PUBLIC LAW BOARD NO. 2143

AWARD NO. 285

SEABOARD COAST LINE RAILROAD CO.

VS.

UNITED TRANSPORTATION UNION (C&T)

STATEMENT OF CLAIM: Claim of Engineer B. L. May for restoration of full seniority rights with pay for time lost from the date withheld from service, October 15, 1980, and establishment of a three-doctor panel in accordance with Article 47, BLE Agreement.

STATEMENT OF FACTS: Mr. May entered the service of Carrier on June 5, 1965, as a fireman. He was promoted to locomotive engineer on December 4, 1967. On September 28, 1980, Engineer May was admitted to Maryview Hospital at Portsmouth, Virginia to undergo tests for a cervical myelopathy (nerve damage). Claimant May was examined by Dr. John H. Presper. In the course of the examination, claimant related that he had been treated by a Dr. Spinangle. Dr. Presper called Dr. Spinangle and confirmed the history of optic neuritis. Dr. Presper associated another specialist, Dr. Skeppstrom, who also examined claimant. Drs. Presper and Skeppstrom concluded that claimant had multiple sclerosis. This diagnosis was forwarded to Carrier's Chief Medical Officer, Dr. Charles A. Mead, who on October 15, 1980, wrote Engineer May that he was medically disqualified for further service as an engineer.

The Discharge and Summary from Dr. Presper dated October 3, 1980, concluded with the following language:

> "He is discharged on no medications with instructions that he slowly could return to work but to cut down his work load. We will see him again in six weeks.
>
> "FINAL DIAGNOSIS: Multiple Sclerosis."

Dr. Mead had concluded his letter with the following advice to claimant: "Unless you have objections, I will refer your file to our Rehabilitation Committee for consideration for continued employment in the Company in some other category."

On December 1, 1980, General Chairman Higginbotham wrote Director of Labor Relations R. I. Christian transmitting Dr. Presper's summary and making the following comments:

> "It was the opinion of Dr. Presper that Engineman May's diagnosis was determinative for Multiple Sclerosis. You will please note in Dr. Charles A. Mead's letter of October 15, 1980, Mr. May was medically disqualified for service as an Engineman without explanation. The findings of Dr. Presper would not indicate that the medical condition of Mr. May would be, in any way, prohibitive to his functioning as a locomotive engineer. We are, accordingly, requesting that he be immediately returned to service with payment for all lost time earnings since October 4, 1980. If the Carrier is unagreeable to returning Mr. May to active duty on the above described basis, then we request that a three-doctor panel be convened in accordance with Article 47, BLE Agreement."

On December 3, 1980, Dr. Mead wrote Mr. May as follows:

> "As discussed in our telephone conversation yesterday, I must of medical necessity disqualify you for further service as an engineman or fireman. I had not wished to make this disclosure to you over the telephone but the circumstances of our conversation made it necessary to do so. It is with sadness and regret that I advise you of this decision, and I can appreciate your disbelief and emotional turmoil. It is not necessarily your present condition at the instant, but the unpredictable nature of your illness which has now been definitely diagnosed by your personal physicians.

"I would urge you to please meet with Mr. Ron McCall at your earliest convenience as the Company is anxious to consider alternate employment and assistance to you.

"Please be assured that I have a deep understanding and appreciation for your situation."

On the same date Dr. Presper wrote a notice "TO WHOM IT MAY CONCERN" as follows:

"Mr. May was admitted to the hospital because of a cervical myelopathy. His diagnostic work-up was consistent with multiple sclerosis. He had one previous attack of optic neuritis which completely resolved. On a follow-up visit on 11/20/80 his neurological examination was, for all practical purposes, within normal limits.

"It is my feeling this man is perfectly capable of being employed in his capacity as an engineer on a locomotive and he has no impairment at the present time which would prevent him from performing his duties."

On January 13, 1981, Mr. Christian responded to Mr. Higginbotham's letter as follows:

"This refers to your letter of December 1, 1980, regarding the medical disqualification of Engineman B. L. May. This employee, according to the findings of Dr. John H. Presper, has diagnosis determinative for multiple sclerosis.

