

PUBLIC LAW BOARD NO. 2206

AWARD NO. 37

CASE NO. 47

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier improperly removed Carpenter Helper Thomas G. Ivers headquartered at Essex, Montana from service on October 23, 1978, and continues to withhold him from service in violation of the effective Agreement (System File B-M-115C).
- (2) Carpenter Helper Ivers be returned to service and paid for all time lost.

OPINION OF BOARD:

Claimant was employed as a Carpenter Helper in the Bridge and Building (B&B) Subdepartment on the Montana Seniority District. On October 23, 1978 Claimant's neurologist contacted Carrier's supervisor B. J. White by telephone and advised that Claimant possibly was in physical danger on the job due to recurrent seizures or blackouts. This information was certified by the physician in a letter dated October 25, 1978, as follows:

B. J. White, B&B Supervisor
c/o Burlington Northern Railroad
Havre, Montana 59501

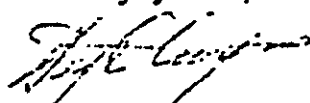
RE: THOMAS IVERS

Dear Mr. White:

Mr. Ivers has suffered five unexplained episodes of loss of consciousness during the past 15 years. Several of these have been witnessed by his wife who offers an excellent history of a convulsive seizure. While these episodes have been extremely infrequent sudden loss of consciousness in the pursuit of Mr. Ivers' present job of painting railroad bridges might well be fatal. It is recommended that patients suffering sudden loss of consciousness of whatever cause not be employed in situations where sudden loss of consciousness might result in their injury or injury to fellow workers. It is difficult to predict the patient's prognosis although the fact that he has continued to have these episodes for the past 15 years suggests that they may persist indefinitely. I would strongly recommend placing him in a job which does not require him to work at heights or in other situations where sudden loss of consciousness might predictably result in great bodily injury.

If you have any questions please let me know.

Sincerely yours,

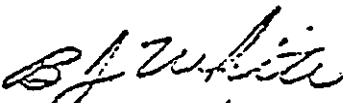

Gary D. Cooney, M.D.

On the basis of the foregoing information, the supervisor advised Claimant on October 23, 1978 of his removal from service, as follows:

Mr. Thomas G. Ivers:

We are sorry to inform you that effective today, October 23rd, 1978, it will be necessary to take you out of service with the Burlington Northern as a Carpenter Helper, with the B&B Department at Essex, Montana for medical reasons.

Wish to say that your work has been very satisfactory and anything we can do to be of assistance, please do not hesitate in calling upon us.


B. J. White
Supvr. B&B

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Thereafter, Carrier's Chief Medical Officer (CMO) consulted with Claimant's physicians, reviewed the findings, and issued his decision on December 18, 1978 that Claimant's return to service was approved only if he was prohibited from working alone, above ground or around moving equipment. On December 19, 1978 the Organization's General Chairman initiated the present claim alleging that Claimant's removal from service violated the Agreement, asserting that Claimant's condition was under control with medication, and moving that he be returned to his former position or a "comparable" position and paid for all time lost. Under date of December 28, 1978, the Superintendent responded as follows:

Dear Mr. Lindsey:

Please refer to your letter dated December 19, 1978 appealing the removal from service for medical reasons of B & B Helper Thomas G. Ivers and your request that he be returned to service and paid for all time lost.

We received a letter from Dr. Gary D. Cooney, Neurological Specialist at Missoula, Montana dated October 25, 1978 wherein he advised that Mr. Ivers has suffered five unexplained episodes of loss of consciousness in the past 15 years, indicating a past history of convulsive seizure. Dr. Cooney's recommendation was that Mr. Ivers not be employed in situations that require him to work at heights and where sudden loss of consciousness might predictably result in bodily injury.

Based on this advice Mr. Ivers was removed from service for his own safety and this information was forwarded to Dr. Abbott Skinner, Burlington Northern Chief Medical Officer for another opinion on Mr. Ivers medical condition.

Dr. Skinner advised that Mr. Ivers condition was such that he could not be allowed to work alone, above ground, or around moving equipment or machinery.

I am sure you will agree based on that prognosis, and those restrictions that it eliminates employment in virtually any craft on the railroad.

Unfortunately, based on these circumstances, and for the safety of Mr. Ivers and others with whom he might work, I must decline your request for reinstatement of Mr. Ivers and payment for all lost wages.

Sincerely,


M. E. Hagen
Superintendent

The claim of Agreement violation was appealed through channels on the property and was denied at all levels of handling. While the claimed Agreement violation was on appeal, Claimant filed on March 20, 1980 a request for a Medical Board, pursuant to Rule 41 - Physical Disqualification:

"RULE 41. PHYSICAL DISQUALIFICATION.

A. When an employee is withheld from duty because of his physical condition, the employee or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employee's physical condition by a competent physician, make written request upon his employing officer for a Medical Board.

