

Award No. 13126

Docket No. CL-14701

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

THE WASHINGTON TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5499) that:

1. The Carrier violated the Clerks' Agreement when on July 31, 1963, it summarily dismissed James P. Jacobs, Clerk, Washington, D. C., from service.
2. Clerk James P. Jacobs shall now be reinstated to the service of the Carrier with seniority and all other rights unimpaired.
3. Clerk James P. Jacobs shall now be compensated for all wage and other losses sustained account this summary dismissal.
4. Clerk James P. Jacobs' record shall be cleared of all alleged charges or allegations which may have been recorded thereon as the result of the alleged violation named herein.

OPINION OF BOARD: Resolution of the issues in this case involve: (1) interpretation and application of Rule 24 of the Agreement; and, Carrier's right to order an employee to submit to a physical examination and to hold him out of service until his return to service is approved by a Medical Examiner. The Agreement is silent on the subject of physical examinations.

PERTINENT PROVISION OF AGREEMENT

The following provision of the Agreement is pertinent:

"Rule 24

DISCIPLINE—HEARING AND DECISION

(a) An employee who has been in the service more than 60 days shall not be disciplined or dismissed, except as provided for in Rule 51, without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At a reasonable time prior to the hearing, such employee shall be notified in writing of the precise charge against him, and he shall have reasonable opportunity to secure the presence of necessary witnesses and one or more duly ac-

credited representatives. The hearing shall be held within 10 days from the date when charged with the offense or held from service, and decision in writing will be rendered within 15 calendar days after completion thereof.

If an employe is suspended, the suspension shall date from the time he was taken out of service."

THE FACTS

Claimant, age 37, was continuously employed by Carrier from October 23, 1952, until on May 6, 1963, he received the following, dated May 3, 1963, from Auditor F. J. Bresnahan:

"In view of the fact that your recent conduct during office hours has been unsatisfactory you are hereby directed to report to The Washington Terminal Medical Department for such physical examination as may be deemed necessary by the Company Doctor. Further, you are being held out of service and will not be permitted to resume duties in this office until your return is approved by the Medical Examiner."

Upon receipt of the foregoing Claimant proceeded forthwith to the offices of Dr. Morse, the Carrier's Medical Examiner, to submit to and was subjected to physical examination. [NOTE: All dates herein are in the year 1963 unless otherwise shown.]

Under date of June 7 Carrier served Claimant with the following:

"Arrange to report to my office at 10:00 A. M., DST, Friday, June 28, 1963, for a hearing on the charge that on June 4, 1963, you failed to comply with the instructions of Dr. W. B. Morse to submit to examination by Dr. H. D. Shapiro, and my instructions to you to comply with the instructions of Dr. Morse.

You may be accompanied by your duly accredited representative and any witness or witnesses of your choice without expense to The Washington Terminal Company."

By agreement of the parties the hearing was timely held on June 28. On July 11, the hearing officer issued his decision:

"I have carefully reviewed the transcript of hearing and the evidence adduced therein, and find that you did fail to comply with instructions of Dr. W. B. Morse to submit to examination by Dr. H. D. Shapiro, and Mr. Bresnahan's instructions to you to comply with instructions of Dr. Morse. The charge against you is serious and warrants drastic disciplinary action. However, it is obvious from your statements in the hearing that you do not understand your obligation to comply with the instructions given you on June 4 by Dr. Morse and Mr. Bresnahan. The record shows that had you been issued these instructions in writing you would have complied with them, but that because you were not given these instructions in writing you failed to comply with them.

In view of the fact that you did not understand your obligation to comply with the instructions given you, I am inclined to be lenient

in this case and give you another opportunity to comply with instructions. It is my decision, therefore, that you be discharged from the service of The Washington Terminal Company effective July 31, 1963, unless prior to that time you comply with the instructions given you on June 4 and also obtain a return-to-duty slip from the Medical Examiner."

Clerks appealed on July 19. Carrier's final decision, affirming the hearing officer's decision and Claimant's dismissal from service, issued on August 12.

The congeries of the facts is found in the transcript of the July 28 hearing.