"With respect to your request for a three-doctor panel, your attention is directed to Paragraph 6(b) of Article 47 of the BLE Schedule Agreement, reading in part as follows:

'6(b) An employee who is removed from the service account his condition may appeal from an adverse decision of the Director of Personnel through his General Chairman, provided he presents his General Chairman with evidence of a thorough examination by a recognized physician, subsequent to his rejection, which examination shows conclusions contrary to those on which his rejection from service was based.' (Empnasis Added)

"There is no dispute concerning the diagnosis that Engineman May has multiple sclerosis. The findings of a three-doctor panel are not going to alter this fact. Unless you can produce some medical evidence which is contrary to these findings, it will not be appropriate to establish such a board. We have discussed Mr.

May's case thoroughly with our Chief Medical Officer and were advised that it may be possible for Engineman May to perform normally for the time being; it is the unexpected that demands disqualification. For an example, a person suffering from MS will have eye problems and not be aware of this until he or she bumps or runs into something.

"Our Chief Medical Officer, Dr. Mead, has had some exchanges with Mr. Robert F. Kelly, Executive Director of the National Multiple Sclerosis Society concerning Mr. May and hopes to arrange a meeting with him in an effort to get him to consider alternative employment and assistance. Dr. Mead desires that such a meeting be arranged as quickly as possible with Mr. Ron McCall of our Rehabilitation Department.

"We regret we cannot respond more favorably, but we are hopeful something can be worked out to provide Mr. May with safe, gainful employment."

Mr. May rejected consideration of continued employment by carrier in some other capacity. Under date of February 23, 1981, Dr. S. M. Freedman, a neurologist, furnished to Mr. May, May's attorney, and to Dr. Mead a medical report concluding as follows:

"This patient possibly has multiple sclerosis although at the present time neurologic examination is normal. Diagnosis is raised on the basis of the combination of optic neuritis and numbness, but I see no reason whatsoever why this man cannot be employed at the Seaboard Coast Lines. He is in good physical condition and certainly should be able to do his normal job as an engineer. If company regulations prohibit that, there are multiple other jobs that he should be able to do for Seaboard Coast Lines, but I see no reason whatsoever why this man could not be employed with the Railroad."

On March 18, 1981, General Chairman Higginbotham wrote Mr. Christian in part as follows:

"You will please note that the findings of Dr. Freedman find Engineman May asymptomatic from a neurological point of view and that no symptoms are, at this time, indicative of the findings of multiple sclerosis. While it is recognized that Dr. Freedman did state that Mr. May 'possibly has multiple sclerosis' no such determination could be made presently. On the basis of such unverified speculation, we fervently believed that Engineman May

should be returned to his normal duties of the Carrier and paid for all lost time held from such service.

"If the Carrier is still unagreeable to such a request, then we wish the Carrier to participate in a three-doctor panel in accordance with Article 47-6(b) with Dr. S. Mitchell Freedman serving as the Employee's medical advocate."

Mr. Christian responded on April 10 in essential part:

"Even with Dr. Freedman's report, Mr. May has not established a 'difference in medical opinion' as required by the Agreement, which is one of the requisities necessary to establish a medical panel. Therefore, your request for a medical panel is declined.

"For your information, there has been another development in this case since your letter of March 18. Mr. May wrote Dr. Mead on March 23, copy of which was sent to you by Mr. May. On April 7 Dr. Mead responded. Copy of Dr. Mead's letter to Mr. May is attached for your information. Hopefully, the rehabilitation efforts in behalf of Mr. May will provide him with gainful employment soon."

Subsequent medical examinations of claimant have been asymptomatic, and since January 21, 1982, claimant has been working as an engineer, restricted to yard or branch line service.

FINDINGS: Upon consideration of the lengthy submission furnished us by the parties, this board makes the following findings:

1. A CARRIER HAS THE FUNDAMENTAL RIGHT TO PRESCRIBE REASONABLE STANDARDS OF PHYSICAL AND MENTAL FITNESS FOR ITS EMPLOYEES AND TO WITHHOLD FROM SERVICE EMPLOYEES WHO DO NOT MEET SUCH STANDARDS.

The leading case establishing this principle is First Division Award 19538. We know of no award denying such right.

This fundamental right of a carrier to establish such standards for its employees was affirmed by Referee Nicholas Zumas in his opinion in Award No. 3 of PLB 3009 on this property when he stated: "There is

no dispute concerning carrier's right to establish reasonable, non-arbitrary medical standards for its employees."

