

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employee:

1. That the Seaboard Coast Line Railroad Company was in violation of controlling agreements or precedents when it did not restore Carman C. O. Peterson to service after his physician had certified him to do so.
2. That accordingly, the Seaboard Coast Line Railroad Company be ordered to compensate Carman C. O. Peterson eight (8) hours at pro rata rate for each work day commencing June 1, 1979 and each work day thereafter until he was restored to service on March 19, 1980; further, that he be compensated for all overtime pay he would have made; and made whole for all vacation qualification and all other benefits accruing to his position in a normal flow of circumstances had this violation not occurred.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Beginning in October, 1977, Claimant, a Carman at Tampa, Florida, marked off indefinitely from his regular assignment for medical reasons. During the next few months, Claimant underwent three instances of ear surgery. As a result of his ear operations and the loss of hearing in one ear, Claimant experienced problems maintaining his balance and suffered from continuous dizziness for a period of approximately two years.

Beginning on June 1, 1979, Claimant sought permission from the Carrier to return to work. He had previously informed the Carrier that one of his personal physicians (Dr. Jones) had concluded that Claimant could return to his job on June 1, 1979. The Carrier's Chief Medical Officer was not convinced that Claimant had completely recovered or that he was physically fit to return to work. On May 31, 1979, the Carrier's Assistant Chief Medical Officer requested Claimant's other physician, Dr. Farrior (an ear specialist), for a prognosis and gave Dr. Farrior a description of Claimant's job and duties. On or about September 17, 1979, the Carrier's Medical Department received a copy of a letter report (dated August 22, 1979) written by Dr. Farrior which stated Claimant should be able to return to

work. However, the report inconsistently indicated that Claimant's dizziness had not yet subsided. On September 27, 1979, Dr. Farrior wrote another note emphatically declaring that Claimant could return to work immediately. The Carrier received a copy of Dr. Farrior's September 27, 1979 note in early October. In early 1980, Dr. Rogers examined Claimant and based on his report, the Carrier approved Claimant's return to service effective March 19, 1980. Claimant returned to work on March 24, 1980.

The Organization argues that the Carrier abused its discretion by withholding Claimant from service from June 1, 1979 to March 19, 1980 since Dr. Jones had issued a medical opinion that Claimant was physically able to return to work. According to the Organization, Dr. Jones' conclusion was ratified by Dr. Farrior who also stated Claimant could fully and safely perform his duties. Also, the Organization asserts that barring Claimant from his position as a Carman for almost ten months constituted improper discipline because Claimant was not first provided with notice and hearing in accord with Rule 32 of the applicable agreement.

The Carrier contends that it reasonably evaluated Claimant's physical condition and determined that Claimant was not fit to return to service until March 19, 1980. The Carrier asserts that it had an obligation to prevent Claimant from returning to work with any disability which could lead to further injury to Claimant or which could jeopardize the safety of other employees. In this instance, the Carrier maintains that the inconsistent medical reports led the Carrier to reasonably determine that Claimant was not physically able to safely perform his duties on June 1, 1979.

The record, in this case, reveals that most of the delay in returning Claimant to work was directly attributable to Claimant and his physicians. On August 22, 1979, Dr. Farrior reported that Claimant's dizziness had not subsided. Though both Dr. Jones and Dr. Farrior had certified Claimant's ability to return to service in 1979, Claimant was still suffering from a loss of balance. A worker with a substantial hearing impairment, dizziness and loss of balance is a potential hazard to himself as well as his fellow employees. Second Division Award No. 8030 (Scearce). Absent an express rule in the collective bargaining agreement, the Carrier may exercise its discretion in determining Claimant's fitness to return to service provided there is no abuse of discretion. Second Division Awards No. 7134 (Sickles) and No. 6474 (McGovern). Also, the Carrier's initial decision to withhold Claimant from service was not tantamount to discipline. Second Division Award No. 5021 (Johnson).

However, by September 27, 1979, Dr. Farrior was absolutely certain that Claimant was fit to return to service and Dr. Farrior so stated in a note which the Carrier received in early October, 1979. Thus, by October, both of Claimant's physicians had approved Claimant's fitness to work in spite of his hearing impairment. Given the unequivocal nature of Dr. Farrior's September 27, 1979 opinion, the Carrier should have then conducted its own physical examination or it should have more promptly sent Claimant to another specialist. This final delay in returning Claimant to service was the result of Carrier inaction. The record before this Board does not disclose an adequate explanation for this delay.

Under the circumstances, we find, that if the Carrier had promptly conducted its own physical examination or had promptly sent Claimant to Dr. Rogers, Claimant could have returned to service on or about January 1, 1980. Claimant is entitled to back pay at the straight time rate for the period from January 1, 1980 to March 19, 1980 less any earnings Claimant received from other employment and less any disability or unemployment compensation which Claimant received during that period.

A W A R D

Claim sustained to the extent consistent with our Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.