Award No. 11782
Docket No. CL-12867

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5001) that:

(1) The Carrier violated the current Clerks' Agreement when it arbitrarily withheld David W. Blume from his regular assignment as Freight Handler, Boston, Massachusetts.

(2) Carrier shall be required to restore Mr. Blume to his regular position with all rights unimpaired.

(3) David W. Blume shall now be compensated at the regular rate of his position for August 22, 1960 and each day thereafter until he is restored to his regular position by the Carrier.

EMPLOYES' STATEMENT OF FACTS: The claimant, David W. Blume, was a regular assigned Freight Handler at Boston, Massachusetts, with approximately 23 years seniority.

On August 22, 1960, Mr. B. A. McMahon, Agent, Freight Terminal, Boston, Massachusetts instructed the Supervisors to advise Mr. Blume that an appointment had been made for him with Dr. Derick, Company Physician, 412 Beacon St., at 2 P.M., August 23, for a physical examination, and, at the same time denied Mr. Blume the right to work. On August 23, 1960 Mr. Blume was examined by the Company Physician, Dr. Derick, whose recommendation was as follows:

"I do not believe he is able to do any heavy work."

Dr. Derick's entire report is attached as Exhibit #1.

On August 26, 1960, Mr. McMahon wrote Mr. Blume, as follows:

"884 Boston, Mass.,
August 26, 1960
File BAM

"Mr. David W. Blume,
2 Delano Court,
Roslindale, Mass.

Dear Sir:

This is to advise that as a result of physical examination by Dr.

It is regretful that a claim of the nature here involved be progressed ex parte to your Honorable Board for settlement. But the record will show that the Carrier has made repeated efforts to settle the issue as to Mr. Blume's qualifications jointly with the Brotherhood. Repeatedly, the Brotherhood refused—electing instead to progress claim for compensation allegedly due.

We respectfully submit, under all the circumstances here present, the Carrier's actions have not been arbitrary, capricious or malicious in any manner.

There has been no violation of the cited rules.

The claim for compensation and restoration to service is without merit and should be denied. Carrier respectfully requests your Honorable Board to either (a) recognize Carrier's determination as to claimant's inability to properly perform his duties or (b) remand the question to the parties for joint determination in line with earlier efforts by the Carrier.

All of the facts and argument contained herein have been affirmatively presented to employe's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. Claimant, David W. Blume, aged 76 at the time he was disqualified from further employment, August 22, 1960, was employed as a freight handler by the Carrier for twenty-three years. The Carrier questioned his physical fitness to continue to do laboring work as a freight handler and sent the employe to its doctor, Dr. Derick, for a medical examination. Dr. Derick made the examination and wrote a report which concludes with the opinion that Mr. Blume is unable to do heavy work.

Claimant was then examined by his personal physician whose report concluded with the statement that in this doctor's opinion Blume was in good physical condition. Thereafter, pursuant to Rule 9 of the current Agreement between the parties if two medical examinations are in conflict the conflict may be resolved by requesting a re-examination by a competent medical authority to be selected by the parties. Such an examination was made by a doctor, Dr. Gryboski, whose report, in pertinent part, states:

> " * * * Even though it is unusual for a man of his age to do heavy work, I seen no reason for stopping him, since he wishes to continue this work."

Thus we find the Carrier's doctor and the neutral doctor in direct conflict as to their medical findings and the Claimant's own doctor expressing no opinion as to Mr. Blume's physical fitness to continue to perform heavy manual labor.

The Organization claims that since the neutral doctor, selected in accordance with Rule 9 of the Agreement, stated: " * * * Even though it is unusual for a man of his age to do heavy work, I see no reason for stopping him, since he wishes to continue this work", when the Carrier declined to permit Claimant to return to work it violated Rule 9, acted in an arbitrary manner and should be compelled to put him back to work with back pay and all rights restored to him. The Board does not agree that this failure to implement Dr. Gryboski's recommendation constitutes a violation of the Agree-

ment. It should be noted that the Agreement does not make the findings of a neutral doctor final and binding on the parties. The Carrier claims that despite the medical reports (which they agree they do not have the competence to question) the determination of a man's physical fitness to perform the duties of his job is left exclusively for them to determine. Their decision was based on their best judgment; there is nothing in the Agreement which prevents them from making the final decision on such a matter and this opinion of the Carrier's authority to determine an employe's qualifications for employment is not questioned by the Brotherhood. Further, the Carrier points out that the instant case is not one of discipline; they did not charge Claimant with any derelictions of duty; the Carrier does not seek to impose a penalty as such on the Claimant; instead the action taken by them was taken in good faith and was designed to protect the health and safety of the Claimant and his fellow workers.