The basic soundness of this doctrine is evident. Its direct connection with the health and safety of all employees and the economic survival of the employer dictates that any erosion of such fundamental right be avoided and that any contractual circumscription of such right be strictly construed. In no industry is the concept of "Safety First" more important than in the operation of trains. This concept should be recognized as being of the very highest importance. Such cannot be done with mere lip service relative to the employer's right to establish and enforce reasonable medical standards.

2. UNDER THE RAILWAY LABOR ACT, THE RAILROAD ADJUSTMENT BOARD AND PUBLIC LAW BOARDS HAVE THE EXCLUSIVE JURISDICTION TO RESOLVE DISPUTES INVOLVING AN EMPLOYEE'S BEING WITHHELD FROM SERVICE ON THE BASIS OF THE EMPLOYER CARRIER'S ESTABLISHED STANDARDS.

The development of this subject is made necessary by the split of authority evidenced between numerous awards written by Mr. Zumas, certainly a distinguished and learned referee, and those authored by other equally knowledgeable arbitrators. On this property, Referee Zumas has written two awards which directly conflict with established precedent established through the opinions of competent neutrals.

The cleavage basically stems from what we perceive to be Mr. Zumas's misapplication of the decision of the United States Supreme Court in F. J. Gunther v. San Diego & Arizona Eastern Railway Company, 382 US 257, 15 L ed 308, 86 S Ct. 368 (1965).

Gunther involved a simple central issue and an uncomplicated set of facts. After 38 years service as fireman and engineer in the service of the carrier, the 71 year old Mr. Gunther was removed from active service because examination by carrier doctors indicated that "his heart was in such condition that he would be likely to suffer an acute coronary episode". Gunther then consulted a heart specialist who concluded that he was physically fit to function as a railroad engineer.

The carrier was unmoved by the recommendation of Mr. Gunther's cardiologist. Although the agreement under which Mr. Gunther's grievance was being processed contained no provision for a three-doctor panel, his union proposed that the dispute be resolved on such basis. The carrier rejected such procedure and the grievance was duly progressed to arbitration before the National Railroad Adjustment Board. The Board, having no power under the governing agreement to do so, resorted to its inherent power under the Railway Labor Act to resolve the dispute and entered its order for the establishment of a three-doctor panel empowered to resolve the question of Mr. Gunther's physical fitness. The panel ruled that Mr. Gunther was physically fit to perform his duties as an engineer; however, the carrier refused to be bound by such decision and the matter was appealed through the federal court system. Carrier's position was upheld in the District Court and Circuit Court of Appeals, but the Supreme Court reversed such decisions and upheld the adjustment board's referral of the matter to the three-doctor panel. Although the Gunther decision has been

stretched beyond recognition, its holding is simple. Under its plenary power conferred by the Railway Labor Act, the NRAB (and now any public law board) may delegate its evidence-gathering function, as well as its decisional authority in the exercise of its power, to resolve the so-called "minor disputes" defined under the law.

This considerable power seems rather incompatible with Section 3 arbitration as it is now viewed in the industry, a view influenced, no doubt, by the abuse of the system from time to time by all concerned (carriers, unions and referees). Yet the clear meaning of the central, pivotal holding of Gunther is that the "broad power" of an adjustment board includes the authority to appoint a master (as in chancery), a commission, a panel or such other instrumentality as may aid the board in the search for the truth and an adjustment of the dispute involved in a just and proper manner. (Inconsistent with this concept, of course, is the practice of dismissing cases where "there is a factual dispute herein which we are unable to resolve on the basis of the evidence before us.")

Thus, the Supreme Court heartily endorsed the referral of the issue of Gunther's physical fitness to a three-doctor panel, thereby constituting the panel an arm of the board and effectually placing in its hands the ultimate resolution of the issue.

We would observe, however, that the Court said, "this was an appropriate way of handling Mr. Gunther's claim"; it by no means said, as the Zumas decisions imply, "this is the way all such cases should be handled."

We find no language in Gunther more significant, more meaningful, than that reading as follows:

> "Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions (of the collective bargaining agreement) should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field."

