

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7033
Docket No. 6807
2-SCL-CM-'76

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 42, Railway Employees'
(Department, A. F. of L. - C. I. O.
(Carmen
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employees:

1. That the Seaboard Coast Line Railroad Company violated terms of the controlling agreement when they held Carman Dewey R. Bazzell out of service May 29, 1972 until January 15, 1973.
2. That the Seaboard Coast Line Railroad Company be ordered to compensate Carman Dewey R. Bazzell eight (8) hours each work day, forty (40) hours each week, at pro rata rate, all overtime he would have made, and that he be made whole for vacation rights he may have lost and all other benefits which accrue to his position.

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.

This case involves a physical disqualification by Carrier of Claimant and the latter's challenge thereto. The principles regarding physical disqualifications cases have been well established in a plethora of earlier Awards. As we read the record, none of the established teachings of these earlier Awards is contested herein. Thus, the parties both recognize that 1) Carrier has the right to determine physical fitness of an employee 2) The findings of Carrier are not absolute and, if challenged, Carrier has the burden of proof on physical disqualification and 3) If Carrier holds Claimant physically disqualified and holds him out of service it assumes the risk of fallibility. See Awards 5847 and 5943.

Claimant was operated on for herniated lumbar discs on January 24, 1972. His personal physician Dr. Benjamin Meyer approved his return to work on May 29, 1972 but Carrier demurred and sent him for examination on June 7, 1972 by Carrier's Local Physician Dr. Joseph Butler. Thereafter, by letter dated June 26, 1972 Carrier's Chief Medical Officer informed Claimant as follows:

"I have received reports from Dr. Benjamin S. Meyer and Dr. Joseph L. Butler from which it appears that you have had a satisfactory result from your recent spine surgery.

You have had two discs removed from your back, and in view of the nature of your job which requires stooping, bending and lifting, I do not believe that you can safely be returned to your assignment and regret that it is necessary to medically disqualify you for further service.

I am sorry that the above decision was necessary, but assure you it was made in your best interest."

Thereafter, on July 20, 1972 the instant claim and grievance were filed claiming that Mr. Bazzell has been medically disqualified improperly. Following substantial handling, Carrier gave Claimant an **extensive** medical/surgical examination in January, 1973 approved him for return to service on January 10 and returned him to work on January 15, 1973. It should be noted that Carrier offered to re-examine Claimant on December 21, 1972 but Claimant requested **postponement of the examination until January 4, 1973.**

As we read the record and the case authority, Carrier has the burden of showing competent medical evidence which supports its disqualification on June 26, 1972. We concur with Carrier's assertion that back surgeries and operations are especially troublesome cases when employees engage in heavy work and we can appreciate that Carrier would be especially apprehensive and careful in such cases. But that is not the issue herein. The very arguments advanced by Carrier suggest a heightened need for competent medical evidence to support a disqualification decision. Yet the instant record contains not one iota of evidence absent conjecture and speculation bordering on "folk knowledge" to underpin the Chief Medical Officers decision of June 26, 1972. Insofar as the record shows and by his own statement, the medical evidence available to the Chief Medical Officer at that time was contained in the opinions of Claimant's physician and Carrier's own physician who had each examined Claimant and concluded in the words of the Chief Medical Officer that Claimant "had a satisfactory recovery from spine surgery". Yet in the face of this bilateral medical opinions based upon examinations the Chief Medical Officer - without examining Claimant at all - decided as follows: "I do not believe that you can safely be returned to your assignment and regret that it is necessary to medically disqualify you from future service". We do not

substitute our lay judgement for that of a medical doctor when we fulfill our function of inquiring into the **evidentiary basis for such a decision**. The plain fact is that there was no medical evidence at all adduced on this record upon which the June 26, 1972 decision to disqualify was or could have been based. Indeed, such evidence as was available all pointed in the other direction. In the facts shown on this record Carrier has failed to carry the burden of proof on this physical disqualification and must suffer the consequences of such failure.

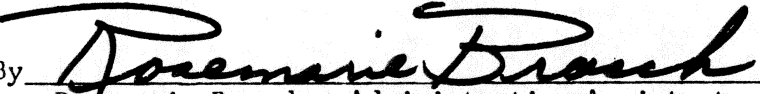
In sustaining the claim we do so for the period of June 26, 1972 through December 21, 1972. We find no dilatory tactics or unreasonable delay in Carrier exercising its right to have Claimant originally examined by Dr. Butler or in reviewing those findings. And any delay between December 21, 1972 and his ultimate return to service were occasioned by Claimant's request to postpone the re-examination.

A W A R D

Claim sustained to the extent indicated in the Findings.

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 9th day of April, 1976.