

Award No. 18007
Docket No. CL-18441

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the System Committee of the
Brotherhood (GL-6681) that:

CLAIM NO. 1

(a) The Southern Pacific Company violated the current Clerks' Agreement on August 18, 1967, when it refused to hold a formal hearing under provisions of Rule 50 requested by Paul H. Hockabout for the purpose of investigating alleged unjust treatment in connection with the carrier's actions in removing him from his regularly assigned position.

(b) Paul H. Hockabout shall now be accorded his right of investigation as provided under Rule 50 of the Agreement.

(c) Paul H. Hockabout shall, in addition, be compensated eight (8) hours at pro rata rate for August 23, 1967; and, commencing August 24, 1967, be compensated eight (8) hours for each work day of Position No. 305, Section Stockman, Roseville, California, until he is permitted to be assigned to that position.

CLAIM NO. 2

(a) The Southern Pacific Company violated Article V of the Chicago Agreement of August 21, 1954, when it failed or refused within the stipulated time limits to disallow or otherwise act upon written displacement notice filed by Paul H. Hockabout on March 16, 1968.

(b) Paul H. Hockabout shall now be compensated eight (8) hours compensation at the rate of Position No. 313, Stockman's Assistant, rate \$24.0139 per day, for all work days commencing Monday, March 18, 1968, and continuing through Friday, May 17, 1968.

(c) Like compensation shall also be allowed for the continuing portion of this claim, subsequently filed, to include dates of May 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1968, when not permitted to displace upon Position No. 313.

CLAIM NO. 3

(a) The Southern Pacific Company violated the current Clerks' Agreement by again denying Paul H. Hockabout his seniority rights when on June 4, 1968, it refused without the necessary proper or sufficient reasons to permit him to displace on Position No. 306, Section Stockman.

(b) Paul H. Hockabout shall now be allowed one day's compensation at the rate of said position commencing June 1, 1968 — the date displacement was filed — and continuing each work day thereafter until his claim is adjudicated.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including subsequent revisions (hereinafter referred to as the Agreement), between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees), which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

As a point of reference for the argument to follow and, insofar as possible, to simplify the factual background and incidents pertaining to the institution and progression of Mr. Hockabout's grievance and claims, the following chronological sequence of events is offered for the use of your Board in its study of this case:

- 12/14/65 Hockabout hospitalized in connection with an arthritic condition. Examination revealed an aneurysm and surgery was recommended. Meanwhile, Hockabout released and returned to his regular assignment of Fork Lift Operator.
- 1/14/66 Surgery performed: abdominal aortic aneurysm.
- 4/24/66 Hockabout returned to duty and assigned to position of Store Attendant.
- 4/19/67 One year later and while still assigned to his Store Attendant position, Carrier notified Hockabout in writing that a new duty was being assigned to him and that, henceforth, he would be required to drive a pick-up truck.
- 5/12/67 Date of letter from Hockabout to Dr. Strange wherein the employe requested that he be permitted to go back to his former position of Fork Lift Operator for the reason he felt the duties of that position were less strenuous than the truck-driving duty newly imposed upon his Store Attendant position (Employees' Exhibit A).

CARRIER'S EXHIBIT J-1 - Letter August 16, 1968 from carrier's material manager to petitioner's division chairman, answering certain questions and setting time for conference.

CARRIER'S EXHIBIT J-2 - Letter September 13, 1968 from carrier's material manager to petitioner's division chairman confirming conference of August 27 and denial of claim.

CARRIER'S EXHIBIT J-3 - Letter September 16, 1968 from petitioner's division chairman advising carrier's material manager that his decision would be appealed.

CARRIER'S EXHIBIT K - Letter September 25, 1968 from petitioner's general chairman, addressed to carrier's assistant general manager personnel, appealing claim in behalf of claimant March 18, 1968 through May 31, 1968.

CARRIER'S EXHIBIT K-1 - Letter October 31, 1968 from carrier's assistant general manager, to whom claim should have been addressed, to petitioner's general chairman acknowledging letter September 25, 1968.

CARRIER'S EXHIBIT K-2 - Letter November 7, 1968 from petitioner's general chairman, addressed to carrier's assistant manager personnel, appealing claim in behalf of claimant for June 1, 1968 and thereafter until claim adjudicated.

CARRIER'S EXHIBIT K-3 - Letter November 18, 1968 from carrier's assistant general manager to whom claim should have been addressed, to petitioner's general chairman acknowledging letter November 7, 1968.