Thus, while the board may delegate certain of its functions to other individuals or agencies, the board cannot properly delegate its ultimate responsibility for just resolution of any dispute within its charge. Under the trend which would be established by systematic adherence to the Zumas doctrine, the "third doctor" becomes the ultimate authority in place of the board.

3. MR. MAY'S COMPLAINT IS THAT HE WAS IMPROPERLY DENIED THE RIGHT TO HAVE HIS CASE SUBMITTED TO A THREE-DOCTOR PANEL UNDER THE FOLLOWING AGREEMENT PROVISIONS:

ARTICLE 47 - PERIODICAL MEDICAL EXAMINATION

* * * *

> 6. (a) If disqualifying defects are disclosed by the Medical Examiner's report and if, in the Chief Medical Officer's opinion, the physical condition of the employee is such that it will interfere with the safe performance of his duties, the Chief Medical Officer will report his findings to the Vice President - Personnel and Labor Relations, with a copy to the Superintendent; and if it is decided that the employee should be removed from the service, the Superintendent will notify the employee and the BLE General Chairman. (Paragraph 6(a) from Letter Agreement 12-15-71 - File 1-47)
>
> 6. (b) An employee who is removed from the service account his condition may appeal from an adverse decision of the Director of Personnel through his General Chairman, provided he presents his General Chairman with evidence of a thorough examination by a recognized physician, subsequent to his rejection, which

examination shows conclusions contrary to those on which his rejection from service was based. If said decision is appealed, the employee involved, or his representative, will select a physician to represent him, notifying the Director of Personnel accordingly, and within fifteen (15) days after such notification, the Director of Personnel will select a physician to represent the Company in conducting a further physical examination. The two (2) physicians thus selected will examine the employee and render a report within a reasonable time, not exceeding fifteen (15) days. If the two (2) physicians thus selected shall agree, the conclusions reached by them will govern.

6. (c) If the two physicians selected in accordance with the preceding paragraph should disagree as to the physical condition of such employee, they will select a third physician, to be agreed upon by them, who shall be a practitioner of recognized standing in the medical profession, and a specialist in the disease or diseases from which the employee is alleged to be suffering. The board of medical examiners thus selected will examine the employee and render a report within a reasonable time, not exceeding fifteen (15) days after selection, setting forth the employee's physicial condition and their opinion as to his fitness to continue service in his regular employment, which will be accepted as final. Should the decision be adverse to the employee and it later definitely appears that his physical condition has improved, a re-examination will be arranged, after a reasonable interval, upon request of the employee.

* * * *

6. (e) It is understood that in cases where an engineer may be held out of service pending final determination as to his fitness to continue such service, and it subsequently develops that his condition did not justify taking him out of service, he will be paid for time lost by him while held out of service on that account.

4. THE ADOPTION BY THE PARTIES OF ARTICLE 47, AND IN PARTICULAR THE SECTIONS JUST QUOTED, DID NOT NEGATE CARRIER'S RIGHT TO PRESCRIBE REASONABLE MEDICAL STANDARDS DISCUSSED IN FINDING NUMBER 1 ABOVE.

This finding is not in conflict with the Gunther decision, or with any award which we have encountered in an exhaustive search for authority (including the several Zumas awards), nor with the position

of the organization herein. The issue is joined only when we consider how the reasonableness of carrier's medical standards may be tested.

Prior to the adoption of the two Zumas awards (Awards 1 and 3, PLB No. 3009), the matter appeared settled in principle on this property by arbitral precedent; notably Award No. 1 of PLB 946 and Award No. 93 of PLB 974. Yet after these two awards were rejected by the Zumas decisions, the Zumas awards were ignored and tacitly repudiated in an award resolving a dispute betwen the parties hereto. (Award 79, PLB 3230, C. A. Peacock, Neutral)

Three other awards lend substantial support to carrier's position herein. They are Award No. 6 of PLB No. 2690 (MP vs. BLE, Roadley) Award No. 140, PLB 2035 (Conrail vs. BRAC, Seidenberg) and Award 3 of PLB 554 (Boyd). We find no contrary awards except awards authored by Mr. Zumas on other properties.

