Award No. 14135
Docket No. CL-15118

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, 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 (GL-5615) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-7 and 3-C-1, when it refused to permit John D. Croft, Chauffeur, Dennison, Ohio, Buckeye Region, to exercise his seniority or return to service.

(b) Claimant John D. Croft be returned to service in order to terminate this claim, and be allowed eight hours' pay a day, plus holiday pay, vacation pay and vacation qualifying rights commencing May 3, 1962, and continuing until adjusted. [Docket 1425]

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.

Prior to March 26, 1962, Claimant John D. Croft was the incumbent of a regular Group 2 position of Chauffeur at Dennison, Ohio, Buckeye Region. He has a seniority date of April 21, 1941, on the seniority roster of the Buckeye Region in Group 2. He also has a seniority date of September 30, 1950 in Group 1.

the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established that (1) the claim listed here with the Board has been changed from that discussed and progressed on the property to such a degree as to constitute a new claim and one that is not properly here before the Board; (2) that in any event, the Claimant's rights under the Agreement were not violated when he was removed from service based on the recommendation of the Carrier's Regional Medical Officer, nor were those rights violated when the Carrier, based on the recommendations of its medical authorities, chose not to agree to place the Claimant on another position under Rule 3-G-1 because this rule does not under any circumstances make it mandatory for either party to agree to placements; and (3) that this Board cannot properly substitute its judgment for that of competent medical men regarding the physical fitness of the Claimant where, as here, there is no showing of unreasonableness, malice, or bad faith. The claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 26, 1962, the Claimant was disqualified from his position as Chauffeur for physical disability. He holds seniority on two rosters; on the group 2 Buckeye Region it dates from April 21, 1941 and group 1 runs from September 30, 1952.

A Joint Statement of Agreed-Upon-Facts was submitted by the parties which indicated that Dr. Boyd, a part-time Company Medical Officer at Coshocton, Ohio, following a periodic physical examination disqualified the Claimant because of obesity, high blood pressure and a diabetic condition. Thereafter, the Claimant's position of Relief Chauffeur at Dennison, Ohio, was abolished on March 31, 1962.

The Claimant then engaged Dr. Boyd to treat him and provide medication. Thereafter, on April 27, 1962, following intensive treatment, medication and dieting for a period of thirty days, he was reexamined by Dr. Boyd. This time, an MD-3 report was issued which authorized his return to duty, effective April 30, 1962. The diagnosis indicated that the Claimant's physical condition had so improved that it warranted his restoration to duty. However, Dr. Amberg, the Regional Medical Officer located in Cincinnati, Ohio, issued a corrected MD-3 form on May 2, 1962, which stated that the Claimant was not qualified to resume duties as a Chauffeur. In effect, this reversed Dr. Boyd's authorization issued five days previously, although Dr. Amberg had neither examined the Claimant nor did he have any personal knowledge of his physical condition at the time; however, he did subsequently examine him on January 10, 1963.

The facts further indicate that Dr. Boyd is a licensed practicing physician, who resides in and maintains a private practice in Coshocton, Ohio, as well as being employed in the capacity of part-time District Medical Officer for the Carrier. On the other hand, Dr. Amberg is the Regional Medical Officer for the Carrier, serves full time and supervises all Medical Officers in the Buckeye Region.

Subsequently the Claimant was reexamined by Dr. Cerny, the Carrier's Medical Officer at Columbus, Ohio, on August 3 and October 18, 1962. Each

time, an MD-3 form was issued by Dr. Amberg, stating that the Claimant was not qualified to resume chauffeur duties. Following the receipt of the MD-3 form based on the October 18th examination, the Claimant wrote to Dr. Amberg for a clarification. Dr. Amberg replied on December 12, 1962, which letter is reproduced herein:

"In reply to your letter of December 5, the MD-3 dated October 18, 1962 shows you disqualified for chauffeur. The letter attached is an indication to your employing officer and the Personnel Department that if a job in your department exists for which you are eligible and if it meets the requirements of your physical condition you could be placed thereon. I do not know what these jobs are. Consultations with your committeeman and the Personnel Department should reveal the nature of these jobs.

