

The Second Division consisted of the regular members and in addition Referee George S. Roukis 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 Employes:

1. That the St. Louis Southwestern Railway Company denied Carman Painter W. C. Searcy his rights to service subsequent to December 16, 1977, in violation of the rules of the current controlling agreement.
2. That the St. Louis Southwestern Railway Company violated the procedural provisions of Rule 22-1 of the controlling agreement effective October 1, 1977, when it failed to deny the claim within sixty (60) days.
3. That the St. Louis Southwestern Railway Company be ordered to return Carman Painter W. C. Searcy 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 any other lost benefits including all wages that he would have earned subsequent to December 16, 1977.

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.

Before proceeding to a substantive discussion of this case, we will address the procedural issue raised by Claimant that Carrier violated Rule 22-1(a) when it denied the claim filed on January 20, 1978 by letter dated April 13, 1978. While the correlation of the above dates appear to raise a timeliness issue, we find that the scheduling of a conference on March 10, 1978 was a timely response to Claimant's request that if Carrier was indisposed to allowing this claim, it should docket it for discussion in conference. This is exactly what Carrier did and we cannot from these facts conclude that a procedural violation occurred.

Moreover, when the substantive elements of this dispute are carefully assessed, we do not find that Carrier acted arbitrarily or capriciously when it formally apprised Claimant on February 23, 1978 that the follow up medical findings demonstrated that he was physically unfit for service.

Claimant, who was 63 years of age at the time, was found by the third and neutral physician, jointly selected by his personal physician and the Carrier's physician, to be physically unqualified for duties as a carman or painter. In fact the impartial physician stated in part that:

"Review of the back and right knee x-rays made at Jefferson Hospital (December 17, 1977) by Dr. E. Frank Reed, reveals spondylolisthetic of his lower lumbar spine with degenerative arthritis. He has atherosclerosis of abdominal vessels. There is also osteo arthritis of the right knee."

Thus, Carrier's terminative decision, which was rendered pursuant to Rule 31-3(b), was based upon a concurrence of findings by two out of three physicians. Its decision, under these circumstances was correct and in accordance with the collective agreement.

On the other hand, we find that Carrier was plainly remiss by not addressing the possibility of returning him to some form of light duty during the December 16, 1977 - February 23, 1978 period, consistent with the spirit and intent of Rule 16 Faithful Service, and Claimant's January 20, 1978 request for such type of work. Claimant had certainly provided Carrier with long years of faithful service and should have been given commensurate consideration. Carrier did not respond to this portion of the claim and the third and dispositive medical opinion was not issued until February 13, 1978 (Dr. H. L. Wineland letter to Dr. John E. Meyers). We believe, upon these facts that Claimant was denied the possibility of returning to work on a light duty basis during the December 16, 1977 - February 23, 1978 period and we will sustain the claim for this time only. We will deny the claim for all time beyond February 23, 1978, since Carrier's determination of Claimant's physical qualifications was rendered consistent with the Agreement and its managerial prerogatives.

A W A R D

Claim sustained to the extent expressed in the findings.

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 23rd day of July, 1980.