This case does not appear to involve a violation of the Agreement by either the Carrier or the Brotherhood. The issue therefore narrows down to a question of judgment. On the face of it there would appear to be justification for removing a 76 year old man from doing heavy manual work when the Carrier did come forward with some evidence to indicate that there have been complaints made by fellow employes and minor supervisors that the Claimant was too old to continue to do freight handler's work with safety to himself or to his fellow workers; also that Claimant's age made it impossible for him to work at the same pace as those men with whom he worked.

Nevertheless the Board is limited to the issues encompassed in the record before it. According to the record, it is clear and it is not denied, that the Claimant and the Brotherhood complied with Rule 9 of the Agreement. It would seem equally clear that if the instant case involved a younger man there would not be any question that once the neutral doctor said the employe was physically able to perform the duties of his job, such an employe would be entitled to be returned to his regular assignment with back pay and with his rights restored.

Under the facts of the present case can it be reasonably said that the Carrier's action should be upheld because the Claimant is an old man? A decision of this Board in another analogous situation, minus only the special circumstance of great age, might establish an unfortunate precedent which in turn could conceivably work a hardship on employes in future situations.

It should be noted that Rule 9 is silent on the action to be taken if, as here, after the neutral doctor rendered his opinion, either side does not comply with the neutral medical opinion. A reasonable interpretation of this provision is that the parties only intended the neutral medical opinion to be used in an advisory manner and it does not operate to compel one way or the other.

If, after the Claimant has been restored to his former assignment, his actual performance on the job demonstrates that he is presently not physically able to do his job, and continuing to keep him on the assignment is a threat to the health and safety of the Claimant and his fellow workers then that situation should be handled by the Carrier de novo.

Under the particular facts and the circumstances of the instant case it is the opinion of this Division that the claim should be sustained.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October 1963.

DISSENT TO AWARD NO. 11782, DOCKET NO. CL-12867

Award 11782 correctly disagrees with and rejects the Brotherhood's contention that Rule 9 was violated by Carrier's failure to restore Claimant to service with pay, and it correctly holds:

> "It should be noted that the Agreement does not make the findings of a neutral doctor final and binding on the parties. * * *
>
> "It should be noted that Rule 9 is silent on the action to be taken if, as here, after the neutral doctor rendered his opinion, either side does not comply with the neutral medical opinion. A reasonable interpretation of this provision is that the parties only intended the neutral medical opinion to be used in an advisory manner and it does not operate to compel action one way or the other."

Award 11782 also is correct in holding as follows:

> "This case does not appear to involve a violation of the Agreement by either the Carrier or the Brotherhood. The issue therefor narrows down to a question of judgment. On the face of it there would appear to be justification for removing a 76 year old man from doing heavy manual work when the Carrier did come forward with some evidence to indicate that there have been complaints made by fellow employes and minor supervisors that the Claimant was too old to continue to do freight handler's work with safety to himself or to his fellow workers; also that Claimant's age made it impossible for him to work at the same pace as those men with whom he worked."

On its face, therefore, the following assumption based on speculation, conjecture or surmise is incongruous with the Majority's interpretation of the Agreement and the facts herein:

> " * * * It would seem equally clear that if the instant case involved a younger man there would not be any question that once the neutral doctor said the employe was physically able to perform the

duties of his job, such an employe would be entitled to be returned to his regular assignment with back pay and with his rights restored."

In the first place this Board has consistently held that it is without authority to base its decisions upon speculation, conjecture or surmise; that it must interpret Agreements as the parties have written them, and that it is without authority to add thereto or detract therefrom. In addition, it is illogical to assume that "a younger man" in such circumstances "would be entitled to be returned to his regular assignment with back pay and with his rights restored" when admittedly there is no rule so providing and the record shows complaints from industries served, from fellow employes and from minor supervisors indicating improper performance of his duties and their fear of working with him from a safety standpoint.

It also is illogical to require Carrier to restore Claimant, now in his eightieth year, to his former assignment and risk liability under the law, on the basis that it then could handle that situation de novo. Petitioner had failed to sustain its burden to show that Carrier had surrendered or limited its basic management functions by the use of language in some rule that is susceptible of no other interpretation from that for which it was contending.

Having concluded that there was no violation of the Agreement by the Carrier and there being no penalty provision in the Agreement, the claim herein should have been denied in its entirety. This division has consistently denied claims upon finding no violation of agreement rules. For illustration: In Award 7283 (Referee Cluster), involving a somewhat similar situation, we denied the claim holding as follows:

> "Since the discipline rule is not applicable, there was no requirement upon the Carrier to provide claimant with the notice and hearing required by that rule. Nor does it appear that Carrier violated any other rule of the agreement in its treatment of claimant; no specific rule is found in the Agreement covering the procedure for disqualification of an employe for lack of ability to perform the duties of his position. * * * We conclude that no rule of the Agreement was violated."

For the foregoing reasons Award 11782 is palpably in error and we dissent.

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ T. F. Strunck

/s/ G. C. White