As to your physical condition, you are still 130 lbs. over-weight and while the diabetes is under better control than at any time this year, still I do not feel that you are safe to work, driving a vehicle where the lives and safety of other employes depend on your physical condition. You may not know but part of the treatment of diabetes is attempting to get the patient's weight about 10 per cent below his ideal weight. This may not be possible in your case. Also you have much higher than normal blood pressure even though it seems to have improved within the last two months. I wish to congratulate you on your loss of 45 lbs. during the past six months.

Hoping that you may find something in your department which will be safe for you to work at, I remain."

On the property, the Organization requested that the Claimant be permitted to exercise his seniority, or to perform service, as a chauffeur; and by way of relief, that the Claimant be returned to service as a chauffeur. The Carrier denied such request on the ground that the employe was physically unfit for duty in any capacity; as well as relying upon Rule 3-G-1, which requires a bilateral agreement acceptable to both parties for such placement.

The Carrier has vigorously resisted the posture of the employe's claim as submitted to this Board, on two grounds. The first, involves the issue of jurisdiction; and the second, goes to the merits of the dispute, namely, whether Dr. Amberg was arbitrary in countermanding Dr. Boyd's authorization of April 27, returning the Claimant to duty, and subsequent rejections.

The basis for the Carrier's assertion of an alleged fatal jurisdictional defect is predicated on the Statement of Claim as submitted by the Organization. It is, therefore, essential that we concern ourselves with this preliminary issue, as proper jurisdiction is a condition precedent to an analysis of the merits of the instant dispute.

The Carrier assiduously argues that a substantial alteration was affected in said claim through the omission of the phrase, "as a chauffeur." On the property, the claim was presented in the following language:

"(a) The Carrier violated the provisions of the Rules Agreement of May 1, 1942, except as amended, particularly Rules 2-A-7, 3-C-1, 3-G-1, 4-A-2, 4-A-3 and other rules, when it refused to permit John D. Croft the exercise of seniority, or to perform service, as a chauffer, [sic] on May 3, 1962, at Dennison, Ohio.

(b) John D. Croft be returned to service as a chauffer, [sic] in order to terminate this claim, and be compensated 8 hours per day, five days per week, including holiday pay, vacation pay, and vacation qualifying rights beginning May 3, 1962, and continuing until adjusted."

However, the Statement of Claim in paragraph (a) before us now, alleges that the Carrier violated the Rules Agreement by refusing to permit the Claimant to exercise his seniority or return to service. Hence, in paragraph (b) the Organization, by way of relief, requests that the Claimant be returned to service. Nowhere, in either Claim (a) or (b), is there included the phrase "as a chauffeur." Thus, the Carrier submits that the Claim before this Board is a different or "new" Claim than the one discussed on the property.

We are required to recognize the validity of the Carrier's contention. This is so, despite the Organization's argument that such change was not substantial and, therefore, should be disregarded.

However, in deleting the words, "as a chauffeur," in both paragraphs (a) and (b) of the Claim before us, the Organization has materially changed the basis for the Claim as submitted and processed on the property. The present Claim has not been validated under Rule 7-B-1 of the effective agreement between the parties.

We are required to conform to the mandate of Section 2, Second, of the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board adopted for the purpose of giving effect to the provisions of the Act. (See Awards 13707, 13644, 13207, 12178, 11182 and a host of others.)

It is, therefore, the considered opinion of this Board that the instant Claim was not handled in the usual manner as provided in Section 3, First (i) of the Railway Labor Act, as amended. The record reveals that there is a substantial variance between the Claim as discussed on the property and the one submitted to this Board. See Award 12499. We are, therefore, compelled to dismiss the Claim without consideration of the substantive issue.

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; and

That the Claim will be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of February 1966.