

PUBLIC LAW BOARD NO. 7099

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, DIVISION OF I.B.T.**

CASE No. 11

-And-

**UNION PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to timely allow Mr. C. Bochmann to return to work on a truck driver position on Gang 9388 beginning on March 16 and continuing through May 10, 2005 (System File 4RM-9641T/1423208 CNW)
- (2) As a consequence of the violation referenced to in Part (1) above, Claimant C. Bochmann shall now be compensated at his applicable truck driver rate of pay for all straight time and overtime hours that Gang 9388 worked beginning March 16 and continuing through May 10, 2005.”

The Carrier has declined this claim.”

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

AWARD

After thoroughly reviewing and considering the record of this case together with the parties' presentation, the Board finds that the claim should be disposed of as follows:

Following an investigation conducted on November 19, 2004, the Claimant was dismissed from service. However, on January 5, 2005, the Claimant was offered a leniency reinstatement which was subsequently approved on January 12, 2005 by General Chairman Bushman. The Claimant agreed to the terms of his reinstatement on January 18, 2005. In so doing, the Claimant was

cognizant of his obligation to pass a physical fitness examination as a precondition to his returning to work.

On February 1, 2005, Claimant attended a physical examination. At such examination, a hearing evaluation was requested. The record shows that numerous calls were made to the Claimant between the dates February 1 through February 5 but to no avail. Accordingly, a certified letter was sent to the Claimant on February 3rd informing him that a hearing evaluation would be required. Claimant received the letter on February 7th, whereupon he contacted the Health Services Department to schedule an audio evaluation for February 8th. Health Services received the results on the Claimant's evaluation on February 9th whereupon it was determined by the Audiologist that additional and more in-depth hearing testing would be required. The testing was performed on February 17th, received and evaluated by Health Services on February 18th, and discussed with the Claimant on February 23rd. Subsequently, numerous calls were placed to the Claimant in order to discuss the issue of whether hearing protection would hinder the Claimant's job performance or be a benefit to him. The record reflects that whereas the Carrier was unable to reach the Claimant by telephone, a certified letter was sent to the claimant on March 2, 2005 requesting that he contact Health Services in order to determine whether he would need hearing protection. Claimant ultimately supplied such information on March 7, 2005 where he advised that he was required to wear hearing protection. Based on this newly received information, Health Services ordered Peltor Hearing protection for the Claimant. Upon receipt of the Peltor Hearing protection, the record shows that numerous calls were made to the Claimant's listed phone number with no success. Again, the Carrier used Certified Mail as the only effective method of reaching the Claimant.

Claimant contacted Health Services on April 4, 2005 whereupon he was informed that he would need to pick up the Peltor hearing and take them to the audiologist for testing. A copy of the report was submitted to Health Services on April 15, 2005 who requested that a hearing field test be administered. The field test was subsequently administered on April 27, 2005. The results of the test were positive and it was affirmed that the Claimant could safely perform his assigned job duties. The results of the field hearing test were delivered to the Carrier's Health Services Department on April 28, 2005. Hearing nothing from the Carrier, the Organization contacted

Health Services on May 9, 2005 to inquire on the status of the Claimant's return to service. The Organization was informed that the Claimant's file had been mistakenly filed and that he was in fact authorized to return to service. The Claimant returned to service on May 10, 2005 as a Truck Driver on gang 9388 at Boone, Iowa.

While the Organization does not question the Carrier's right, upon reasonable cause, to require physical examinations, hearing evaluations, or to establish medical standards reasonably associated with a job assignment, the Organization does question "[t]he necessity of redundant tests and ever changing Carrier requirements as well as the inordinate length of time required to perform such examinations" and ultimately return the Claimant to service.

In our careful review of the record in this case, and as discussed below, the Board finds ample blame by the Carrier as well as the Claimant himself for the delay in returning the Claimant to service.

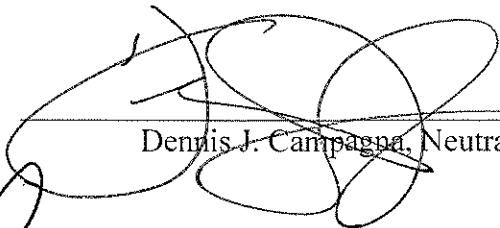
As our initial point, it is well established arbitration precedent that the Carrier has every right to set and implement reasonable medical standards. Moreover, so long as the Carrier's policies and standards are not arbitrary, capricious or discriminatory, we are loathe to substitute our judgment for that of a medical practitioner, or to interfere with medical standards. Whereas the record in this case shows that the Claimant had an extensive history of hearing problems, we cannot, in the first instance, find that the Carrier's insistence on an auditory evaluation of the Claimant was arbitrary, capricious or discriminatory. Nor can we find that the subsequent auditory evaluations requested by Health Services represented a needless delay of the process of ascertaining whether the Claimant was medically fit to return to work.

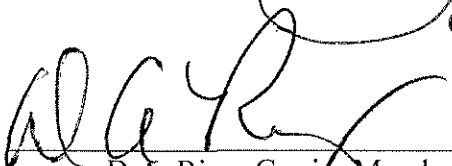
Next, as to the time it took to accomplish the task of reaching the ultimate determination that the Claimant was medically cleared to return to work, the record supports the conclusion that contacting the Claimant by telephone was difficult at best. As a result, there were numerous instances where the Carrier was forced to communicate with the Claimant through the use of Certified Mail, a necessity that further delayed the process. However, we find that any delay in the process should have ended on April 28, 2005 once the Carrier was informed by Health

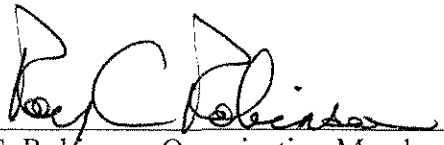
Services that the Claimant was medically fit to return to service. Moreover, we can find no legitimate reason why the Claimant could not have been returned to service on that date. Accordingly, we sustain the claim from April 28, 2005 to the Claimant's return to work on May 10, 2005.

AWARD

Claim sustained in accordance with the findings herein.



Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Oct. 15, 2008
Dated: September 30, 2008

Buffalo, New York