Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9368
Docket No. 8971
2-MP-CM-'83

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated the controlling Agreement when they withheld Carman G. V. Hastings from service May 3, 1979 because he was wearing a hearing aid.

2. That the Missouri Pacific Railroad Company be ordered to compensate Carman Hastings as follows:

   (a) Compensate for all wages lost starting May 3, 1979 and continuing until returned to service with all rights unimpaired.

   (b) Made whole for vacation rights.

   (c) Made whole for all seniority rights.

   (d) Made whole for loss of health and welfare and insurance benefits.

   (e) Made whole for pension benefits including Railroad Retirement and unemployment benefits.

   (f) Made whole for any other benefits he would have earned during the time he is withheld from service.

   (g) In addition to the money amounts claimed herein, Carrier shall pay Carman Hastings an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

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.

The Claimant was initially hired by the Carrier in 1949 and subsequently left the employ of the Carrier. He was again employed in 1974 and worked until he was removed from service by the Carrier on May 3, 1979. The Claimant was removed from service May 3, 1979, as a result of his failure to pass a hearing test and to meet the necessary auditory requirements as established by the Carrier in its medical standards.

The Organization argues that Rule 32, which is the Discipline Rule is controlling. In their mind, it is clear that from Rule 32 the Claimant was due a fair and impartial hearing before being removed from service. They note that he was not afforded any such hearing. They note that the Carrier, in defending against the claim, contends that the Claimant's problem is medical. They do not believe that this assertion can be defended by the Carrier inasmuch as they believe that the Carrier was aware that the Claimant was injured during World War II. The Carrier first gained knowledge of this injury in 1949 when the Claimant was initially hired and again in 1974 when they were furnished with evidence that the Claimant drew an annuity from the Veterans' Administration account his 30 percent loss of hearing. The Claimant's loss of hearing has remained constant at 30 percent and has not decreased or increased since 1949. The Organization's argument implies that the Carrier's actions were arbitrary and capricious inasmuch as they had knowledge of the Claimant's hearing loss and condoned his condition. In this respect, they would suggest that it is unfair for the Carrier to come forth now and refuse to allow the Claimant to continue working. The Organization believes that the Claimant's case is different from one, who, due to some medical problem, suffers a loss of hearing. The Claimant was employed in 1949 with a 30 percent loss of hearing. He was employed in 1974 with a 30 percent loss of hearing and was removed from service in 1979 with a 30 percent loss of hearing. The Organization also notes that it is a well-established fact that at least four employes working at the San Antonio, Texas, facility wear hearing aids. They believe that it is unfair to enforce a rule in piece-meal fashion.

The Carrier suggests that the crux of the dispute is whether the Carrier can disqualify from service an employe whose hearing does not meet Carrier standards. There is no rule in the contract which gives the Employes any voice in establishing Carrier's medical standards, and no rule which gives any other person or groups of persons, except the Carrier, the right to establish such standards. Moreover, they believe the Carrier's standards to be reasonable and in no way can the standards be said to be arbitrary. The Carrier's standard relative to hearing is as follows:

> "D. HEARING
>
> No examinee for promotion or re-examination can be considered to have sufficient acuteness of hearing who is unable to hear words or numbers spoken in an ordinary conversational tone of voice at a distance of ten (10) feet with each ear separately, without the use of a hearing aid.

> On audiometric test the examinee may have no more than an average 30 decibel loss of hearing for the frequencies of 500 - 1000 and 2000 cycles per second, in either ear, to be considered within the requirements for re-examinations.
>
> Employes will not be considered as meeting the carrier's physical requirements when it is necessary that a hearing aid be used to fulfill the above requirements."

The Carrier notes that the Claimant was both given an audiometer test and a field test and failed both. The Claimant, due to his condition, would not be aware of the movement of freight cars in and around the area in which he works. Moreover, he would be risking permanent disability or death for himself or others if he were allowed to continue to work. The Carrier notes that as big as a freight car is, it can roll very quietly, almost silently, and when an employe's eyes are directed elsewhere, he must be able to rely on his hearing to alert him of either the car's movement or a warning of danger.

