

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31532
Docket No. MW-31148
96-3-93-3-50**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier withheld Mr. G. E. Swales from service on September 19, 20, 23, and 24, 1991 without just and sufficient cause (System Docket MW-2267).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant G. E. Swales shall be compensated for all wage loss suffered as a result of the Carrier's actions."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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.

On September 16, 1991, Carrier disqualified Claimant from his position as a vehicle operator based on the results of a hearing test. Despite the disqualification, Claimant was paid for September 17 and 18, 1991. Carrier had Claimant retested and,

based on the new test results, Claimant was deemed qualified and restored to service on September 25, 1991. During handling on the property, Carrier advised the Organization that the results of the September 16, 1991 test were due to Claimant's inability to follow the instructions for responding to the test.

The Organization contends that Claimant was not medically disqualified on September 16, 1991, as demonstrated by his reinstatement on September 25, 1991. The Organization contends that Claimant had been working with a hearing impairment for some time and that Carrier was aware of this. In the Organization's view, Carrier had the burden to show that Claimant's hearing had changed at the time his disqualification and Carrier failed to meet this burden. According to the Organization, nothing had changed. The Organization argues that Carrier admitted that it had no grounds to withhold Claimant from service by paying him for September 17 and 18, 1991.

The Organization further argues that Carrier had the burden to show that the results on the hearing test which produced Claimant's disqualification were caused by Claimant's inability to follow instructions. The Organization contends that Carrier's assertions to this effect were not backed with evidence during handling on the property. The Organization maintains that Carrier did not give the Claimant proper instructions and that Claimant was withheld from service in retaliation for his filing a hearing loss claim.

Carrier maintains that it has the right to determine the medical qualifications of its employees and that the Organization failed to prove that its determination was arbitrary or capricious. Carrier argues that Claimant's hearing test, which resulted in his September 16, 1991, disqualification, was caused by Claimant's inability to follow directions and that the Organization failed to make any showing to the contrary. Carrier further contends that the fact that it paid Claimant for September 17 and 18 is irrelevant and that there is no evidence that it retaliated against Claimant for filing a hearing loss claim.

Initially, we observe that Carrier has attached considerable material to its Submission that was not exchanged on the property. Carrier also raised certain arguments in its Submission that were not raised on the property. None of this evidence or argument is appropriately before this Board.

When we consider what was presented and exchanged during handling on the property, however, we conclude that the claim must be denied. Carrier has the right to determine the medical qualifications of its employees and to act reasonably on the basis of medical tests.

Although it is true that Claimant was performing his job despite his hearing impairment, Carrier acted on the basis of new information — the new hearing test — which showed that Claimant's hearing impairment was such as to disqualify him from his position. There is no evidence that Carrier's decision to disqualify the Claimant was arbitrary, capricious or made in bad faith.

The Organization asserted that Carrier failed to properly instruct Claimant, thereby ensuring that he would fail the hearing test and be disqualified, all in retaliation for Claimant's having filed a hearing loss claim. When presented with Carrier's explanation that Claimant had failed the hearing test because of his inability to follow directions, the Organization offered no evidence to support its position. No statement from the Claimant as to the manner in which he was instructed to perform the hearing test was presented.

The Organization's unsupported assertions cannot establish the Carrier's arbitrariness or bad faith. On the contrary, the facts that Carrier acted quickly to have Claimant retested and that it promptly restored him to service upon obtaining the results of the retest are inconsistent with having a retaliatory motive. Furthermore, we see no reason to infer from Carrier's having paid the Claimant for September 17 and 18 any admission of wrongdoing on Carrier's part. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of July 1996.