As to what gave rise to Auditor Bresnahan's issuing the May 3 directive taking Claimant out of service, Bresnahan testified:

"My attention was attracted to the voices of individuals outside of the doorway to my private office. That happened on Friday, May 3, and when I went to the doorway I noted that Mr. Jacobs in a loud voice was having a discussion or making some remarks to my Assistant. At that time the discussion and remarks ceased and Mr. Jacobs headed in the direction of his desk. I called in my Assistant and asked him the reason for the commotion. He advised me that Mr. Jacobs had reported about six minutes late for work and that he, my Assistant, had called this particular tardiness to his attention. My Assistant informed me that Jacobs' remarks were that he didn't have to be concerned with the tardiness of that date because he did not intend to work at all on that Friday. Jacobs, I am informed, had a brief discussion with his Supervisor, Mr. Mathews, and told Mr. Mathews that he was taking the day off. He then left the office. I gave consideration to this incident and other incidents which had been brought to my attention by supervisors and other employees concerning Mr. Jacobs' conduct in the office, and as the result on Monday, May 6, I referred him to Dr. Morse for such examination as Dr. Morse might deem desirable. The background of this decision on my part with respect to medical examination was my knowledge of the fact that Mr. Jacobs has at times in our office suffered certain sicknesses or would become indisposed insofar as performing his duties."

Bresnahan failed or evaded giving responsive answers to questions by Claimant or his Representative as to what were the "other incidents." There is some allusion in the record that Bresnahan had written reports on the conduct of Claimant from supervisors and fellow workers. These, which would be the best evidence, were not introduced into the record by Carrier; nor, is their substance in any manner revealed. The only probative evidence in the record as to Claimant's conduct is brief loud talking on May 3. Claimant admits to this.

It is uncontroverted in the transcript that Claimant reported to Dr. Morse on May 6, upon receipt of the direction to do so—Dr. Morse found Claimant to be physically normal—Dr. Morse, on that date, said nothing about need of further examination and did not tell Claimant his diagnosis.

On May 9, Claimant being out of service and having heard nothing from Dr. Morse, called the Doctor as to his status. Dr. Morse testified that he "suggested a psychiatric examination." It is to be noted that this was only a suggestion; it was not ordered.

Under date of May 29, Auditor Bresnahan sent the following letter to Claimant:

"This has reference to my memorandum of May 3, 1963, advising that you were being held out of service and would not be permitted to resume duties in this Office until your return is approved by the Medical Examiner.

You will recall our conversation on May 16 in which I suggested that you be examined by your family physician or a specialist and that our Medical Examiner be directly advised concerning your physical condition and prognosis with respect to resumption of service. In this conversation I told you of my sincere desire to do anything I could to bring about your early return to duty.

I am not informed of any developments since my conversation with you on May 16; therefore, you will please arrange to promptly report to Medical Examiner Morse in order that he may make or arrange for a physical examination with respect to your condition."

Pursuant to this letter Claimant reported to Dr. Morse on June 4. On this occasion, for the first time, Dr. Morse directed Claimant, without giving reasons, to submit to an examination by Dr. Shapiro, a psychiatrist, at Carrier's expense. Claimant refused to do so unless so instructed in writing. Dr. Morse informed Carrier of Claimant's reaction. In Carrier's opinion Claimant's conditional refusal was insubordination and it proceeded to initiate the discipline proceeding evidenced by its notice to Claimant under date of June 7, *supra*.

Let us now examine the testimony of Dr. Morse. We find his testimony unresponsive, confusing and unsupported by clinical records or professional diagnosis.

Dr. Morse testified that "I was requested to examine him (Claimant) as a result of unusual behavior during working hours." Also, "I had seen notes made by employees of the Audit Office regarding (Claimant's) behavior. I don't remember who made them, but they indicated that his behavior was unusual." The notes were not produced. There is no evidence in this record of unusual conduct on the part of Claimant during office hours. Indeed, the only evidence in this record as to Claimant's conduct prior to May 3 is his unchallenged testimony:

"In the past ten years and several months of working for Washington Terminal Company I have never been questioned as to my activities or my performance of work in the Audit Office and within fifteen minutes or a half hour in Doctor Morse's office he thought that I was mentally disturbed in that short time enough to see a psychiatrist."