The Carrier notes that the Organization has based the claim on two allegations; those being that the Claimant's hearing loss was a result of a Second World War injury and that the Carrier twice hired the Claimant with knowledge of this deficiency. The Carrier contends that neither allegation is correct. The Carrier was not aware of the Claimant's hearing loss in 1974. They direct attention to the Claimant's response to the following question which appeared on the employment application: "Is your hearing normal?" The Claimant answered with an unqualified "yes". Not only was the Carrier not aware of any hearing loss on the part of the Claimant, but they note that Carrier records indicate the Claimant passed hearing tests in 1974 and in 1977 without the use of a hearing aid. Thus the Organization's allegation pertaining to a pre-existing substandard hearing condition and their allegation that this condition was condoned by the Carrier, are incorrect. Even if the Claimant had previously worn a hearing aid as contended by the Organization, the fact is that he was not disqualified for wearing a hearing aid, but was disqualified because he failed to pass a hearing examination without the use of a hearing aid. The wearing of a hearing aid does not automatically disqualify an employe from service anymore than would the wearing of eye glasses. The Carrier notes that the Claimant was disqualified from service for no other reason but his failure to meet the Carrier's auditory acuity standards. They note that the Claimant remains out of service on a medical leave of absence at this time.

The Board has previously considered other cases very similar in nature to the instant case. It is well established that the Carrier is well within their prerogatives to establish reasonable rules and standards relating to the physical qualifications of employes. It has also been held that disqualifications for failure to meet medical standards are not subject to the contractual discipline procedures. On the other hand, these standards should not be applied arbitrarily, capriciously, or discriminately. In this case, there can be no doubt that the Claimant failed to pass the Carrier's reasonable standards for hearing levels.

The Organization has suggested that the Carrier has applied the standards in an arbitrary fashion inasmuch as they believe that the Carrier had knowledge of the Claimant's hearing loss at the time they hired him. However, it is the finding of the Board that the evidence does not support this assertion. There is little question that at the time of hire in 1974 and as late as 1977, the Claimant passed a hearing test and met the Carrier's hearing standards. Even assuming, arguendo, that the Carrier had copies of the Veterans' Administration document indicating a 30 percent hearing loss, the Board cannot conclude that the Carrier acted arbitrarily. This document does not establish that the Claimant necessarily failed to meet Carrier's standard upon hire. It cannot be said that the Carrier acted arbitrarily particularly in light of the fact that the Claimant passed hearing tests in 1974 and 1977; thus indicating that the Carrier had no reason to believe that the Claimant failed to meet their standards at that time. Had there been evidence that the Claimant failed to meet the Carrier's specific hearing standards upon rehire in 1974 or later and that the Carrier allowed him to work anyway, there would be more merit to the Organization's argument. There is no evidence of an inconsistent or haphazard exercise of the Carrier's prerogative relating to medical standards in light of the fact that the Carrier disqualified the Claimant upon first learning of the Claimant's failure to meet their standards.

In previous cases involving similar circumstances, the Board while denying the claim, has recommended that the Carrier reevaluate the Claimant's hearing loss and reevaluate if there may be any positions where the Claimant could safely work. The Carrier indicated in their submission that, in connection with other cases, they have determined that there are no positions within the Carmen's craft which an employe could perform with a substandard hearing level. The Board notes that a substantial portion of time has transpired since the Carrier made such a determination. There may have been changes in the Claimant's condition or in the nature of the Carrier's work force during this time that would result in the Claimant being able to provide service for the Carrier. The Board believes that it would be proper for the Carrier to make another good faith evaluation of the Claimant, his condition and potential employment opportunities in view of that condition and the Carrier's standards.

A W A R D

The claim is denied; however, the matter is remanded to the Parties in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of February, 1983.