

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 9791
Docket No. 9721
2-SP-MA-'84

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

(International Association of Machinists and
(Aerospace Workers, AFL-CIO
Parties to Dispute: (
(Southern Pacific Transportation Co. (Eastern)

Dispute: Claim of Employees:

Claim in behalf of Machinist W. D. Baker at the pro rata rate of pay commencing January 30, 1981, due to the Carrier's violation of the controlling Agreement effective April 15, 1967, as amended. This claim is continuing and includes all overtime for which Machinist Baker would have been available had he not been improperly removed from service.

Resolve by the decision of a third unbiased doctor selected by the Carrier's Chief Surgeon and the Claimant's physician.

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.

The Claimant, had been a Machinist for the Carrier's Houston Division and had been so employed for approximately eight (8) years. Claimant was initially charged with a violation of Rule 801 and as a result of an investigation on December 9, 1980, was dismissed from service effective December 16, 1980. However, as a result of a conference between the Carrier's Plant Manager and the local Organization Chairman, the following agreement was reached:

"After reviewing the transcript of Mr. W. D. Baker, of December 9, 1980 in which he was dismissed from service for violation of Rule 801 of the Southern Pacific Transportation Company, I believe that discipline has served its purpose.

Therefore, Mr. Baker is to return to work on a leniency basis, uncompensated for loss time, and all seniority rights unimpaired; pending a return to work physical which is scheduled for January 16, 1981 at 9:00 am."

Claimant was then examined by the Carrier's physician on January 16, 1981. He was found, as a result of a back X-ray to have a "Class V, Lipping; slight narrowing lumbo-sacral space, Prior myelogram No laminectomy scar." The Plant manager rejected Claimant's "return to duty as his back does not meet our requirements based upon the results of that physical examination.

The Carrier contends the claim is time barred since it is not within the time limits specified by Rule 32(a) which sets forth a sixty (60) day period. Such a position fails to recognize the significance and the uniqueness of the January 9, 1981 settlement, which simultaneously treats both disciplinary and medical issues as part of a single action. Further, there was no reason in the record for the Claimant to believe he had a course of action for any claim until he was advised by the Carrier on February 2, 1981 that he was found physically disqualified. The claim filed on March 30, 1981 is, therefore, found to conform with the time requirements of Rule 32(a).

The Claimant was subsequently examined by his own radiologist and his own orthopaedic doctor. The orthopaedic doctor found, in pertinent, part:

"x-rays of the lumbar spine show no evidence of pathology with the exception of minimal spurring at the anterior plate of L3, 4, and 5. There is no evidence of disc space narrowing. The vertebral body height is within normal limits. The x-ray examination is considered normal for this patient's age and is not indicative of any pathology.

Final diagnosis: Normal back status. No evidence of lumbosacral pathology of any neurological disorder relating to the back or any other organ system disease.

Impression: This patient has no contra indications to any activity and is capable of full and unrestricted activities in all grades and classes."

The Claimant's radiologist's report noted:

"LUMBOSACRAL SPINE

The intervertebral disc spaces and vertebral bodies are of normal height. There is slight relative narrowing of the L5-S1 transitional zone interspace. There is no associated bone change to suggest pathologic degenerative disc disease. Only minimal anterolateral osteophytosis is present in the mid portion of the lumbar spine.

IMPRESSION: Essential negative lumbosacral spine. No acute changes noted.

DORSAL SPINE

No fractures or other significant bone abnormalities are identifiable. The soft tissues are unremarkable.

IMPRESSION: Negative dorsal spine."

It is apparent that two sets of qualified doctors have come to opposite medical opinions concerning the Claimant's physical condition.

The Carrier has the clear right to make determinations about the physical qualifications of its employees. However, it is essential that such conclusions be based upon some degree of medical certitude so that the final decision is fair and proper to both the Carrier and the employee. It is not within the competence of the Board to analyze medical data and to determine the physical capability of an employee (see Second Division Award 6539).

Third Division Award 20548 (Referee Franden) is instructive on the issue of conflict in medical testimony:

"Based on the present record we find that there is need for additional medical data to determine the physical fitness of claimant to return to work. Therefore, we direct that Carrier and Claimant (or his representative) select a neutral third doctor for the purpose of examining claimant, and that the Carrier's physician, Claimant's personal physician and the neutral doctor present a written report to this Division of the Board, within sixty (60) days of the date of this Award, stating their conclusions regarding the physical qualification of claimant for restoration to service as of August 31, 1972, and at present. The neutral doctor's report need not be concurred in by both of the other doctors. A detailed explanation of the duties of claimant as agent shall be supplied to the neutral doctor (by Petitioner and Carrier) so that he may properly evaluate the physical fitness of claimant to perform the job.

Upon receipt and consideration of the medical reports directed above, the Board will make its final disposition of this claim.

To avoid any confusion, the doctors' reports above requested should be submitted through the Carrier, with copies furnished the petitioner."

Given a finding of a bona fide difference of medical opinion in this case, the procedures and determinations set forth in Referee Franden's award are found to have application in this matter now before the Board.

With the operational dates modified to conform to the facts of the instant case (i.e., February 2, 1981), the procedures prescribed in that section of Third Division Award 20548 cited heretofore are incorporated and made part of the findings of the Board and shall be so applied in this case.

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Claim is remanded to the property for additional medical data as indicated in the Finding herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 29th day of February, 1984