

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.
(Carman
(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 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 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.

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.

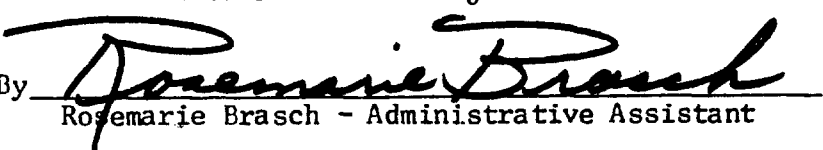
A W A R D

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.