

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISIONAward No. 8425  
Docket No. 8347  
2-MP-CM-'80

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 2, Railway Employees'  
                          { Department, A. F. of L. - C. I. O.  
                          { (Carmen)  
                          { Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rules 18 and 32 of the controlling Agreement June 20, 1978, when they denied Carman Russell H. Prall the right to return to work account hearing defect which was over fifteen (15) years old and to which the company was aware of for over fifteen (15) years.
2. That the Missouri Pacific Railroad Company be ordered to return Carman Russell H. Prall to his former position with seniority and vacation rights unimpaired and pay for all wages lost from June 20, 1978 until he is returned to work.

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, who was employed as a Carman-Welder, was released from service on June 20, 1978, it being alleged that he was not qualified to return to service because of "defective hearing". The record shows that Claimant had been employed by Carrier for approximately 27 years and his affliction, the degree of which is a 30% bilateral loss, is a noise induced hearing loss which has lasted for 15-16 years during which most time Claimant has worn a hearing aid.

Prior to his release from service, Claimant was voluntarily off from work for the purpose of undergoing an operation on his arm. According to Carrier policy, because Claimant's absence was in excess of 30 days, he was required to take a physical examination before returning to work. In the course of this examination, it was determined that Claimant did not qualify for service due to his defective hearing and, as a result, he was disqualified from service upon the recommendation of the Carrier's Chief Medical Officer.

Claimant's Organization contends that Carrier's refusal to allow Claimant to return to work was improper in that such action was violative of Rules 18 and 32 of the parties' controlling Agreement.

Specifically, Organization contends that Claimant was dismissed from service without a fair and impartial investigatory hearing as required by Rule 32. Additionally, Organization argues that Carrier has made no effort to determine whether Claimant could perform his duties safely on his present job or, as required by Rule 18, to find him a job which he could perform safely. Also added to its initial claim, Organization further contends that Carrier had previous knowledge of Claimant's condition but failed to take any action against Claimant at that time. Accordingly, Organization maintains that Carrier, by its previous failure, has forfeited his right to raise this argument at this time.

As its final series of arguments, Organization contends that Carrier has been discriminatory in this matter since Carrier has permitted, and continues to permit, other handicapped employees to work; and further Organization argues that Claimant's condition is not as severe as Carrier alleges since Claimant's previous supervisors have attested that Claimant is qualified and capable to perform his work duties despite his hearing loss.

Carrier contends that there is no dispute regarding the existence and degree of Claimant's hearing loss. Further, Carrier maintains that, though Claimant is physically capable of performing Carman's work he cannot meet Carrier's auditory acuity standards and such failure places him and his fellow carmen in a situation of unacceptable risk to both his and their safety. Moreover, Carrier maintains that Claimant's impairment is so severe that he cannot meet Carrier's hearing requirements without the use of a hearing aid, and said requirements, according to Carrier, do not permit the use of such a device.

In similar fashion, Carrier contends that no law or rule limits its right to set reasonable physical standards for its employees and to enforce these standards by disqualification, if necessary. Thus, Carrier argues, that neither Rule 18 or 32 has been violated in this matter since Claimant was not dismissed from service because of improper conduct, but rather, he was disqualified from service because of his hearing loss.

Regarding the contention that Rule 18 obligates Carrier to place Claimant on "light duty" assignment, Carrier maintains that no such obligation exists since all carman work is performed in an environment in which Claimant's hearing loss would create an unsafe situation. Continuing on this point, Carrier contends that it has attempted to locate an appropriate job on which Claimant could be placed, but this effort, for various reasons, has proven unsuccessful.

As to Organization's claim that Carrier had prior knowledge of Claimant's condition and therefore now is estopped from taking any action in this regard, Carrier maintains that this particular argument is inappropriate since it was not raised by Organization on the Carrier's property; and, more importantly, Carrier contends that, though Claimant's hearing loss was known, the extent of the condition was discovered only in June of 1978 when Claimant, for the first

time, was required to undergo a complete physical examination as a condition of his reinstatement following another unrelated illness.