The following testimony of Dr. Morse speaks for itself, bearing in mind that he examined Claimant only once, on May 6:

"Q. During the time that you performed your examination of Mr. Jacobs in your office, did you through your professional background detect any factors that would lead you to believe that his behavior was other than usual?

A. Not in particular, but he was, I thought, somewhat disturbed in some of his statements.

Q. Then it is only reasonable for me to understand from your

testimony that you did feel a psychiatric evaluation was definitely necessary in the case of Mr. Jacobs?

A. I did. I felt it was necessary?"

Thereafter, in the course of the hearing, when Claimant sought to have Dr. Morse give his professional reasons for suggesting a psychiatric examination, the hearing officer (Mr. Dowell) prevented the Doctor from giving a responsive answer:

Mr. Jacobs to Dr. Morse:

Q. Why did you suggest a thing like that? In that short period of time, why? I am not questioning your background, profession or anything like that. I am just asking you directly on what basis can you judge that. I want some sort of concrete answer. Why did you prescribe such a thing? After receiving notice, I walked over to your office. I came in to work and was told by a supervisor that Mr. Bresnahan wanted to see me and I told my supervisor, Mr. Mathews, I had just seen Mr. Bresnahan downstairs. He went someplace else. I came to work a few minutes late. Mr. Mathews came over and said not to do anything until Mr. Bresnahan saw me. Mr. Loughery spoke to Mr. Mathews. Mr. Bresnahan had either given notice to Mr. Loughery or in any event the notice was passed down to me. I received this notice and I went from there, excused myself from Mr. Mathews, went to your office and you examined me, tested my heart with stethoscope and took pulse, blood pressure and what not. As far as you could determine at that time, I was in good physical shape, you said.

Mr. Dowell to Mr. Jacobs:

I believe the testimony as furnished by Dr. Morse will indicate that on his initial examination of you he stated that he could find nothing physically wrong with you. Is that correct, doctor?

By Dr. Morse:

That's right."

THE ISSUES

1. Whether Claimant was held out of service pursuant to the May 3 notice for discipline; or, was he held out of service, in the exercise of a right of Carrier, until examination by Carrier's Medical Examiner and the Examiner's finding relative to physical qualification?

2. Whether Claimant, on June 4, was guilty of insubordination in refusing to submit to a psychiatric examination as ordered under the facts of record?

RESOLUTION

Both parties contend that the meaning of the May 3 out-of-service notice is clear. Carrier says that it clearly states that Claimant was being held out of service only until he was found physically fit, by the Medical Examiner, to perform the duties of his position. With equal certainty Clerks say the notice clearly states that Claimant was being held out of service for "recent conduct," a disciplinary action requiring compliance with Rule 24 of the Agreement. We find the notice is susceptible to both interpretations. Since

the notice was drafted by Carrier and subject to both interpretations we apply the rule that under such circumstances the applicable interpretation is that most favorable to the addressee. Therefore, we find that Claimant was held out of service for his conduct, a disciplinary action, and Carrier was obligated to comply with Rule 24 of the Agreement. Its failure to comply was a violation of the Agreement.

We come next to the insubordination alleged in the notice of June 7.

We are in agreement with the principle enunciated by Carrier, citing Awards Nos. 728, 8724, 9208, 11492, 10920, that Carrier has an obligation to have in its employ those who are physically and mentally fit for the service to be performed. Impliedly, this includes the right to direct its employes to submit to physical examination if it has reasonable cause to believe that this is necessary to determine whether an employe is physically fit to perform the duties of his position. But, we emphasize the word "reasonable." The principle does not give the Carrier the absolute right to invade the person and privacy of an employe. If an issue is raised the Carrier has the burden of proving that it had reasonable cause for ordering the examination. It is not enough for Carrier to say it had reasonable cause. It must be proved by a preponderance of material and relevant evidence. The facts in this case, above, paint a word picture of Carrier's failure to meet this test. The bare incident of brief loud talking on May 3, which is the only evidence of Claimant's behavior in the record, cannot be held to be a reasonable cause for ordering Claimant to submit to a psychiatric examination. Consequently, Claimant's refusal to do so cannot be held to be insubordination.

We find, from the facts of record, that the Carrier did not have reasonable cause for ordering Claimant to take a psychiatric examination.

We will sustain the Claim.

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 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; and

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1964.