

Award No. 2257
Docket No. 2265
2-CMSI&P-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYEES'
DEPARTMENT A. F. of L. (Carmen)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement carman Michael Nech has been unjustly denied his seniority rights and unjustly held out of service since September 14, 1954.

2. That accordingly the carrier be ordered to:

A) Restore the aforesaid carman to service with seniority rights unimpaired and grant him all rights accruing to him by virtue of his seniority.

B) Compensate him for all time lost, including regular and overtime compensation he would have earned as well as vacation compensation he would have received if not denied his seniority rights since September 14, 1954.

EMPLOYEES' STATEMENT OF FACTS: Michael Nech, hereinafter referred to as the claimant, was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the carrier, at Tacoma, Washington, since 1912 until September 14, 1954 when he was disqualified by the carrier's chief surgeon. The claimant presented statements from his doctors attesting to the fact he was fit to work. In order to dispose of this matter it was agreed between the carrier's Mr. Downing and the undersigned that the carrier would select a physician of their choice and the claimant would select a physician of his choice, which physicians would then select a neutral physician which would be the means of disposing of this question of whether or not the claimant was fit for service. Submitted herewith as Exhibit A is a copy of letter of August 4, 1955, directed to the undersigned by Mr. Downing, assistant to vice president, confirming the above stated agreement.

be reasonably safe in assuming that he would be unlikely to have anymore."

It is the carrier's position that the decision of the neutral doctor, by which both parties to this dispute have agreed to abide, intends that Mr. Nech, if he takes no dilantin and has no further seizures within the next year, shall be returned to the carrier's service. The carrier agreed to abide by the neutral doctor's decision and the carrier affirms that it will return Mr. Nech to service in accordance with the decision of Doctor Bannick. In other words, as to the date and conditions under which Mr. Nech shall be returned to the carrier's service, the carrier shall strictly comply with the decision of Doctor Bannick. The employes are also under obligation, by agreement, to abide by Doctor Bannick's decision. The carrier does not claim the right to interpret and apply Doctor Bannick's report contrary to his intent and we deny the employes that right. The carrier remains willing, in accordance with the agreement between the parties, to restore Mr. Nech to service in accordance with the decision of Doctor Bannick.

Submitted herewith as carrier's Exhibit I is a copy of letter written by Doctor Bannick to Mr. Downing under date of March 15, 1956, with copy to Mr. H. A. Gazinski, general chairman. It will be noted that Doctor Bannick states, in part, that:

"Just how long this period should be is again a complete guess, but my feeling would be that if he went a year without the use of dilantin and without any seizures, we would be justified in assuming that he was not going to have any more, and could then resume any normal work. This would bring it to October, 1956."

As indicated above, the carrier will be governed by the findings of Doctor Bannick insofar as concerns the restoration of Mr. Nech to service.

There is no basis for this claim and the carrier respectfully requests that it be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

On May 6, 1954, claimant was disapproved for service by reason of physical disability. Claimant made claim for time lost which was declined on May 20, 1955. On June 14, 1955, the organization proposed that the claim be adjusted by the appointment of a neutral physician to be agreed upon by the company's physician and claimant's physician. The proposal was accepted and Dr. Edwin G. Bannick was selected. On October 21, 1955, Dr. Bannick rendered a report of his findings and recommendations.

Briefly stated, the report stated:

(1) It is unlikely that claimant would have any seizures and if his employment would be such that he would not endanger others in case of a recurrence, he could be safely employed. (2) That he should be observed for a year without taking medication (dilantin) before he is placed in a position where he would endanger others in case of a recurrence of a seizure or a blackout spell. In subsequent correspondence, Dr. Bannick did not recede from his report and findings. Under its terms which were binding on both parties claimant should have been returned to work under that part of the

report which we have designated as (1). The record shows that positions were available which met the requirements of the neutral physician's report.

Carrier contends that claimant has lost his right by not appealing from a denial of the claim within nine (9) months from May 6, 1954. The agreement to submit the case to a neutral physician tolls the cutoff rule. The neutral physician's report bears the date of October 21, 1955. Claimant was entitled to be restored as an employe on that date. The time for appeal is from that date and it was clearly within time.

Claimant is entitled to his wage loss from October 21, 1955, until he is restored his employment rights.

AWARD

Claim sustained per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1956.