

Award No. 19181
Docket No. CL-19535

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Edgett, Referee

PARTIES TO DISPUTE:

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

**THE CHESAPEAKE & OHIO RAILWAY COMPANY
(Chesapeake District)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7013) that:

(a) The Carrier violated the Agreement when it held Mr. James Oscar Turner out of service and dismissed him.

(b) The Carrier shall restore Mr. James Oscar Turner to service with seniority and all other rights unimpaired and compensate him for all loss of wages and wage equivalents sustained because of its wrongful action.

OPINION OF BOARD: Claimant was injured while in Carrier's service and sought the assistance of an attorney, who advised him not to sign anything unless he was sure of its import. When Carrier instructed him to take a physical examination his apprehension about signing papers resulted in a series of events which culminated in his dismissal from Carrier's service.

Claimant's service with Carrier was as a laborer on its Merchandise Piers in Newport News, Virginia. His seniority date on the Transportation Department roster was August 23, 1955, but his service with Carrier covers a period of twenty-three years.

Following his injury, which required a number of stitches to close, he underwent a periodic visit to the hospital for check up and control of a diabetic condition. His physician removed the stitches while he was in the hospital and certified that his diabetes was under control and that he was fit for duty.

Carrier instructed Claimant to report for a physical examination on several occasions. Since he had been instructed to undergo the examination, but had failed to do so, Carrier advised him to attend an investigation on Friday, April 10, 1970, stating:

"You are charged with insubordination in that you failed to comply with instructions to report to Dr. Ralph Price for special physical examination on April 6 or April 7, 1970."

Claimant testified that he had reported to the Doctor, but that the Doctor would not examine him unless he signed some papers. He testified that he did not understand the nature of the papers that he was required to sign and that he was not refusing to take the physical examination, he was only unwilling to sign papers that he did not comprehend. No direct evidence from the office of the examining physician was produced at the investigation. One of Carrier's employes testified that as of April 8, at 10:35 A.M. she had been told that Claimant had not been there. Claimant insisted that he had. No attempt was made to resolve, what is a rather simple matter of proof. Carrier, instead, relied on the undisputed fact that the examination had not been completed.

However, Claimant was not charged with failure to take the examination, he was charged with failure to report for examination. The conclusion reached by Carrier was:

"James Oscar Turner is at fault for being insubordinate in that he failed to comply with instructions to report to Dr. Ralph Price for special physical examination."

The Board has stated its view with respect to review of a Carrier's disciplinary action in cases too numerous to require citation. A basic principle is that Carrier's decision will not be disturbed where it is supported by substantial evidence with probative value and hence is not arbitrary or capricious. When that principle is applied in this case Carrier's decision is found to be unsupported by substantial evidence with probative value and therefore an abuse of the discretion vested in it.

As noted, Claimant testified that he did not refuse to take the physical examination, he only refused to sign papers he did not understand. It is, as noted, undisputed that he did not take the examination. However, Carrier did not assess the discipline for not being examined, it disciplined him for failing to report to the Doctor. Carrier had the burden of proof on that question and it failed to meet it. The evidence of record does not support the allegation that he did not go to the Doctor's office. Since that is the basis upon which his alleged insubordination was grounded, and substantial proof of that offense was not adduced, Carrier's decision must be reversed by this Board.

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 Agreement was violated.

AWARD

Claim sustained as to Part (a). Carrier to restore Claimant to service with compensation and adjustment of record as provided by Rule 27 (d) of the Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May 1972.