

PUBLIC LAW BOARD NO. 2439

Award No. 64
Case No. 64

PARTIES
TO
DISPUTE

- Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company (Western Lines)

STATEMENT
OF CLAIM

- "1. That the removal of Track Laborer, Mr. Thomas Smedlund, from his assigned position, alleging physical disqualification, was in violation of the agreement, wholly uncalled for and in abuse of discretion.
2. That claimant be returned to his former position with compensation for all time lost."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Mr. Smedlund had been employed by Carrier since January of 1965. In 1980 he was employed as a crane operator in the Bay Area Region of the Engineering Department of Carrier and during that time he suffered a series of seizures. His medical condition was diagnosed as "recurrent grand mal seizures". Subsequently, after being off from his work and undergoing medical care upon recommendation of his physician and concurred in by Carrier's Chief Medical Officer, claimant was returned to duty as a track laborer on September 15, 1981. Under the Carrier's policy, he could no longer work as a crane operator. Subsequently, on November 9, 1981, claimant was notified by his immediate supervisor, the District Maintenance of Way Manager, that he was being withheld from service on the following grounds:

"Since your return from sick leave on September 15, 1981, it has been noted your physical health has been on a steady decline.

Effective at the end of your shift, November 9, 1981, you are hereby held out of service due to your physical health condition, until such time as a full medical evaluation examination is performed as per Rule 32 of the agreement between the Southern Pacific Transportation Company and its employees in the Maintenance of Way and Structures Department."

On approximately February 1, 1981, claimant was given a thorough medical examination at the request of Carrier's Chief Medical Officer. The diagnosis of the examining physician included the following:

"Alcoholism and past history of grand mal seizures, probably secondary to toxic effects of alcohol.... Claimant should not be placed in any job which entails work around dangerous equipment, operating equipment, no working at heights or around open pits or holes."

In that examination it was also noted that claimant had been under his doctor's instructions to use 200 mg per day of a medication for purposes of controlling his seizures. On his own, he had reduced himself to the use of some 400 mg of that medication per week because of side effects of the medication which he found to be difficult to accept. Carrier's Chief Medical Officer, by letter dated February 24, indicated to claimant that because of the findings of the examination made on February 1, it would not be possible to return him to his previous occupation. Claimant's own physician, after an examination, indicated in writing by letter to claimant's General Chairman, dated February 18, 1982, that he felt that claimant was physically able to perform the requirements of his labor gang job. Based on the divergent medical opinions concerning claimant's ability to work, the Organization requested that claimant be accorded his rights under Rule 32 (b) of the Labor Agreement and a special medical panel be established for purposes of examining him and determining whether indeed he could perform his duties. The request for a three-doctor panel was denied by letter dated May 24, 1982. The denial was based on the fact that, among other things, there was no apparent disagreement between the opinions of the Chief Medical Officer of Carrier and claimant's attending physician.

Petitioner indicates that there was never any evidence with respect to claimant having any physical problems with respect to his return to work in September of 1981. In fact, according to the Organization, he was not allowed a break in period and was put right to work with the gang and instructed to perform the full duties of Track Laborer as though he had never been off. Even under those circumstances, according to Petitioner, claimant only complained of muscle soreness as a result of the unexpectedly severe strains being put upon him. The Organization points out that the District Manager was the Carrier Representative who passed judgment on claimant's physical fitness and medical condition. This

was improper, according to the Organization, and, furthermore, a direct violation of the agreement, particularly Rule 32. The Organization points out that claimant's own physician certified that he was able to perform his tasks and that the medical opinion of his own physician was sent to Carrier's Chief Medical Officer but with no result. In this instance, even though claimant was ultimately examined by a Company-designated physician, he was never informed of the results of that examination and Carrier's Medical Officer stonewalled his request for a third-doctor panel. The Organization argues that Carrier has an obligation to either get employees back to work or furnish the employees with a documented reason for not allowing him to return to work and this was not done in the case at hand.

Carrier argues that it acted properly and in the best interests of claimant and all other employees when it removed claimant from service for medical reasons. He had been working with medical restrictions because of his seizures and it became apparent that he no longer could carry out the assignments in spite of the restrictions on his work. Carrier points out that it has the right to establish and maintain reasonable standards for handling employees with disabling physical conditions, and there is a specific policy with respect to employees who have had seizures. They include the following.

1. No one who is in train, engine or yard service may return to such duties at any time if he has been the subject of seizures. In other service, employees are restricted as follows:
 - "1. Not to work on or about unprotected elevations.
 2. Not to climb on ladders.
 3. Not to run any moving equipment or machinery, and
 4. Not to drive Company vehicles and/or equipment."

In the case at hand, Carrier insists that there was no difference of opinion among the doctors with respect to claimant's physical condition and there was no basis for convening, therefore, a three-doctor panel.

The Board is particularly concerned with two aspects of this case. First, it seems unusual at minimum for a layman (claimant's immediate supervisor) to make

the determination with respect to his physical and/or medical condition. Even more significantly, Carrier's Medical Department waited from November to February to see that claimant was accorded a medical examination. Such a time lapse, in terms of an employee being held out of service, is utterly unacceptable and should not be tolerated. If, indeed, an employee is pulled out of service for medical reasons, the determination of whether that action was appropriate should be handled in a prompt and efficient manner and not over a long period of time, such as that involved herein.

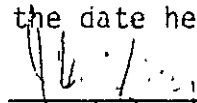
From the entire record of this case, it is quite clear that there is, indeed, a disagreement between Carrier's Medical Officer and claimant's physician with respect to his ability to carry out his functions as a member of the labor gang. Under the circumstances of the disagreement and the fact that his being pulled out of service was solely based on his supervisor's opinion, claimant should be placed back to work as a track laborer with the understanding of the restrictions placed upon his activities by Carrier. There has been no evidence to indicate why he could not perform as he had previously in that capacity. There is no basis under Rule 32 for his being removed from service and kept out of service based on that rule and Carrier's action in implementing it. Based on the complexity of the problem presented herein, however, and some of claimant's culpability in not presenting data to Carrier promptly, he will not be compensated for time lost.


AWARD


Claimant will be placed back in his former position as a Track Laborer with the restrictions placed upon him by Carrier's Medical Department but will not be compensated for time lost.

ORDER

Carrier will comply with the Award herein within thirty (30) days from the date hereof.


I. M. Lieberman, Neutral Chairman


L. C. Scherling, Carrier Member


C. F. Foote, Employee Member