

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22581  
Docket Number CL-22543

Richard R. Kasher, Referee

(Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees  
PARTIES TO DISPUTE: (  
(San Diego & Arizona Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-8579) that:

(a) The San Diego and Arizona Eastern Railway Company  
violated the current Clerks' Agreement when it removed employee  
F. R. Mousseau from service; and

(b) The San Diego and Arizona Eastern Railway Company  
shall now be required to return Mr. F. R. Mousseau to service with  
all rights unimpaired; and

(c) The San Diego and Arizona Eastern Railway Company  
shall now be required to compensate Mr. F. R. Mousseau one day's  
compensation at the Guaranteed Extra Board rate, \$48.44 per day,  
December 3, 6, 7, 8, 9, 10, 13, 14, 15, 17, 20, 21, 22, 23, 24, 25,  
27, 28, 29, 30, 31, 1976, January 1, 3, 4, 5, 6, 7, 10, 11, 12, 13,  
14, 17, 18, 19, 20, 21, 1977, and continuing each date thereafter  
until he is restored to service with all rights unimpaired.

OPINION OF BOARD: Claimant entered the service of the Carrier on  
July 16, 1969 as a telegrapher. Claimant, a  
Navy veteran, was approximately 55 years of age upon his entry into  
the service of the Carrier. At the time the grievance arose, the  
Claimant was a guaranteed extra board clerk working at San Diego on  
various positions. The Claimant was removed from service on  
December 3, 1976 as the result of a medical examination performed  
at the Carrier's direction by the Carrier's medical department on  
October 28, 1976. The Carrier's physicians determined, on or about  
November 24, 1976, after reviewing the results of the medical  
examination, that the Claimant should not continue working and  
should retire. The basis for the recommendation that the employee

retire was the Carrier's medical report which concluded with the following diagnosis:

- "(1) Diabetes Mellitus
- (2) Mild Hypertension
- (3) Moderately severe cerebral and generalized arteriosclerosis with probable mild mental deficit.

On the basis of my findings, and the letter from Mr. Harold (Harral) it is understandable that the patient might be forgetful and in view of these findings it is recommended that the patient be put on medical disability."

Subsequent to Claimant's removal from service on December 3, 1976, a request for an investigation pursuant to Rule 50 of the Agreement was made. Rule 50 provides in part: "An employee who considers himself unjustly treated, shall have the same right of investigation . . ."

Additionally, the Claimant sought, after providing the Carrier with documentation from his own physicians attesting to his ability to return to work, a determination by a panel of doctors pursuant to Rule 62(b). This Rule provides in pertinent part:

"If an employee should be disqualified for service or restricted from performing service to which he is entitled by seniority on account of his physical condition, and feels that such disqualification is not warranted, the following procedure will govern:

A special panel of doctors consisting of one doctor selected by the Company specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; one doctor to be selected by the employee or his representative specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; the two doctors to confer and if they do not agree on the physical condition of the employee, they shall select

"a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering."

The remainder of the rule establishes the panel's process and decisional authority.

The Organization contends that the Carrier's resistance to institution of the hearings required by Rules 50 and 62(b), in and of itself, requires the sustaining of the claim. The Organization further contends that Rules 3 and 26, seniority rules, were also violated; and that Rules 63 and 66, Rules, respectively, involving Incapacitated Employes-Changed Duties and Sick Leave were also violated. The Organization specifically cites the language in Rule 62(b) which states that the tripartite medical board shall be established if the employe feels that the disqualification was not warranted.

The Carrier takes the position that it was justified in disqualifying the Claimant in view of the medical examination and recommendation by its physicians recited above. That is, upon the finding of the diabetes, mild hypertension and the moderately severe cerebral and generalized arteriosclerosis with probable mild mental deficit, the Carrier acted within its rights to remove Claimant from service and to recommend retirement since Claimant could not adequately perform assigned duties. The Carrier further contends that the first time a medical opinion, substantiating the Claimant's position that he was able to perform his duties adequately, was furnished to the Carrier occurred on July 25, 1977. That medical report states, "To Whom It May Concern: Examined this man on 7 Feb. '77 and found no evidence of arteriosclerosis and no pathology that would prevent his working. In my opinion he is completely employable." The medical panel's finding on August 29, 1977, which determined that the evidence of medical fitness furnished by the Claimant on July 25, 1977 was sustainable, did not, the Carrier argues, render unjustifiable its decision of the previous December that the Claimant should be disqualified. Further, the Carrier argues, nothing in Rule 62, or any other provision of the current Agreement, provides for the compensation requested under the conditions in the instant case.

The Carrier concludes that it was justified in withholding Claimant from service until as a result of the findings of the majority of the panel of doctors Claimant was returned to duty, and therefore, the Carrier submits that the claim should be denied.

The position of the Organization is sustainable under both Rules 50 and 62(b) of the Agreement. Requests for hearings and/or examinations were made under both of the subject rules properly and timely. The fact that a final determination sustaining the Claimant's position that he was medically fit for service was not made until August of 1977, was not due to the fact that the Claimant or the Organization delayed in the resolution of the question.

The Carrier's position that the employee was in fact medically disabled during some period prior to the determination by the panel of doctors must be rejected on two grounds. First, Carrier's position concerning the Claimant's medical condition prior to the panel of doctors determination is speculative. Secondly, the Carrier cannot benefit by this speculation since it had within its control the ability to convene a panel which would have rendered a more speedy determination of the Claimant's condition.

Finally, numerous awards of this Division of the Adjustment Board have granted compensation to employees who have been held out of service as a result of improper medical disqualifications where nearly identical rules have been found to have been violated.

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; and

That the Agreement was violated.

A W A R D

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1979.