B. The Company and the employee shall each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians shall appoint a third neutral physician, who shall be an expert on the disability from which the employee is alleged to be suffering.

C. The Medical Board thus constituted will make an examination of the employee. After completion they shall make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the physical condition of the employee shall be final.

D. The Company and the employee shall each defray the expenses of their appointee, and shall each pay one-half of the fee and expenses of the third neutral physician.

E. If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Company doctors, the original medical findings which disclose his condition at the time disqualified shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section A of this rule."

On April 22, 1980 Carrier advised Mr. Ivers that a Medical Board could be arranged upon receipt of a dissenting opinion from a competent physician.

On May 2, 1980 Claimant sent Carrier a hand-written note prepared by his personal physician in December 1979 which stated, in part, "I feel he would be able to perform his previous work". Under date of May 13, 1980 Carrier's CMO wrote to Claimant's doctor as follows:

~~Chester Hope, M.D.
Columbia Falls Clinic
Columbia Falls, Montana 59912~~

Dear Doctor Hope:

Re: Thomas G. Ivers

There has been considerable correspondence involving the above named employee and your note that he could return to work is appreciated. However, I have some concern as to the type of work this man should engage in because of his seizure problem. In light of your consultant's report and caution as to job placement and the general history of individuals with seizure problems, I am reluctant to allow this man to work on scaffolding, open bridges, and around fast-moving equipment.

If you feel strongly that such activity is medically realistic, please advise. I hasten to inform you that I have no objection to his employment in railroad work, but feel that certain environmental controls are important. Your prompt reply will be greatly appreciated.

Sincerely,

ORIGINAL SIGNED BY

Dr. Abbott Skinner /s/ L
Abbott Skinner, M.D.
Chief Medical Officer
Personnel Department

Claimant's physician responded on May 21, 1980, as follows:

Abbott Skinner, M.D.
Chief Medical Officer
Burlington Northern
176 East Fifth Street
St. Paul, Minnesota 55101

Dear Doctor Skinner:

Re: Thomas G. Ivers

I have no argument against the restrictions you have placed on Mr. Ivers, however I would have to continue to classify him as totally disabled until such time that Burlington Northern could rehire him.

Cordially,

Chester Hope, M.D.

Based upon the foregoing evidence, Carrier determined that there was not a basis under Rule 41-A to appoint a Medical Board. Mr. Ivers remains on medical leave of absence status and his claim has now been appealed to this Board for final disposition.

In considering this claim, we have been cognizant throughout that we deal not with a disciplinary matter in which culpability is to be determined and penalties assessed, but rather with an unfortunate "no fault" situation. Frankly, we are of the opinion that this arbitration tribunal is a poor vehicle and an inappropriate forum for such a case because our jurisdiction technically is limited to determining whether a provision of the Agreement has been violated rather than weighing and balancing important but countervailing rights and equities which are in conflict in this case. In that connection, the Chairman of the Board deferred decision on the merits and urged the parties at the arbitration hearing to extend further their efforts to resolve this problem. The record shows that in April 1979 Carrier had proposed that, following rehabilitative counseling, Claimant could be offered a clerical position. So far as we can determine that offer was rejected by Claimant. However, at the urging of the Chairman, the parties did make another attempt to place Claimant in a craft in which his physical condition would not jeopardize his safety. In January 1981, arrangements were made for Claimant to fill a shop laborer position at Havre, Montana, and he was offered that position. Claimant declined to accept the shop laborer position and, in due course, the matter came on for decision by this Board.

At the outset, we find no merit in the claim that Carrier acted arbitrarily or unreasonably in removing Claimant from the high-altitude bridge work and other dangerous duties associated with his Carpenter Helper position. The medical evidence is overwhelming and unanimous that continuation in such work was detrimental to his own safety and possibly that of other individuals as well. There was no Agreement violation in his removal from service on or about October 23, 1978. See Awards 3-15367; 3-19328.

The alleged violation of Rule 40 - Discipline is palpably inappropriate because it is well settled that the discipline rule is not applicable to bona fide physical disqualifications. Awards 3-11909; 3-18396; 3-18512; 3-18710..


The consultation by Carrier's CMO corroborated the findings of Claimant's own physicians regarding his condition. This unanimity regarding Claimant's physical condition obviated the right to demand a Rule 41 Medical Board and arguendo the physicians even concurred that Claimant should perform only restricted service if he was returned to work. The record before us indicates that Claimant has elected to reject two opportunities to return to such restricted service and instead seeks reinstatement to his former job. In the circumstances of this record we find no Agreement violations and we have no alternative but to deny the claim.

AWARD

Claim denied.


C. L. Melberg, Carrier Member


F. H. Funk, Employee Member


Dana E. Eischen, Chairman

Date: 9/24/81