

The Second Division consisted of the regular members and in addition Referee Bernard Cushman when award was rendered.

Parties to Dispute: { System Federation No. 45, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company denied Carman Levell Singleton his rights to service in violation of the rules of the current controlling agreement.
2. That the St. Louis Southwestern Railway Company be ordered to return Carman Levell Singleton to service and make whole for all vacation rights, all health and welfare and insurance benefits, pension benefits including Railroad Retirement and unemployment insurance and other benefits including all lost wages that he would have earned subsequent to October 16, 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 waived right of appearance at hearing thereon.

Temporary Carman Levell Singleton was employed by the Carrier as a Carman Apprentice on February 28, 1972, and subsequently promoted to Temporary Carman. By letter dated October 15, 1976, the Carrier directed Claimant to undergo a physical re-examination on October 18, 1976, by Dr. H. L. Wineland and informed the Claimant that he was being held from service pending approval of the doctor. The Claimant was examined by Dr. Wineland on October 18. Dr. Wineland, by letter dated October 20, 1976, wrote Dr. J. R. Gandy, the Carrier's Chief Medical Officer, that as a result of his examination he found the Claimant to be controllable on medication but was reluctant to permit him to be employable by the Carrier because of instability of judgment and possible failure of medication. Dr. Wineland strongly recommended that the Claimant not be employed because of danger to himself and others. Dr. Wineland stated further, "Rehabilitation for a safe, sedentary work-job is my suggestive alternative".

The Organization, by letter dated October 19, 1976, wrote to the Carrier stating that it had been informed that the Claimant was being withheld from service and had been instructed to report to a doctor designated by the Carrier on October 18, 1976. The Organization stated further in its letter that it had been requested by the Claimant to represent him and stated that he must first be given the opportunity to choose his own doctor and furnish the required reports, citing Rule 41-2(b). The letter also stated the Organization took the position that any medical reports furnished as a result of the October 18th physical examination would be in violation of Rule 41 and of no effect.

By letter dated October 19, the Carrier stated that it would recognize an examination by the Claimant's own doctor. The Claimant chose Robert J. Smith as his doctor and by letter dated October 28, 1976, Dr. Smith stated that his final diagnosis was that the Claimant was in good health and able to carry out his usual duties on his job. The Carrier was furnished with a copy of Dr. Smith's letter.

Because the opinions of the Carrier's medical consultant and Dr. Smith were in conflict, a third doctor was selected by Dr. Smith and the Chief Medical Officer for the Carrier, in this instance, Dr. Wharton of Dr. Gandy's office. Dr. William R. Harper was the physician who was chosen. By letter dated December 2, 1976, directed to Dr. Wharton, Dr. Harper stated that the Claimant had an idiopathic seizure disorder which was well controlled on Dilantin. Dr. Harper stated that such a disorder would not preclude his employment in a non-hazardous area. He stated further that he would not recommend his return to his job as a freight car welder due to the hazard to the Claimant and, perhaps, to his co-workers. He stated that the Claimant should make an excellent employee in another job. Thereafter, the Claimant was notified that he was disqualified from further service due to his physical disability.

The Organization objects to any consideration by this Board of the report of Trainmaster Marley referred to in the Carrier's submission to the Board, on the ground that that report was not part of the handling of the dispute on the property. The Board sustains the Organization's objection. The Claimant's past medical history and the findings of Dr. Harper, however, make it clear that there was reason to be concerned about the physical condition of the Claimant.

The Organization contends that Rule 41-2(b) was violated because the selection of the third and neutral physician was not made by Dr. Wineland who made the original examination on behalf of the Carrier, but by Dr. Wharton of the Chief Medical Officer's office and the Claimant's physician, Dr. Smith. The Board is unable to see how the Claimant was prejudiced thereby and finds that in the absence of any showing of prejudice the Organization's claim is not well founded. Similar considerations apply to the Organization's contention with regard to the fact that the Carrier's doctor made the first examination prior to the time the Claimant had an opportunity to be examined by a doctor of his choice.

Rule 41-3(b) provides that "An opinion concurred in by two of the three doctors shall be conclusive and binding on all parties." The determinations by Dr. Harper and Dr. Wineland, are, therefore, binding on the Claimant. We recognize the obligation of a Carrier to require that employees be physically qualified to perform their jobs. Third Division Award No. 7134. And we cannot say that the Carrier's action here was arbitrary or in bad faith. The Board notes, however, that both doctors and in particular Dr. Harper, the neutral physician, recommended that the Claimant be furnished other employment for which he was qualified. Indeed, Dr. Wineland recommended rehabilitation. Dr. Harper found that the idiopathic disorder would not preclude the Claimant's employment in a non-hazardous area and recommended that he be given another job.

The Board is of the view that if there is a job or position available which the Claimant is qualified to fill that the Carrier should offer employment to the Claimant in that position.

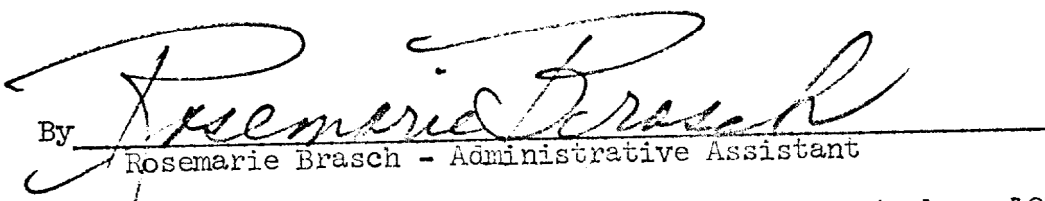
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Claim denied with the proviso, however, that the Carrier shall, if such a position is available, offer to the Claimant a position for which he is qualified to fill.

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 27th day of September, 1979.