

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
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(Southern Railway Company

Dispute: Claim of Employees:

1. That under the Agreement, Carman C. H. Bowling, Coster Shop, Knoxville, Tennessee was improperly held out of service from November 16, 1976 to December 31, 1976 for medical reasons.
2. That accordingly, the Carrier be ordered to pay Carman C. H. Bowling, thirty-four (34) days pay from November 16 to December 31, 1976.

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 were given due notice of hearing thereon.

The Claimant reported back to his supervisor on November 16, 1976, with a medical release from his personal physician. He had been absent since September 29, 1976 (a total of 49 days), as a result of surgery to an injured elbow.

Claimant was examined the next day by a company doctor but was not approved for service until December 30, a total of 44 days' delay from the time he presented his release. During the examination on November 17, a hearing loss of some significant measure was detected. On November 23, 1976, the Carrier's chief surgeon directed that the Claimant should undergo an audiogram to determine the exact extent of his hearing loss. This examination was performed December 1, 1976. The results indicated a hearing loss between 55-105 decibels in the left ear, and between 15-70 decibels in the right ear and a perforated tympanic membrane. The Carrier points out that its standards require a hearing loss of not greater than 50 decibels.

The additional delay is explained by the Carrier in that on December 10 the chief surgeon contacted the specialist who performed the audiogram seeking his opinion as to the Claimant's ability, given his condition, to work at his position. At the same time the chief surgeon also contacted the Claimant's supervisor to determine if the Claimant had encountered any problems in the past that might be attributed to a hearing loss. This delay was apparently the result of the Carrier's desire to give due consideration to the particular circumstances of the Claimant, rather than to apply rigidly the medical standard without regard to the demands and requirements of the individual's work environment and past performance.

The information requested on December 10 was not received until twelve days later (December 22). Six days later on December 28, the chief surgeon approved Claimant for service. He was contacted December 30. He did not return to service until January 3, 1977. However, it is found the additional delay was the claimant's own doing. The Board, therefore, need not be concerned with any delay after December 30.

The Organization claims the delay was unreasonable and cites Second Division Award 6278, which recognizes the Carrier's right to determine the physical fitness of employees but holds the right must be exercised in a reasonable period and sets five days from the date of the employee's return as a reasonable time to perform a re-entry examination. There are many cases setting a similar five-day requirement.

The Carrier argues that it has a positive responsibility to insure that an employee can work safely and without risk to himself, his fellow workers, or the public. The Carrier also argues that it has the right to set medical standards and to enforce them by holding employees out of service to uphold their responsibility. This Board agrees with these propositions as it has many times, holding the Carrier has these rights so long as they are not asserted arbitrarily or capriciously.

This Board agrees with Award 6278 that the Carrier has the right to hold employees out of service pending physical examination, and that the examination must be made in a reasonable period of time. However, the Board concludes that "the reasonable period" must be fitted to the facts and circumstances of each case, and the Board resists efforts to apply a fixed period. In this case the Board recognizes that hearing loss was unforeseen; that it required further tests by an additional doctor; that the Carrier took additional time to assess carefully the Claimant's ability to perform his duties. The Board will find that a reasonable time in which to have effectuated a decision in this case would have been December 15, 1976. The Claimant shall be compensated for all time lost between December 15 and December 30.

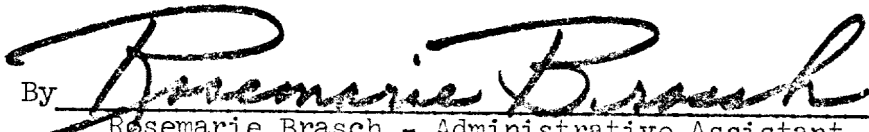
A W A R D

Claim sustained to the extent specified 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 7th day of March, 1979.