Upon careful and complete review of the record in this matter this Board is persuaded that: (1) Claimant suffers from a significant hearing loss; (2) Carrier's actions in this matter were motivated by legitimate concerns relating to potential unsafe conditions which might be caused by Claimant's hearing loss, and, as such, this type of issue is exempted from the hearing requirements specified in Rule 32 (See: Second Division Awards No. 7497 and 8030); and (3) Carrier has the authority and responsibility to establish and maintain minimum physical competency standards for its employees and, insofar as these standards are reasonable and are established in good faith, and so long as they are not applied in an arbitrary capricious or discriminatory manner, the Carrier's judgement in such matters should not be disturbed (See: Second Division Awards Nos. 1480, 3108, 3561, 4158, 6233, 6476, 7497, and 8030).

Despite having made the above determinations, this Board feels sufficiently compelled to comment in detail upon two significant aspects of this case which have proven to be particularly nettlesome. The first is the extended period of time which Claimant has worked while affected by his hearing loss; and second is the Carrier's obligation, in light of Rule 18, to attempt to allow employees such as Claimant "preference to such light work in their line as they are able to handle".

The record in this dispute clearly shows that Claimant, after several years of working without incident, was found to have a hearing loss which placed him below Carrier's acceptable auditory standards as established by the Association of American Railroads. Though Claimant's Organization argues that Carrier knew or could reasonably have known of the existence and extent of Claimant's condition and thus has forfeited its right to take action in this matter, this Board is unpersuaded by this argument since: (1) the record does not demonstrate the extent of Carrier's knowledge as suggested by Organization; (2) the scope of Claimant's duties as Carman-Welder involves a significant amount of interaction with other employees and is not exclusively confined to the welding booth as Organization suggests; and most importantly (3) the inevitable result of such an interpretation as that which is urged by Organization would be that Claimant would be retained in his position thus continuing to expose both himself and other crew members to potential harm and Carrier to potential liability.

The decision which this Board is compelled to render in this particular dispute is not one which has come easily, nor is it one which any Board relishes in making. Nonetheless, this case like so many other of this nature, necessitates the resolution of two seemingly disparate and conflicting sets of rights in a manner that is fair and equitable while at the same time respecting the existing right of each party. When this test is applied to this instant case there can be no doubt that the Carrier's position is the more convincing and reasonable, and, therefore, must be sustained. This determination, in large measure, has been influenced by an award in an almost exact case wherein Referee Searce sustained Carrier's position on the basis that:

"... Notwithstanding the fact that his hearing was possibly in no more deteriorated status than at the time of his employment we cannot ignore the clear showing that, regardless of what happened prior to the point of discovery of his hearing impairment, the Claimant was a potential hazard to himself and others postfactum such discovery (Second Division Award No. 8030)."

Now to the second issue regarding the Carrier's obligation under Rule 18. In this regard, Claimant's Organization asserts that Claimant could work alone in a welding booth and in such position he could safely perform his required duties without jeopardizing his own health and safety or that of his fellow employees. Contrary to this assertion, however, it is unrefuted that there is but one welding booth position available at Claimant's place of employment and that said position requires the performance of other duties in addition to the welding duties which are performed in the welding booth.

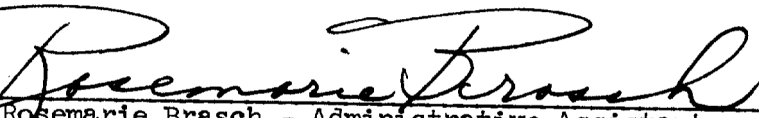
Thus, at the time at which this dispute arose, it appears that there were no positions available to Claimant which were within the exercise of his seniority rights. Be this as it may, however, in accordance with Rule 18, Carrier is obligated to provide Claimant with employment whenever, by virtue of Claimant's exercise of seniority, he may hold a position wherein his hearing deficiency will not pose a threat to himself or his fellow employees, and will, at the same time, meet Carrier's minimum hearing standards. Because of this specific obligation, and because the record suggests that Carrier had not undertaken as complete of a review of alternate employment opportunities which would be appropriate given Claimant's many years of faithful service to Carrier, this Board directs that Claimant's hearing capabilities be reevaluated to determine if there has been any change in his condition; and secondly, that Carrier reevaluate the positions available to Claimant by virtue of his seniority and other contractual rights, and in the event that such a position is available, Claimant would be entitled to said position in a manner consistent with our findings as set forth above.

A W A R D

Claim is denied; however, the matter is remanded to the parties in accordance with the views expressed in the Findings posited above.

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 23rd day of July, 1980.