NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22379
THIRD DIVISION Docket Number MW-22272

Nathan Lipson, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western
(Railroad Company

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

(1) The Carrier violated the Agreement when it withheld Section Laborer Tim Manchego from service on his return from leave of absence (sickness). /System File D-19-76/MW-1-77/.

(2) Section Laborer Tim Manchego be paid all wage loss suffered starting with the filing of this claim, October 15, 1976, and to continue until violation referred to above is corrected."

OPINION OF BOARD: Claimant Tim Manchego commenced employment with the Carrier as an Extra Gang Laborer on September 3, 1974, and established a seniority date as a Section Laborer on June 9, 1975. On October 1, 1974, the Claimant took a leave of absence to have surgery and other medical treatment on his left eye. When he returned to work on May 6, 1975, the Carrier neither made an issue about his physical condition, nor opposed his return to service. The Claimant continued working until November 19, 1975, when he was laid off as a result of a force reduction.

Mr. Manchego was recalled to work on February 23, 1976, and, again worked without objection from management. On May 14, 1976 the Claimant experienced difficulty with his eye from irritation caused by dust particles, and took medical leave to obtain medical treatment.

The Claimant obtained a note dated June 25, 1976, signed by his physician, W. E. Ingalls, which was addressed "TO WHOM IT MAY CONCERN", stating the following:

"Mr. Tim Manchego may resume full time work at this time. His vision is 20/20 in the right eye and 20/300 in the left eye which should be adequate for almost any job. His vision has not significantly changed over the past few years judging from his past medical records."

The above release was presented by the Claimant to his foreman who referred him to the Roadmaster. Said official took the position that Mr. Manchego could not return to work because the June 25 note did not constitute a full release. It is clear from the record that the Organization took issue with the Carrier and made continuing efforts to settle the case. Thus, a statement from a second ophthalmologist, Dr. Mark W. Weber, dated September 15, 1976 was obtained. Said letter states the following:

"Tim Manchego has a failed corneal graft in the left eye. His corrected visual acuity is 20/20 in the right eye.

I feel:

1) It is safe for him to resume full employment.

2) He must wear safety glasses at all times.

3) A repeat corneal transplant in the left eye would have a significant probability of success, should he desire it in the future."

The Organization and Claimant felt that the above constituted the "full release" desired by managment. On October 8, in the first written position on the matter, the Carrier, by A. C. Black, Division Engineer, stated:

"There is no question that Mr. Manchego does not meet the requirement of at least 20/30 vision in one eye and not less than 20/50 in the other with or without glasses; therefore, he cannot be allowed to return to work at this time and your request is denied."

On October 15, 1976, the instant claim was submitted.

In its submission to this Board, the Carrier for the first time made the argument that the instant claim is defective in that no specific rule was identified as being violated. While there is authority dismissing claims for failure to assert a rule, it is quite clear that a Carrier must assert any such procedural objection on the property. Since there are numerous awards that neither party can raise a procedural defect for the first time at the Board, we need not consider said Carrier objection further.

A more serious procedural objection raised by the Carrier is that of timeliness. Rule 29(a) of the governing agreement between the parties states in part that:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved to the officer of the Company authorized to receive same within sixty (60) days from the date of the occurrence on which the claim or grievance is based."

The Carrier argues that the "date of the occurrence" in the present case must be June 25, 1976, the date on which Claimant was not reemployed, and that the claim filed on October 15 cannot possibly be deemed timely, because 112 days have elapsed, and the contract bars claims presented beyond 60 days. On first view there appears to be merit in the Carrier's position.

But, as noted above, it was not until October 8, 1976 that the Carrier took a written position denying Claimant reinstatement. By a letter dated October 15, 1976 the Organization General Chairman again requested reinstatement, asserting that the September 15, 1976 letter from Dr. Weber was obtained, because when "Mr. Manchego presented (the June 25th letter) to his foreman (he) referred him to the roadmaster who advised him that the release was not a full release therefore he could not return to work at that time." Said Organization assertion stands unrebutted in the record.

From the above it must follow that Claimant's status was unclear until the October 8 position of the Carrier, and that the refusal to reinstate on said date becomes "the occurrence on which the claim or grievance is based" in the context of Rule 29(a). Accordingly, the claim before us must be deemed timely.

Turning to the merits of the case, the Carrier makes the argument that management has always had the right, and must continue to have the right to establish physical qualifications for employes. There are numerous Awards in support of that general proposition, and this Board certainly does not disagree with same. For example, there can be no question that the Carrier has the right to establish employment standards for applicants, which include such physical qualifications as the Carrier sees fit to adopt.

But there are difficulties in applying the above general observations to the instant case. The record shows that management had adopted and applied Carrier Saftey Rule 876, which states:

> "Employees having eyesight in but one eye must wear prescribed eye protection at all times while on duty."

The record shows that prior to the time the present claim was presented, two Section Foremen and one Section Laborer, as well as an additional unidentified employe, were on the job with serious vision impairment in one eye. Such facts can only lead to the conclusion that the Carrier has established qualifications which include the assignment of employes with defective vision in one eye, and has successfully operated with such employes. The instant record does not suggest that the Claimant was actually unable to perform his duties, and the Board, accordingly, must assume that ability to do the job is not an issue in this case.

It is well known that a Board may find a wrongful physical disqualification from employment to be a violation of the collective bargaining agreement, even where the contract does not contain an express provision on the subject. The above concept is based on the idea that while it is the basic prerogative of a carrier to establish physical qualifications or requirements of employes, such prerogatives may not be exercised in an arbitrary or capricious manner, nor may the prerogative be used in bad faith, or to discriminate against an employe. We would again emphasize, however, that this discussion is to dispose of the problem in the present case, and is not to be construed as limiting the general rights of the Carrier to establish physical qualifications identified above.

In the instant case, it must be noted that the Carrier has in the past utilized employes with impaired vision in one eye successfully. That is the only inference to be raised by Carrier Safety Rule 876, as well as from the evidence in the record. The evidence shows that the Carrier knew or should have known prior to June 25, 1976, that the Claimant had impaired vision in his left eye, but said condition, notwithstanding, the Carrier employed the Claimant, and, insofar as the record is concerned, the Claimant successfully performed his duties.

Given the above circumstances, it can only be concluded that the Carrier violated the contract effective September 15, 1976 when it was informed in unequivocal terms by competent medical authority that the Claimant was able to resume his duties but refused to put the Claimant to work. As previously noted, the Carrier did not dispute the ophthalmologist's opinion that "it is safe for (the Claimant) to resume full employment," but simply took the position that Mr. Manchego could not be allowed to return to work, because he did not meet the general employment standards that the Carrier had adopted.

Such circumstances require the conclusion that the Claimant must be reinstated forthwith, and must be made whole for any loss in earnings during the period of his unemployment. It is, accordingly, determined that Mr. Manchego should be made whole for all wages lost effective upon the filing of his claim --- i.e. October 15, 1976.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

The claim is sustained as set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1979.