CARRIER'S EXHIBIT K-4 - Letter January 20, 1969 from carrier's assistant general manager to petitioner's general chairman confirming denial of claim in conference of January 16, 1969.

As will be noted from reading of exhibits, claimant was restricted by competent medical authority in the service he could perform because of his physical condition, reported as abdominal aortic aneurysm (surgically replaced with a DeBakey dacron graft on January 13, 1966), arthritis, bursitis, gout and benign prostatic hypertrophy; that notwithstanding the willingness and efforts of the carrier to provide claimant with employment and duties within restrictions placed, he adamantly refused to take such employment, continued to attempt to obtain positions the duties of which far exceeded his restricted activities, and on April 9, 1968, applied to the Railroad Retirement Board for disability annuity which the Board granted effective August 7, 1967. It is in this posture that the claim is before the Board for adjudication.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 13, 1966 Claimant, a Lift Truck Operator, was operated on at the Southern Pacific Memorial Hospital and a DeBakey's dacron graft was inserted to replace an abdominal aortic aneurysm, which was found to be asymptomatic. He also was suffering from bur-

stitis, gout and benign prostatic hypertrophy at the time of his admission to the hospital on December 4, 1965.

As a result of said operation he was advised by Dr. John R. Crew, M.D. that he could not return to duty as a Lift Truck Operator, but recommended return to duty in a sedentary capacity.

Claimant returned to work as a Store Attendant, Roseville, California, on April 24, 1966. On April 7, 1967, Carrier requested by letter of its Chief Surgeon, Dr. Vance M. Strange, advice as to any restrictions on Claimant operating a half-ton pick-up truck from time to time on his job of Store Attendant, which was approved by said Chief Surgeon after consultation with Dr. Crew. On April 19, 1967, Claimant was advised by letter from Carrier's Material Manager, H. T. Parigini that effective on said date part of his duties will be driving the pick-up truck in or around Roseville and to Sacramento to pick up material in emergencies and for such work was to be paid at the applicable straight time rate of Truck Driver.

On May 12, 1967, Claimant addressed a letter to Carrier's Chief Surgeon, Dr. Vance Strange, protesting the approval of his being required to drive a pick-up truck as part of his duties as a Store Attendant, pointing out that driving said truck requires the crossing of railroad tracks, which Claimant complained was far worse than operating a lift truck, and, therefore, he was protesting Dr. Strange's recommendations barring him from returning to his former regular assignment as Lift Truck Operator. Claimant advised Dr. Strange in said letter that great nervous tension is generated by being required to operate a truck on the freeway because of the speed required, especially after dark. Claimant concluded said letter to Dr. Strange by asking him to apprise Carrier of his physical condition for Carrier's guidance as to his employment rights.

By letter dated June 25, 1967, Claimant advised Carrier's Storekeeper, W. R. Bibby, with copy of said letter to Dr. Strange, that the handling of ice from cars at caboose track and to boxes at service track with pick-up truck is a very hazardous job, and could cause a person to slip or cause a hard jerk if ice should suddenly slip, and further advised that if the information that Dr. Strange and store management has given me is correct (information restricting him from his former Lift Truck Operator position), then he, Claimant, was holding Carrier responsible if its action in causing him to perform this type of work should be injurious to his health.

As a result of Claimant's letters to Carrier of May 12, 1967 and June 25, 1967, Carrier's G. C. Freeborn requested of Carrier's Chief Surgeon, V. M. Strange, by letter dated July 6, 1967, that he advise as to what he considers a sedentary position, and if restrictions are placed on Claimant as to limits of weights, etc. Dr. Strange replied to Carrier's request by letter dated July 20, 1967, and reported that after consultation with his attending physician, Dr. John Crew, it is his opinion that Claimant's duties should be entirely sedentary, i.e., he should be able to do clerical duties provided his work was confined to a desk during his entire tour of duty, and Claimant should not be required to lift over 25 pounds in weight, or do any climbing or working on ladders. Dr. Strange further advised that Claimant definitely cannot be returned to the duties of Lift Truck Operator, and concluded by saying if he cannot be assigned to duties of a sedentary nature as mentioned aforesaid, then Claimant should make application for disability annuity.

As a result of Dr. Strange's letter of July 20, 1967, aforesaid, Carrier's Material Manager, H. T. Parigini, informed Claimant by letter dated August 7, 1967, that in view of medical advice that his duties should be entirely sedentary and that he should not be required to lift over 25 pounds or do any climbing or working on ladders, therefore, he was being disqualified from his position of Store Attendant, Roseville Store, since the duties of said position are not of a sedentary nature.

