

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. 16, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Carrier unjustly deprived Carman L. C. Sereci from relishing the rights and privileges afforded him under the Current Working Agreement when they arbitrarily disqualified him from all services of the Carrier on August 22, 1972, without due consideration.
2. That the Carrier be ordered to compensate Carman L. C. Sereci from all wages lost from August 22, 1972 to April 19, 1973, make him whole for all seniority rights, all health and welfare insurance benefits, vacation rights, pension benefits including Railroad Retirement and Unemployment Insurance, and all other benefits he would have received had he not been held out of service.

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.

This case presents the claim of Carman L. Sereci that he was unjustly disqualified from all service on medical grounds on August 22, 1972. The record shows that Claimant was returned to service on April 19, 1973 and voluntarily retired on October 12, 1973. Accordingly, the period for which wages and compensatory damages are demanded is from August 22, 1972 to April 19, 1973.

Carman Sereci was employed at Carrier's Calumet Shop at Chicago, Illinois. Sometime in September 1971 he informed his supervisor that he was having chest pains and trouble breathing. Thereafter, on October 9, 1971 Carrier's Regional Medical Director disqualified Sereci from all service. In this disqualification the Medical Director cited reports from two other doctors, T. Ahearn and George F. Kruse; but neither of these reports appears in the record herein. Nor is there any record evidence that the Regional Medical Director himself examined Claimant at that time, or caused him to be examined.

In April, 1972 Claimant initiated efforts to return to his employment with Carrier and presented several doctor's statements, primarily from his personal physician Dr. John A. Caserta, that he was physically and mentally qualified to return to work. On May 15, 1972 Carrier caused Claimant to be examined by Dr. T. F. Ahearn, a Company Doctor. A copy of Dr. Ahearn's report is in the record herein and contains no contraindications to Claimant's employment as a carman. Nonetheless, on August 22, 1972 Carrier's Master Mechanic sent to Claimant the following letter:

"Mr. L. C. Sereci  
10210 S. Yates  
Chicago, Illinois 60617

Dear Sir:

This is in regard to your efforts to return to active duty as a Carman for the Norfolk & Western Railway at Calumet, Chicago, Illinois.

As a result of examinations and correspondence from your personal physician and our Norfolk & Western local doctor, Medical Department decided for the benefit of all concerned that you be disqualified for all services."

Subsequently, on September 27, 1972 the Organization herein filed a claim that Sereci was unjustly disqualified and also a request that a third and neutral doctor be selected by mutual agreement of both parties to resolve the question of Sereci's qualification to work. Further, the Organization suggested that Claimant be compensated for all lost wages, returned to service and "made whole" for listed benefits, if the neutral doctor found him qualified for service. Carrier answered this letter on November 21, 1972 agreeing to accept a neutral doctor's determination of claimant's physical condition; but insisting on withdrawal of the monetary claim beforehand, and denying the validity of the claim on the grounds of no rule support. The record shows that Carrier and the Organization engaged in further substantially identical correspondence exchanges

until February 20, 1973 when the Organization provided Carrier with the name of Claimant's personal physician.

Thereafter, Carrier's Regional Medical Director, Dr. Hopwood and Claimant's physician, Dr. Caserta selected Dr. Charles L. Range as the neutral physician whose decision would be controlling. On April 3, 1973 Claimant was examined by Dr. Range who issued a report to Carrier's Dr. Hopwood, concluding with the following statement:

"It has been so long since he last worked that only a trial of labor at his former position would allow me to determine his ability to do so without symptoms. The patient indicated to me that he feels he is physically able to work at his former job and at present I find nothing that definitely refutes his statement. The medical situation at present does not permit me to make any more definite recommendation at this time."

On April 17, 1973, Dr. Hopwood notified Carrier's Master Mechanic that Mr. Sereci was qualified for work and, on April 19, 1973, Sereci was returned to service. On May 26, 1973 the instant claim that Sereci had been unjustly disqualified from all service on August 22, 1972 and seeking damages from that date to April 19, 1973, was initiated. The claim was denied on July 25, 1973 by Carrier's Chief Official designated to handle such disputes, as follows:

"It is the duty and responsibility of the Company to determine that the physical and mental conditions of its employees are such that they are able to perform their assigned duties in a manner that they will not be a hazard to themselves, their fellow workers and the general public. Dr. Hopwood is a capable physician whose diagnosis in this case was not refuted, but confirmed by the neutral doctor where decision was based upon a trial by test.

Your claim is not supported by the rules of the current agreement and is respectfully declined."

We have reviewed carefully the facts of record herein and the many awards cited by the parties. We are guided in our deliberation by several important principles therein. It is not denied that Carrier has the right, indeed, the obligation to ascertain that employees are physically qualified to perform their work without hazard to themselves or others. Awards 5641, 5974, et al. Impliedly, this includes the right to direct its employees to submit to physical examination if it has reasonable cause to believe that this is necessary to determine whether an employee is

physically fit to perform the duties of his position. Award 13126 (Third Division). If Carrier's finding of a physical disqualification gives rise to a dispute then the burden of proving the physical disqualification by substantial material evidence of probative value is upon Carrier. Award 5847, 6561. It is too firmly established to require citation that when petitioned to resolve a dispute, this Board's consideration is confined to the material evidence in the record, without supplementation by either conjecture or hindsight.

The record herein simply does not support Carrier's assertion that, as of August 22, 1972, Claimant should be totally disqualified for service. Carrier has provided not one scintilla of evidence to support its asserted reasons for that disqualification to wit: "... examinations and correspondence from your personal doctor and our Norfolk and Western local doctor...". Rather, such record evidence as is available shows that as of August 22, 1972 such examinations and correspondence supported Claimant's request that he be returned to service. If Carrier had in its possession other evidence bearing on this point it failed to provide same on this record at its peril. Finally, the neutral examination, while less than overwhelming in support of Claimant's position, was on balance an affirmation of his ability to return to work. The foregoing facts viewed in light of Carrier's burden of showing that its August 22, 1972 decision, at the time it was made, was justified, compel a conclusion that Carrier has failed on this record to carry that burden. Accordingly, we shall sustain the claim.

It is noted that Claimant seeks, in addition to reimbursement of wage loss, to be made whole for other benefits he might have received but for the disqualification. Upon review of this portion of the claim we find that several of the benefits sought have been obviated by Claimant's October 1973 retirement. Moreover, we are ruled on this point by Rule 28(c) of the controlling Agreement which reads in pertinent part: "... reinstatement will be made and payment allowed for the assigned working hours actually lost, less any earnings in or out of service". Reinstatement is not at issue in this case but Claimant was wrongfully held out of service from August 22, 1972 to April 19, 1973. Accordingly, Carrier shall pay Claimant for the assigned working hours actually lost between August 22, 1972 and April 19, 1973, less any outside earnings.

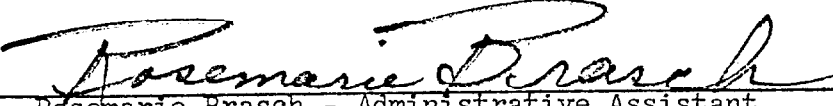
A W A R D

Claim sustained as 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 20th day of June, 1975.