

SPECIAL BOARD OF ADJUSTMENT NO. 192

PARTIES:

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

AWARD IN DOCKET NO. 2

STATEMENT OF  
CLAIM:

Claim of the System Committee of the Brotherhood that:

1. Carrier violated the provisions of the Clerks' Agreement when on November 13, 1951, it removed Oscar J. Leach from his position of Yard Clerk at Wellston, Ohio, without written advance notice or impartial investigation, and
2. That Carrier should reinstate Oscar J. Leach to his Yard Clerk position with all rights unimpaired, including vacation and pass rights, and shall compensate him for all wage losses, retroactive to November 13, 1951.

FINDINGS:

On November 13, 1951 the claimant was advised by a Trainmaster that it would be necessary to take him out of service because of his physical condition.

The record indicates that since late 1947 the claimant has been under close observation by Carrier medical examiners with respect to physical ability to continue in service as a yard clerk. Despite an adverse medical report by a consulting surgeon dated December 1, 1949 he was continued in service and again cleared by Carrier's medical examiner as OK for service on October 10, 1950. According to the Carrier its medical department became concerned with the claimant's gradually worsening physical condition and hence he was removed from service. However, it does not appear that at any time between October 1950 and November 13, 1951 Carrier's physicians found that claimant was not physically qualified for service as a yard clerk. It does appear that the claimant was examined by a Company doctor on June 24, 1952 during the handling of this claim and the Company doctor stated as a result of his examination that he certainly did not believe that claimant should be re-employed in any capacity that required him to be around moving equipment or in any job that required considerable walking. The employees show one medical report dated August 13, 1954 which conflicts with that conclusion and another dated July 9, 1954 somewhat inconsistent therewith.

The employees contend that this claim should be sustained on the ground that Rule 47, entitled "Grievances Involving Discipline" was violated in that the claimant was not afforded a fair and impartial investigation before being removed from service.

Rule 47 does not apply to removal from service because of physical disability. That is apparent from its title and its opening sentence which states "An employee who has been in the service more than ninety (90) days shall not be disciplined or dismissed without a fair and impartial investigation." The word "disciplined" as used in this context clearly means a disciplinary measure short of discharge and "dismissed" refers to final separation from service as a disciplinary measure.

The carrier has a right and a duty to require that its employees be physically fit to perform the duties of their positions. However, it may not arbitrarily remove an employee from a job on the mere assertion that he is physically unqualified to perform the same. Here it wasn't until June 7, 1952 that such a determination was made on the basis of a physical examination and then it was not determined that he was unqualified to perform the duties of other positions to which the claimant might be entitled by reason of his seniority but solely that he was unable to perform the duties of the yard clerk position. As noted above, however, the claimant's own physician's report was in conflict with that determination.

It is shown that during the handling of this claim on October 27, 1952 the Carrier offered to submit the question of the claimant's physical condition to a joint board consisting of one doctor selected by the employees, one selected by the carrier and a third doctor to be selected by the two thus nominated. This offer was refused unless the claimant was restored to service. There was no justification for establishing such a condition to acceptance of the 3 doctor panel. In any event, therefore, the claimant is not entitled to any compensation for having been held out of service after October 27, 1952 since by his own unjustifiable conduct he prevented a determination of the issue.

The foregoing analysis of the record indicates that this claim should be disposed of on the following basis:

1. The claimant should be reimbursed for all time lost, less earnings in outside employment, for the period from November 13, 1951 to October 27, 1952, inclusive.

2. The claimant should submit to examination by a joint Medical Board to determine his qualification for continued employment, said Board to consist of three doctors; one chosen by the claimant, one chosen by the Carrier and the third by the two doctors so chosen; the claimant to pay the expense of the doctor chosen by him, the carrier to pay the expense of the doctor chosen by it and the expense of the third doctor to be shared equally. If the determination of that Board is that the claimant is qualified to return to service, he should be restored to whatever position he is entitled by reason of his seniority and qualification. If that Board determines that he is not qualified to return to service his removal from service shall stand.

AWARD

Claim disposed of as indicated in Findings.

/s/ Francis J. Robertson  
Francis J. Robertson  
Chairman

/s/ E. J. Hoffman  
E. J. Hoffman  
Employee Member

/s/ T. S. Woods  
T. S. Woods  
Carrier Member

Dated at Baltimore, Md. this 1st day of December, 1958.