(Advance copy. The usual printed copies will be sent later.)

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6367
Docket No. 6202
2-AT&SF-EW-72

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 97, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(The Atchison, Topeka and Santa Fe Railway Company - Coast Lines -

Dispute: Claim of Employes:

(1) That the Atchison, Topeka and Santa Fe Railway Company erred and violated the contractual rights of Mr. M. O. Dasher, when they denied him the provisions of Item 19 of Appendix B to the August 1, 1945 Agreement.

(2) That, therefore, commencing on September 25, 1969 and running through February 9, 1970 the Claimant be compensated for all lost wages and/or other benefits, rights and privileges.

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 appears to be a case of initial impression. The Awards of this Division that were cited deal with the right of management, for the safety of an employee believed to be suffering a disabling physical condition and that of his fellow workers as well as the property which must be properly maintained and safely operated, to ascertain, through competent medical examination, whether such employee may be retained at work without hazard to himself and others. Upon receipt of a disqualifying medical report, the carrier may take appropriate steps consistent therewith.

The Petitioner herein does not dispute the fundamental concept of the reviewed Awards. It invoked Item 19 of Appendix "B" of the Controlling Agreement which affords to an employee an opportunity to contest the findings and recommendations of the physician upon which the Carrier relied for action it took. Said provision reads:

"(19) In the application of Rule 40, if, after entering service, any employe undergoing physical examination as provided by that rule is disqualified by a Company doctor, such employe will be privileged to present a certificate of examination from a physician of his own choice. If the two physicians disagree as to the physical condition of such employe, they will select a third physician to be agreed upon by them, who shall be a practitioner of recognized standing in the medical profession, and may be a specialist in the disease, or ailment, from which the employe is alleged to be suffering. The board of medical examiners thus selected will examine the employe and render a report within a reasonable time, (ten(10) days after selection, if practicable), setting forth his physical condition and their opinion as to his fitness to continue service in his regular employment, will be accepted as final..."

Petitioner charges that the Carrier refused to proceed in accordance with Item 19, as requested, to the detriment of the Claimant. The Carrier denies the charge, claiming that Claimant did not meet the conditions precedent for implementing the procedures of Item 19.

The Claimant, who commenced employment with the Carrier in 1946, suffered two heart attacks, one in 1953 and another in 1962. He was granted a three months leave of absence for sickness following the 1953 attack and returned to work at the expiration thereof. Following his 1962 disability, he was kept out of service for a little less than one year. He resumed working in his capacity as an Electrician Lead Workman upon application in his behalf by his Organization. In agreeing to reinstate him, the Carrier stated that he would be "on a more or less trial basis subject to further review if the work appears too strenuous for him." Thereafter, Claimant submitted himself, at Carrier's request, to semi-annual physical examination at the Santa Fe Hospital, Los Angeles, California, and reports thereon were submitted to the Carrier.

Immediately prior to the regularly scheduled physical examination in July, 1969, Carrier's Manager, Mechanical Department, alerted the chief Surgeon at the Hospital that Claimant appeared "to tire quite easily when physically exerting himself.." and appeared to suffer "shortness of breath after climbing stairs or other strenuous work". The medical report of the July 21, 1969 examination, while indicating a new factor, namely a heart enlargement, nevertheless released Claimant for continuing work on the same basis as heretofore. Despite this, Claimant was advised, at the conclusion of his vacation in mid-August, 1969, that he was being kept out of service, indefinitely, because of his physical condition. The Claimant and his Organization grieved and when the Carrier averred that its action was based upon competent medical advice, the Organization requested that Item 19's procedure be undertaken. The Carrier rejected this request on the ground that the Claimant had failed to submit "a certificate of examination from a physician of his own choice". There then ensued extensive discussion and correspondence between the parties hereto.

We cannot fault the Carrier for its concern, stemming from supervisional observations of the Claimant at work, that he was not as well as the medical report concluded, and its submission of the report for review and recommendations by it

own medical department and its reliance upon the findings and opinion of its medical d ector. However, at this point, the issue was drawn. There were two medical determinations and they conflicted. This is the "re gestae" which gives rise to the applicability of Item 19 of the Appendix "B". We find nothing in this provision which precludes Claimant from electing to rely on the report of the physician who examined him on July 31, 1969, and declaring that physician to be one of his own choice. The fact that the Doctor was employed at an institution jointly directed by the Carrier and representatives designated by Labor Organizations, and the July 1969, and prior physical examinations of the Claimant were pursuant to the Carrier's request does not eliminate him from being considered a physician of the claimant's own choice, if he so states. The clause does not require a certificate from an employe's "personal physician", as demanded by the Carrier, We must therefore hold that the report relied upon by claimant and Petitioner constituted the necessary document for its application.

It is conceivable that had the medical board been convened promptly, and the alleged deficiencies in the July, 1969 report carefully been reviewed, the Carrier's position would have been confirmed and the matter would have been resolved without further ado. The entire tenor of Item 19 is to submit to the expertise of the medical profession all questions of physical fitness of Carrier's employees covered by the controlling Agreement. Lay personnel are not empowered to have their observations and judgments in this area determine employability.

We are mindful of the fact that the medical community makes no claim that t can precisely ascertain the impact of work on a patient who has incurred conditions such as that suffered by the claimant herein. This is borne out by the events which urred shortly after claimant's return to work in February, 1970, after the Carrier cepted the report and recommendations of the claimant's treating physician. However, hindsight cannot justify failure to comply with the contractually established obligations and procedures at the time they are asserted.

We find that the Petitioner rightfully called for agreement to a medical board to determine the differences between the recommendations of the examining physician at Santa Fe Hospital and the Carrier's medical director and that Claimant should have been retained in Carrier's employ pending its agreement to submit to the procedures of Item 19 of Appendix "B" of the Controlling Agreement.

Consistent with our many Awards, we are limiting the remedy to remuneration of wages claimant would have earned including payment for vacation and holidays accrued, during the period September 25, 1969 and February 9, 1970, had he been in the continuous employ of the Carrier during that time.

A W A R D

Claim sustained to the extent set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

ted at Chicago, Illinois, this 26th day of September, 1972.