement is silent on the subject, the Carrier has reserved the right to require a physical examination. The Claimant had previous trouble with his back. We cannot see how the Carrier exceeded its rights when it required a physical. The Carrier acted promptly in giving the examination the following day. The examining physician recommended a complete physical examination. This was done in 8 days. We

fail to see any arbitrary or capricious acts of Carrier in following that recommendation.

For the foregoing reasons, we find the Agreement was not violated.

**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 not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1963.