Carrier and the Organization entered into an Agreement dated August 17, 1967, whereby Claimant would be allowed to exercise his seniority within 5 days following his return from vacation to any position in keeping with the restrictions as contained in letters of Dr. Vance M. Strange, Chief Surgeon.

By letter dated August 16, 1967, addressed to Carrier's said Material Manager, H. T. Parigini, Claimant advised him because of Carrier's action of removing him from Store Attendant Position No. 310, which he held for a period of 15½ months without complaint, he was requesting that an investigation be held under Rule 50 of the Agreement to develop the injury caused him by said unjust treatment.

Carrier by letter dated August 18, 1967 from Mr. Parigini to Claimant, denied said request for a Rule 50 investigation, and informed him that if he wished further evaluation of his physical condition, he should present himself at the Southern Pacific Memorial Hospital, San Francisco, for this purpose.

The Organization's General Chairman, James E. Weaver, by letter dated November 29, 1967, appealed Carrier's H. T. Parigini's denial of August 18, 1967 to S. B. Burton, Assistant General Manager, in regard to Claimant's request for an investigation under Rule 50 of the Agreement. Carrier's S. B. Burton replied to said appeal by the Organization and pointed out that his protest has not been timely filed under the claims and grievance procedure provided by the Agreement.

The Organization on October 20, 1967 filed claim for Claimant for Carrier's refusal to assign him to Section Stockman, Roseville, California for August 23, 1967 and each work day subsequent thereto until restored to said position, which claim was denied by Carrier on December 4, 1967 on the grounds that he was not physically qualified for said position.

On January 4, 1968, the Organization's General Chairman, James E. Weaver, appealed Carrier's H. T. Parigini's decision of December 4, 1967 refusing Claimant's request to be assigned to said Section Stockman Position No. 305 to Carrier's Assistant General Manager, S. B. Burton, claiming violations of Rules 26, 33 and 50 of the Agreement.

Carrier's said S. B. Burton, by letter dated March 5, 1968, replied to General Chairman's appeal letter of January 4, 1968 in regard to Section Stockman Position No. 305, Roseville, and referred to conference between the parties on February 28, 1968, concerning medical restrictions on Claimant performing the duties of said Section Stockman Position No. 305, and stated that it was agreed that another examination and evaluation would be made of Claimant's physical condition to determine the positions which he will be permitted to work.

Claimant was re-evaluated by Dr. John R. Crew, M.D. in March of 1968 and Dr. Crew advised Dr. Strange, Carrier's Chief Surgeon, that the weight restrictions could be increased to 35 pounds in the patient's interest. Thereupon, Carrier by letter dated April 1, 1968 from Assistant General Manager Burton advised General Chairman Weaver that said 35 pound weight restriction bars Claimant from performing the duties of Store Attendant or Section Stockman, but that Claimant may wish to consider a sedentary position at the Sacramento Store.

Claimant, on March 16, 1968, applied for position Stockman's Assistant No. 313, Roseville Store, which was denied by letter of Carrier's H. T. Parigini on May 27, 1968, stating restrictions placed on his services do not permit him to perform the duties of said position.

The Organization's General Chairman, B. M. Lovelle, by letter dated June 19, 1968 to Carrier's H. T. Parigini, advised him that inasmuch as Claimant did not receive written declination of his application of March 16, 1968 for said Position 313 until May 31, 1968, Carrier, therefore, was in violation of Article V of the August 21, 1954 National Agreement.

Carrier advised the General Chairman by letter dated August 1, 1968 that Article V was not applicable. On June 1, 1968, Claimant filed displacement notice to position of Section Stockman, No. 306, Roseville, California, which was declined by Carrier's Storekeeper W. R. Bibby on June 4, 1968, informing him that he was not qualified for said Position No. 306 because of medical restrictions placed on his services. Said decision was appealed to Carrier's said Material Manager by the Organization's Division Chairman B. M. Lovelle by letter dated July 15, 1968, which was denied by Mr. Parigini by letter dated September 13, 1968, addressed to said Division Chairman.

