

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. 6, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Elgin, Joliet & Eastern Railway Company

Dispute: Claim of Employees:

1. That the Elgin, Joliet & Eastern Railway Company violated Rule 103 when they refused to have their Chief Surgeon examine Carman Painter Arthur L. Powell for his return to service.
2. That the Elgin, Joliet & Eastern Railway Company, hereinafter referred to as the Carrier, be ordered to reinstate Carman Painter Arthur L. Powell, hereinafter referred to as Claimant, with all seniority, vacation and all other rights unimpaired plus eight hours pay at the pro rata rate for each day that he is withheld from service commencing May 13, 1977 until said reinstatement is in effect. In addition to the money amounts claimed herein, the Carrier shall pay Claimant an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

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.

This dispute involves the rights of Claimant to return to work following his hospitalization from July 12, 1976, to July 30, 1976. This matter was covered in Award No. 7766 (Weiss), in which the claim was denied. In the present dispute there is, however, a difference in that the Organization rests its claim on the failure of the Carrier to follow the provisions of Rule 103, which read in part as follows:

"(b) If the medical findings, of the Carrier's physician and the employee's physician disagree, they shall promptly select a neutral physician who shall be a practitioner of recognized standing in the medical profession, and where any special type of case is involved, he must be a certified specialist in the disease or impairment which resulted in the employee's disqualification.

After the neutral physician has examined the findings and conclusions of the Carrier's physician and of the employee's physician, he shall examine the employee. Within fifteen (15) calendar days after completion of this examination he shall render a written report of his medical findings, which shall be controlling. This report shall be made to the Carrier's physician and to the employee.

The employee will pay the expense of the physician representing his interest. The Carrier will pay the expense of its own physician. The expense of the neutral will be divided equally between the Carrier and the employee.

(c) ... In the case where the employee accepted his original disqualification but then, at a later date, presented himself to the Carrier's Chief Surgeon for a reexamination (because he believed his condition had improved and warranted his return to service) and the neutral concludes that the Carrier unjustifiably refused to allow the employee to return to service, then, in such a case, the employee will be entitled to be compensated only for loss of earnings of his assignment from the time said employee presented himself for a reexamination until restored to service."

The facts in Award No. 7766 are nevertheless applicable here. There is no basic disagreement as to the "medical findings of the Carrier's physician and the employee's physician", which disagreement is a necessary precondition to the implementation of the provisions of Rule 103.

The medical findings not in dispute are "S/P Herniated disc L 4-5", a widely recognized condition which is regularly used as a bar to employment and is not unreasonably applied by the Carrier for the type of work required of its employees. While improvement as to coping with such a condition may be shown (and apparently was shown in the case of the Claimant herein), there is no indication of change in the underlying physical findings.

With this conclusion, the Board reaches the same point as it did in Award No. 7766; i.e., that "we find no basis to support the contention that Claimant was improperly disqualified for service commencing August 3, 1976," or that examinations by the Carrier's physician and possibly a neutral physician under Rule 103, were improperly denied.

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Award No. 7901
Docket No. 7902
2-EJ&E-CM-'79

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 19th day of April, 1979.