To be sure, the issue is not easily resolved. There are strong equitable considerations on each side of the question. Barring some clearly disqualifying impediment, Engineer May was entitled to work his assignment, this by virtue of his seniority, and other rights, under the collective bargaining agreement. There is an indelible poignancy about his case because he spurned all of carrier's urgings that he consider an alternate assignment with carrier while his physical condition was being monitored. As a result, Mr. May suffered heavy financial loss, including his home, as a result of his being deprived of work as a locomotive engineer. Against this backdrop, Mr. May has now been restored to his old position and to date remains free of

symptoms of multiple sclerosis. And in this frame of reference alone it would be easy to order carrier to pay Mr. May for all time lost, either invoking the shibboleth of "Gunther" or on the theory that time has proven that carrier was not justified in its temporary (albeit lengthy) disqualification of the claimant.

To do the latter would display an ignorance of the insidious nature of multiple sclerosis, the disease with which claimant was afflicted according to the findings of both his own doctor and carrier physicians. Two things must be recognized: (1) When in an active state, multiple sclerosis can strike suddenly, so affecting the vision (including instant and complete blindness) and perception of a locomotive engineer as to render him incapable of safely discharging his job responsibilities. (2) It is frequently the nature of the disease to go into remission, leaving the victim symptom-free, only to return in its own season.

Any argument that a medical standard disqualifying from service a locomotive engineer who is suffering from active multiple sclerosis is arbitrary or unreasonable is simply insupportable.

A decision which supports our conclusions herein is that of the eminent referee Jacob Seidenberg in Award 14 of Public Law Board No. 2035. Under the wording of the three-doctor panel rule involved, the disqualified employee had an unrestricted right to have his physical fitness determined by a tripartite medical panel, <u>even without his having produced a report from his physician-nominee!</u> Carrier refused to participate in the use of a panel, alleging that the claimant failed

co meet its prescribed standards for weight and blood pressure. Dr. Seidenberg upheld the carrier's position; stating: "This Board does not believe a panel of doctors is empowered to overrule Carrier established medical standards reasonable on their face...The matter of established medical standards is a matter that the Carrier could control..." The employee's right to a medical panel under the Conrail rule was no less explicit than that in Article 47 involved herein.

Thus while Referee Zumas would routinely refer all such matters to the three-doctor panel, effectively letting such panel pass judgment as to the reasonableness of the carrier's applicable medical standard, Dr. Seidenberg would reserve to the arbitral board such prerogative, a reservation which we find completely compatible with Gunther, which stressed not only the plenary power but also the special qualifications of the board which are the underpinnings of such power.

After much study we are persuaded that the Seidenberg award places the matter in proper focus. Only through its application can we preserve the principle endorsed in all of the awards we have found on the subject: "Carrier's right to establish reasonable, non-arbitrary medical standards for its employees" (Page 7, Award 1, PLB 3009, Zumas). Such award goes on to say "However, it has been established that where the standards are immutable and allow no procedure for review, they in fact become unreasonable and arbitrary." We endorse this language, noting, however, that it is our prerogative and responsibility to make such review. And, to be sure, we recognize that there are cases wherein justice might be best served by an arbitral

board's calling on a tripartite medical panel either to assist the board in making the ultimate determination as to whether or not a carrier standard is reasonable or leave the determination of such issue entirely up to the panel as Referee Zumas prefers.

Under no circumstances, however, can we read Gunther as dictating routine referral of the matter to the medical panel.

5. IN THIS CASE CARRIER HAS ACTED REASONABLY THROUGHOUT MR. MAY'S ORDEAL. THERE IS NO EVIDENCE OF DISCRIMINATORY HANDLING OF CLAIMANT, AND SINCERE EFFORTS WERE MADE BY CARRIER TO PROVIDE SAFE, ALTERNATE EMPLOYMENT WHILE THE PROGRESS OF THE DISEASE WAS MONITORED.

In summary, we find that carrier's medical standard was clearly reasonable and entitled to enforcement, and that under such circumstances carrier's refusal to use claimant as an engineer while he had active symptoms of multiple sclerosis was not unreasonable. At the same time, there is no evidence before us that carrier unreasonably delayed claimant's return to duty after the illness went into remission.

AWARD: Mr. May's claim is denied.

Rendered March 17, 1986.

David H. Brown
DAVID H. BROWN, Neutral Member

/s/ J M HICKS
J. M. HICKS, Organization Member

/s/ R. O. KEY
R. O. KEY, Carrier Member