NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERNECE)
)
) Case No. 92
and)
) Award No. 67
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: March 20, 2007

STATEMENT OF CLAIM:

1. The Carrier's action is removing and withholding Welder K. Dimery from service beginning on March 8, 2005 and continuing was arbitrary, capricious, unjust and in violation of the Agreement (System Files MW-05-66/1422749 and MW-05-78/1426655 MPR).

2. As a consequence of the violation referred to in Part (1) above, Claimant K. Dimery shall now be compensated for all lost wages, at his respective rate of pay, beginning March 8, 2005 and continuing until he was returned to service.

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant has a history of medical issues with his knees. On March 7, 2005, Claimant was withheld from service for medical reasons. By letter dated March 11, 2005, Carrier notified Claimant that its Health Services Department had released Claimant to return to service with four restrictions: no frequent kneeling or squatting, no walking on unlevel surfaces, no prolonged standing, and a need to be limited to predominantly seated work activities. Carrier notifed

Claimant that the restrictions could not be accommodated.

The record contains a progress note dated January 11, 2005, from the orthopaedist who was Claimant's treating physician which indicated that Claimant could "remain at work." The record also contains a release without restrictions dated March 18, 2005, from Claimant's personal physician, and a progress note dated March 11, 2005, from Claimant's treating physician stating that Claimant could continue to work without restrictions and indicating no objection to Carrier obtaining a second opinion. The record reflects that Claimant submitted the March 18 release to Carrier that same day, and that Carrier received the March 11 progress note on March 23, 2005.

By letter dated March 23, 2005, Carrier's Occupational Ability Review Nurse notified Claimant that the letter from his personal physician was insufficient and noted the contents of the treating physician's progress note. Carrier's letter further advised Claimant that the Health Services Department required an objective medical exam by Claimant's treating physician identifying Claimant's ability to kneel or squat frequently and to walk on unlevel surfaces, and whether Claimant was medically cleared for a Functional Capacity Evaluation. The letter advised that upon receiving clearance, Carrier would schedule the Functional Capacity Evaluation.

It appears that on April 5, 2005, Claimant's treating physician ordered the Functional Capacity Evaluation. Carrier's records reflect that it received the treating physician's note agreeing to the FCE on April 18, 2005. On April 19, 2005, the physical therapist obtained authorization from Carrier for the FCE, which was scheduled for April 28, 2005. However, the therapist postponed the FCE when he discovered that he needed additional information which he secured from Carrier. The therapist conducted the FEP on May 11, 2005, and Claimant's treating physician released him without restrictions on May 17, 2005. Carrier's Associate Medical Director released Claimant to return to duty, except for positions requiring a DOT driver's license due to an unrelated medical issue, on May 25, 2005. Claimant returned to duty on June 2, 2005.

It is well-established in countless awards, as well as in common sense, that Carrier has the right and the duty to take reasonable measures to ensure that its employees are medically qualified to perform their duties. Such measures ensure the safety of the employee, the employee's co-workers and third parties. A board should defer to Carrier's reasonable medical judgment unless it finds that judgment to be arbitrary and capricious. However, it is also well-established that in carrying out its medical review, Carrier must act reasonably promptly to minimize the time that the employee is out of work. *See, e.g.*, NRAB Third Division Award No. 29511 (delay from November 18, 1988 to March 14, 1989 unreasonable under the circumstances). What is reasonably prompt depends on the surrounding circumstances.

The Organization contends that Claimant was medically disqualified by his supervisor who was biased against him and that the disqualification was part of an overall pattern of harassment and intimidation by the supervisor. Certainly, if the decision to medically disqualify

Claimant was made by a supervisor, rather than a medical professional, it would be arbitrary and capricious. The record reveals, however, that although Claimant's supervisor reported concerns with Claimant's ability to kneel and bend, it was Carrier's Associate Medical Director that made the decision to impose restrictions on Claimant which led to his disqualification. Furthermore, although the Organization has asserted that Claimant was the victim of ongoing harassment by his supervisor, it offered no evidence to support that assertion. A claim cannot rest on assertions without evidence. The argument must fail for lack of proof.

Although Carrier exercised its reasonable medical judgment in removing Claimant from service, it had a duty to act with reasonable diligence to resolve Claimant's status, once Claimant submitted additional medical information. Carrier received the release from Claimant's personal physician on March 18, 2005, which was a Friday, and notified Claimant that a release from a doctor other than his treating physician was insufficient. The letter further clearly advised Claimant what additional documentation Carrier required. The letter was sent March 23, 2005, five days, including an intervening weekend, after Claimant submitted the doctor's release. We cannot say that three business days was an unreasonable amount of time for Carrier to respond.

Although Carrier's March 23 letter advised Claimant that upon receiving his treating physician's approval, Carrier would schedule the FCE at Carrier's expenses, on April 5, 2005, Claimant's treating physician ordered the FCE. Carrier received the treating physician's approval of the FCE on April 18, 2005. There is no explanation in the record for the 13 day delay, but there is no evidence that Carrier was responsible for the delay. What is clear is that on the day after Carrier received the approval from Claimant's physician, Carrier approved the FCE as ordered by Claimant's doctor. It is also clear that Carrier promptly complied with the physical therapist's request for additional information concerning Claimant's job responsibilities. The therapist completed the FCE on May 11, 2005, and Claimant's treating physician released Claimant without restrictions on May 18, 2005. Carrier's Associate Medical Director approved Claimant's return to duty on May 25, 2005. Given the complexity and detail of the FCE, we cannot say that one calendar week between Carrier's receipt of Claimant's doctor's release and the Associate Medical Director's approval was an unreasonable amount of time. Nor can we say that the period between May 25 and June 2, the date that Claimant returned to service, was an unreasonable time, particularly in light on the intervening Memorial Day holiday weekend. Accordingly, we see no basis for sustaining the claim.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member May 7, 2007

D. D. Bartholomay,
Employee Member 5-2-07

Dated at Chicago, Illinois, April 30, 2007