

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: ( System Federation No. 121, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
(  
( The Texas and Pacific Railway Company

Dispute: Claim of Employees:

1. That the current agreement was violated when on March 25, 1975, Carman L. C. Tutt was unjustly treated when he was suspended from service of Carrier for an alleged hearing defect.
2. That accordingly, the Carman be made whole by compensating Carman L. C. Tutt eight (8) hours each five (5) days each week, commencing March 25, 1975 and continuing until Claimant is returned to service. Reinstated to service with seniority rights unimpaired, vacation rights, sick leave benefits, and all other benefits that are a condition of employment and compensation for all losses sustained account loss of coverage under health and welfare and life insurance agreements during the time held out of service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is a long service employee of Carrier, 27 years. He has impaired hearing and he has been examined repeatedly by Carrier and he fails to meet the standards established for Carmen who are required to drive and/or work around vehicles. The Employees make various allegations but the essential question relates to the reasonableness of Carrier's conclusion that claimant does not meet the required hearing standard without benefit of a hearing aid (including a back-up instrument).

It is uncontested that Carrier has the responsibility to establish minimum physical standards for employment. So long as these are reasonable and established in good faith and so long as application of such standards are neither arbitrary, capricious, unreasonable nor discriminatory the Carrier's judgment in an individual case should not be disturbed.

Here we find no real dispute exists that claimant has deficient hearing. This is admitted by claimant's own doctor. On this basis we see no reason to consider the need for examination by a neutral doctor. We are beyond the examination stage. Moreover, there is no real basis for questioning Carrier's standard. It cannot be contested that impaired hearing for a railroad employee whose duties involve movement in and around trains and other moving vehicles can provide a special hazard for himself and for others. There is no persuasive basis to maintain that Carrier's standards for hearing disqualification are improper.

Carrier maintains this claim fails because there is no rule violation here. In answer, claimant cites Rule 24 which is headed "Discipline". Subsection (b) thereof provides:

"(b) If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Reading this subsection above might give encouragement to claimant's position if it can be established he was "unjustly suspended or dismissed". But to do this we must ignore subsection (a) and the heading of this rule. Clearly, we are dealing with a disciplinary rule and claimant's dismissal is for failure to meet physical standards which is not a disciplinary matter in any sense.

Regardless of Rule 24, however, if it could be established that claimant was unjustly dismissed because the standards employed on the application thereof were improper, we believe it is within the power of this Board to devise an appropriate remedy for reinstatement.

The question, therefore, boils down to the reasonableness of Carrier's position in refusing to consider Claimant's hearing as improved by a hearing aid. The employes make the point that correctable hearing is much the same as correctable vision and, presumably, employes are not dismissed when it becomes necessary for them to wear glasses. The record does not include appropriate proof along these lines nevertheless the point is understood.

This argument has a certain plausibility and appeal and we would have preferred to learn from experts whether or not it has merit. However, we do know that Carrier fears that an employee dependent upon a hearing aid presents a special hazard insofar as these devices are subject to malfunction,

including battery failure, and the device can be turned down or off inadvertently and the employee would be unaware of such occurrence. Claimant's own medical witness supports this but suggests a back-up instrument.

Logically, the demands of the Carrier's assignment, as described herein, are such that a risk of malfunctioning is more than the Carrier should be required to assume. We are not able to disturb that conclusion insofar as the claimant does not persuade us, and meet his burden of proof, that this is unreasonable. For these reasons we are constrained to conclude that the claim must be denied, yet this matter should not be concluded on that basis without more.

In all candor we are moved by this claimant's years of employment and, presumably, the condition he finds himself after long and faithful service. Rule 16 of this Agreement recognizes this principle and provides for light work assignments for those unable to handle heavy work. The approach is laudable albeit narrow. We do not suggest the rule can be expanded to cover a hearing situation. Rather, it is our purpose to consider whether or not this concept points the way to some better method of handling these matters.

The Carrier cited the Third Division Award 13667 (Weston) as an almost identical case. That case involved the claim of a long service section foreman who was removed from service for hearing deficiency corrected by a hearing aid and the claim was denied. Referee Watson pointed out, however, the Carrier offered to reinstate claimant with the understanding he would be restricted to safer duties and claimant rejected such offer. The award went on to sustain the Carrier's position regarding hearing aids and ended with the following precatory words:

"Claimant is an employe of long service and has progressed, over the years, from track laborer to Assistant Section Foreman and then to Section Foreman. He has held the last named position since January 16, 1946. We are hopeful that an acceptable position can be found for him by Carrier that will not require his presence in a hazardous area."

It has been a disturbing aspect of this case that the record on the property does not include suggestions or indications by the Carrier that efforts have been made to find some alternative, non-hazardous assignments for this claimant consistent with his seniority and capabilities. It is disturbing, not because the rules require it, more because the circumstances here compel such consideration. We have already made reference to the fact the Agreement sanctions the approach in a general way under Rule 16 for long service employees. For these reasons we are persuaded to offer the thought expressed by the late Saul Wallen, a distinguished arbitrator, in Aluminum Company of America and Aluminum Workers International Union, Local 405 dated October 31, 1961. That case is inapposite and involves a one-eyed man. Nevertheless, the words of Arbitrator Wallen include a great deal of wisdom that we believe have application here and may well provide a guide:

"In making its determination the company may take into account the question whether the employee is able to perform the job safely. Indeed it has an obligation to make such a determination for it must avoid exposing employees to undue hazard both for the sake of the employees and their fellows and for the purpose of protecting itself from exposure to liability. Where management's judgment in this regard can go either way, prudence dictates error on the side of safety.

But to say this is not to say that virtually all jobs are barred to one-eyed men in the company's employ. In determining such a person's qualifications the company should try to strike a reasonable balance between maximum safety and the needs for and rights of these persons to continued employment. The ultimate in safety might dictate their being barred from employment entirely. This is an unrealistic approach in a world in which men must work for a living. On the other hand, workers so handicapped cannot fairly expect consideration for jobs where the chance of injury to their good eye is real and tangible.

What is required in such cases is an approach which recognizes that, while there are always some risks in factory jobs, places must be found for people so handicapped (in line with the seniority provisions of the agreement) in which the risk is relatively small even though not totally absent. And, wherever possible, steps should be taken in the form of special safety measures to further reduce the risk in such cases."

We do believe, however, that Carrier has a contractual obligation to provide employment for this employe on any position in his craft where his hearing deficiency would not be a risk to general safety. Therefore, we believe the matter should be carried one step further and on this basis we withhold denial of this claim pending remand to the property to make a clear determination whether or not an appropriate position is available where the risks are minimized for an employee carrying out his duties with a hearing aid (and back-up equipment) consistent with the thoughts expressed here. The realities are that such efforts, reasonably made, whether successful or unsuccessful, will result in denial of the claim. However, we believe there is a difference and this further effort should be made. If they are successful the claimant would be reinstated effective with the commencement of his new duties. It should go without saying that refusal by the claimant will relieve carrier of any further efforts and the claim is denied.

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2-T&P-CM-'78

A W A R D

Case is remanded in accordance with the views expressed in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1978.