

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32778
Docket No. MS-33136
98-3-96-3-554**

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

**(United Steelworkers of America
PARTIES TO DISPUTE: (
(Lake Terminal Railroad Company**

STATEMENT OF CLAIM:

**"Lake Terminal Railroad
Claim Number MW-14-95**

Mr. Jose Laboy, the Claimant, a Laborer in the Maintenance of Way Department issued a grievance alleging that the Carrier violated his seniority rights under Rule 6: Seniority, when the Carrier furloughed the Claimant, for medical reasons and kept less senior employees gainfully employed.

Rule 6: Seniority, Sections (a), (c) and (f)1, read as follows:

'(a) An employee's seniority rating will be his total length of service in the department in which he is employed, computed in years, months and days from the date first employed in the department; however, temporary employment in other department by the Company's request will not change the employee's seniority status in the department which he is regularly employed, but a transfer to another department by the employee's request will break his seniority.'

'(c) The Principle of seniority will operate only in case of promotions, vacancies, furloughs and newly created jobs or positions, and in the choice of vacation periods.'

‘(f)1 Promotions, transfers, furloughs and recalls from furlough shall be upon the basis of seniority.’

Mr. Laboy reported off work on April 6, 1994 with the ‘stomach flu.’ Mr. Laboy reported to work on April 7, 1994 as scheduled and became ill on the job site. He complained of stomach pains and dizziness. His supervisor, Clarence Rutherford, maintained that the Claimant had a seizure. Based upon the supervisor’s alleged observations, the Claimant was transferred to the Plant Hospital where he was examined by Plant Physician Szhayel Scheinberg. He was diagnosed as having ‘flu-like’ symptoms and sent home for the remainder of the turn. Mr. Laboy returned to work on April 12, 1994 and worked until April 25, 1994 at which time he was furloughed by the Carrier. The Claimant remained on medical restriction by his physician, R. Dion Fernando, M.D., until February 7, 1996 at which time Dr. Fernando released the Claimant for work under the same set of conditions that he had previously been allowed to work. The Carrier failed to recall the Claimant and denied his grievance to return to work.

Remedy requested: That Mr. Laboy be immediately returned from furlough and that he be compensated for all lost time (including overtime) and benefits retroactive to February 7, 1996.”

FINDINGS:

The Third 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 were given due notice of hearing thereon.

Claimant is an epileptic who was employed by Carrier as a Laborer in the Maintenance of Way Department. On April 7, 1994, an incident resulted in Claimant being seen by a physician at the USS-Kobe Plant Hospital. Subsequently, Carrier's Medical Director determined that Claimant had had an epileptic seizure and disqualified him from working around heavy machinery or equipment. The Organization maintains that Claimant did not have a seizure, but merely suffered from stomach flu.

It is well-established that Carrier has both the right and responsibility to determine the medical qualifications of its employees and that the Organization has the burden of proving that Carrier's determination was arbitrary or capricious, *See, e.g.*, Third Division Award 31824 and authority cited therein. In the instant case, the Organization has failed to carry its burden.

Claimant's Foreman provided a statement describing the incident. He attested that Claimant stated he was dizzy, began to lean to his right until he was laying down, had mumbled speech, his left arm was shaking and his eyes were rolling back. He did not respond when the foreman asked if he was all right.

Carrier's Medical Director determined that Claimant had had a seizure. Claimant's personal physician agreed that if the incident occurred as the Foreman had described it, Claimant had had a seizure. Both doctors agreed that if Claimant had had a seizure, he should not work around heavy machinery or equipment. Claimant applied for a disability pension from the Railroad Retirement Board. The Railroad Retirement Board found that Claimant should not work around heavy machinery, climb ladders or work around heights, although it also found that Claimant was not disabled from all possible positions and denied the application.

The Organization relies on the report completed by the doctor who examined Claimant at USS-Kobe Plant Hospital which diagnosed only flu-like symptoms. However, it appears that that report was based only on the information that Claimant related to the doctor. There is no evidence that the doctor had available the description of the incident from Claimant's Foreman. Although the Organization submitted a statement from Claimant dated February 8, 1996, almost three years after the incident, denying that he had had a seizure, the evidence to the contrary is overwhelming.

In denying the claim, we note two things. First, if work arises in the future that Claimant can perform with his restrictions, we urge Carrier to consider him for the

position. Second, we note that Carrier also argued that the claim was not timely. Because we deny the claim on its merits, we do not consider the timeliness issue.

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 23rd day of September 1998.