

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43551
Docket No. MW-43735
19-3-NRAB-00003-160521**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(Union Pacific Railroad Company (former Missouri
Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier medically withheld Claimant T. Valenzuela from service beginning on April 6, 2015 and continuing (System File T-1550U-901/1628033 UPS).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall promptly compensate Claimant T. Valenzuela for all hours he was not allowed to work commencing April 15, 2015 and continuing.”**

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.

This Claim involves the Carrier's decision to withhold the Claimant from service for medical reasons. The Claimant established and maintained more than thirty years of seniority in the Carrier's Maintenance of Way and Structures Department. In April of 2015, the Claimant was assigned as a rubber tire backhoe operator on Gang 8770.

On April 9, 2015, the Claimant reported that his ear protection was blocking any and all noise. The Claimant said he was unable to hear approaching trains or verbal warning. The Claimant was seeking a proper set of ear protection and to alert the Carrier of a safety concern. The Carrier notified the Claimant that it was withholding him from service pending a medical evaluation. The Carrier reviewed the Claimant's medical records and asked him to attend an examination with a hearing specialist. Due to a severe hearing loss, the Claimant was allowed to return to work with permanent medical restrictions. The Claimant exercised his seniority to return to a position that would accommodate his medical restrictions. The Claimant was returned to the Carrier's service on May 12, 2015, as a trackman.

The Organization submitted a claim on May 18, 2015, alleging that the Carrier violated the Agreement when it removed the Claimant from service for a fitness-for-duty examination. The Carrier denied the claim and the parties were unable to resolve it on-property. It is now properly before this Board for final adjudication.

The Organization contends that the Carrier arbitrarily disqualified the Claimant from his position in retaliation for asking for different hearing protection. The Organization acknowledges that the Carrier may set reasonable medical standards for its employees but contends that the Carrier has failed to establish any reasonable basis for removing the Claimant from service or to require him to undergo medical examination. The Organization contends that the medical evaluation showed that the Claimant's hearing had not changed from his previous examination, so he must have been removed because he complained about the defective ear protection.

The Carrier contends that the Claimant was removed from service the same day he informed supervision that he could not hear approaching trains or warnings from fellow employees while wearing his ear protection. The Carrier contends that because the ear protection would not have eliminated all sounds, it was concerned about the Claimant's ability to perform his duties. The Carrier contends that when its Chief Medical Officer reviewed the Claimant's medical records, it was determined that the

Claimant suffered from severe hearing loss and would have permanent medical restrictions but would be allowed to return to work in a compatible environment.

It is well-settled that a carrier may set reasonable medical standards for its employees. "It is clearly established that Carrier has the right to withhold an employee from service when serious questions are present concerning the employee's physical qualifications to perform the job." Third Division Award 32933. Unless that decision is arbitrary or capricious, this Board will not set aside the Carrier's determination that an employee does not possess the physical qualifications to perform the job.

The Carrier established on this record that the Claimant was suffering a severe hearing loss that required that he be returned to work under permanent medical restrictions. The Organization offered no evidence to refute this determination. The Carrier has the right to withhold an employee whose physical condition may prevent him from working safely. The record does not support a finding that the Carrier's decision was in retaliation for the Claimant's complaint about his ear protection. Under the circumstances, the Carrier's determination to disqualify the Claimant cannot be said to be arbitrary or capricious.

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 27th day of March 2019.