The Organization on September 25, 1968, appealed Material Manager Parigini's decision in regard to said Stockman's Assistant Position No. 313 and on November 7, 1968 appealed said Material Manager's decision in regard to Section Stockman Position No. 306. Said appeals were denied by Carrier's S. B. Burton by letter of January 20, 1969 to the Organization's General Chairman, C. S. Coleman, in which letter it was pointed out that a check disclosed a great deal of material was handled that weighed more than 35 pounds and that a Section Stockman was observed handling pallets weighing 50-60 pounds, a diesel locomotive fuel pump weighing 90 pounds, a carton containing two brass motor support bearings weighing 100 pounds. Carrier's Mr. Burton said letter of January 29, 1969 went on to say:

"This is by no means a complete list of materials weighing in excess of 35 pounds, but when considered with the fact that store employees at Roseville must use ladders to check stock on shelves, to store stock and to obtain stock as required, it is obvious that Mr. Hockabout is unfit to perform the duties of the positions at Roseville store."

Carrier contends that Claim No. 1 (a) and (b) are not properly before this Board for its consideration due to failure to comply with the provisions of Article V of the August 21, 1954 Agreement governing the handling of claims or grievances. With this contention we agree. Article V, Section 1(b) provides that if a disallowed claim or grievance is to be appealed, such

appeal . . . must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision.

The record shows that on August 16, 1967, Claimant made a request to Carrier's Material Manager, H. T. Parigini, for an investigation under Rule 50 of the Agreement. On August 18, 1967, Carrier's said H. T. Parigini wrote the Claimant and advised him that his request for a Rule 50 investigation is without merit and is denied. On November 29, 1967 the Organization's General Chairman protested Mr. Parigini's decision of August 18, 1967 in regard to said Rule 50 investigation to Carrier's Assistant General Manager, S. B. Burton. No further appeal was taken by the Organization in regard to appealing Mr. Parigini's decision of August 18, 1967 relative to Rule 50 investigation. Therefore, Claim No. 1, Items (a) and (b), are dismissed because of failure to comply with the provisions of Article V, Section 1(b) of the August 21, 1954 Agreement. See Award No. 16542, involving the same parties to this dispute.

In regard to Claim No. 2, the Organization contends that Carrier violated Article V of the August 21, 1954 Agreement when it failed within the time limits of said Article V to disallow or otherwise act upon the written displacement notice filed by Claimant on March 16, 1968.

We do not agree with the Organization that Carrier violated the time limit provisions of Article V of the August 21, 1954 Agreement in regard to Claim No. 2. Time limit provisions of said Article V pertain to "claims or grievances". The displacement notice filed by Claimant in this instance in regard to Stockman's Assistant Position No. 313 is not a "claim or grievance" within the intent and meaning of said Article V of the August 21, 1954 Agreement, and Carrier was not, therefore, required to take action on said displacement within the time limits as specified in said Article V. Thus, we are compelled to deny Claim No. 2.

The record clearly shows that Carrier presented medical evidence supporting its position that Claimant was not physically able to perform the duties of his assigned position of Store Attendant. While it is true that Claimant performed duties of said position for over a year, nevertheless, the fact remains that Claimant brought about his own removal from said position when he complained to Carrier's Chief Surgeon, Dr. Vance Strange, of being required to operate part time a half-ton pick-up truck, which he complained, caused him great nervous tension. Further, Claimant advised Carrier that he would hold it responsible if Carrier's action in requiring Claimant to perform said type of work should be injurious to his health. Thus, Carrier was justified in disqualifying Claimant from holding said Store Attendant's position.

We likewise conclude that Carrier was justified in disqualifying Claimant from holding Section Stockman Position No. 305, Roseville, California, and Section Stockman Position No. 306, Roseville Store, due to physical disability. Carrier had Claimant re-evaluated by Claimant's attending doctor, Dr. John R. Crew, wherein Dr. Crew raised the weight restriction from 25 pounds to 35 pounds. Further, Carrier pointed out to the Organization that a check showed that a great amount of material was handled on said positions and weighed in excess of 35 pounds.

As was stated in this Board's Award No. 8186:

"We are confronted with the question as to whether or not Claimant was improperly held off duty. We find that he was not improperly held off duty. The Respondent's action was not arbitrary. Their action was based on what they considered competent medical advice, and their action was a proper exercise of their discretionary powers."

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.

AWARD

Claim No. 1:

- (a) Dismissed
- (b) Dismissed
- (c) Denied

Claim No. 2:

- (a) Denied
- (b) Denied
- (c) Denied

Claim No. 3:

- (a) Denied
- (b) Denied

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1970.