NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 173
AWARD NO. 167

PARTIES TO DISPUTE

CARRIER
Union Pacific Railroad

AND

ORGANIZATION
Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

Carrier's File
1504590

System File
D-0850U-201

STATEMENT OF CLAIM

1. The Carrier violated Rules 1, 14, 20, 21, 25, 26, 27, 28, 33, 35, 36, 39, 40, 48, and 50 of the Agreement when it withheld Claimant, James L. Kirk, Jr., a Machine Operator from service without explanation or justification for a medical evaluation commencing April 1, 2008 and continuing through April 18, 2008.

2. As a consequence of Carrier's violation as set forth in Point 1 above, the Organization requests that Claimant Kirk be compensated for all straight-time and overtime hours he was not allowed to work between April 1, 2008 and April 18, 2008.

STATEMENT OF BACKGROUND

On the incident date in question, April 1, 2008, Claimant Kirk was regularly assigned as a Ballast Regulator Operator working in the vicinity of The Dallas Oregon territory. Under ordinary circumstances, Claimant's every day duties typically entail his working inside the cab of his machine, regulating ballast and building shoulders. It was noted that the regulator platform and cab door of Claimant's machine is just shy of being elevated four (4) feet off the ground. However, on April 1, 2008, Claimant and other members of his surface and lining gang were instructed they would be assisting in unloading a rail train that day, the duties of which required Claimant and his fellow gang members to climb up to a height of eight (8) feet and above onto rolling stock, that is, a high moving rail train attached to rail train service. Such an assignment, not work

typically performed by Claimant, involves working with tall equipment as well as performing tasks with potentially difficult footing/balance situations. Carrier noted that pursuant to Rule 20 (j), it can utilize employees assigned to machine operator positions to perform other duties if the machines are not needed.

Motivated by concern for his safety in performing work on the tall equipment, Claimant approached ARASA Supervisor, Aaron Winegar and requested that he be excused from working on the train and the tall equipment explaining to Winegar that his balance was poor and as a result, he would not be able to work on the rail train. In the alternative, Claimant requested he be assigned to perform work associated with the rail train that did not involve working with the tall equipment. Notwithstanding his request for reassignment, and out of concern for Claimant's safety and the safety of other members of the gang, Supervisor Winegar instead removed Claimant from service and pursuant to his supervisory authority of a Manager's Referral in accord with Health Services Department Rule 2.5.b pertaining to Supervisor-Requested Evaluations, instructed him to go to a medical doctor for an evaluation in order to ascertain if he was able to perform the functions of his job. Said Rule 2.5.b reads in pertinent part as follows:

> **If a supervisor has concerns about an employee's ability to work based on observed behavior(s) that may be associated with a physical or mental condition, the supervisor should immediately . . . refer the employee for a fitness-for-duty evaluation. When the supervisor requests a fitness-for-duty evaluation, the supervisor may temporarily withhold the employee from active service.**

It is noted that Claimant has been an employee since 1980 and over the past 28 years of employment, he has worked with rail trains whenever they come on the territory. Claimant complied with Supervisor Winegar's directive and immediately proceeded to be evaluated by Stephen A. McLennon, a physician affiliated with Internal Medicine Associates. Upon completing his evaluation of Claimant, Doctor McLennon issued the following medical advisory dated April 1, 2008:

> **To Whom It May Concern;**
>
> **James Kirk may return to work on 4/1/08 with temporary restriction of not working at heights above 8 feet. He is safe to perform his regular duties as a machine operator. I recommend that this be referred to the UPRR medical office for further consideration, and possible therapy if deemed necessary. I also recommend that his job description be reviewed.**
>
> **If you require additional information please contact my office.**
>
> **signed/ Stephen A. McLennon MD**

With this medical advisory in hand, Claimant returned to work but, according to Carrier, the Service Unit determined it could not accommodate Claimant's medical restriction and, as such, Claimant was not permitted to resume his duties as a Machine Operator. Instead of being permitted to return to work, Claimant was instructed to forward Dr. McLennon's medical statement to Carrier's Medical Department in Omaha which instruction he complied with by faxing said statement the very same day, Tuesday, April 1, 2008. Following receipt of Dr. McLennon's statement, by letter dated two (2) days later, April 3, 2008, Carrier's Director, Administration Western Region, Randy V. Johnson apprised Claimant that as a result of his reported physical condition which prompted a concern about his personal safety and welfare at work, he contacted Carrier's Health Services Department requesting that they conduct a medical review and clearance in accord with Section 2.5b of Carrier's Medical Rules (revised March 1, 1997). On the following Monday, April 7, 2008, the Medical Department informed Claimant he would be released to return to work with the same restriction of not working at heights above eight (8) feet and that this release was being wired to the Service Unit that afternoon. On Friday, April 11, 2008, in light of Claimant still not being permitted to return to work, Organization Vice Chairman David R. Scoville discussed the matter with Mike Gilliam, Manager of Track Programs who expressed concern over the eight (8) foot restriction placed on Claimant's return to work. According to Scoville, he apprised Gilliam that Claimant's regular work assignment was not inclusive of working at "excessive" heights and asserted that, in any event, Claimant could safely perform his assigned duties and most duties incidental to his assignment as a Machine Operator. Notwithstanding this discussion, the record evidence reflects that Claimant still was not permitted to return to work. According to Scoville, this continuing situation occasioned a second discussion, this time with John Taylor, Director of Track Maintenance on the Portland Service Unit the following Monday, April 14, 2008. In this conversation according to Scoville, Taylor indicated he did not think the Carrier would be able to accommodate Claimant's temporary restriction. As he did in his discussion with Gilliam, he apprised Taylor that Claimant was a Machine Operator and was not normally assigned to work at excessive heights and, as a result, Management could easily accommodate the restriction without any undue liability.

The record evidence reflects that on Wednesday, April 16, 2008, Claimant provided Carrier with a medical release from a Doctor Daniel L. Marier, a physician affiliated with Pendleton Internal Medicine Specialists, P.C. who released Claimant to return to work with no restrictions. This medical release reads as follows:

> **To Whom It May Concern,**
>
> **James Kirk may return to work regular duty full time with no restrictions.**

In accord with this medical release, Carrier permitted Claimant to return to work on Saturday, April 18, 2008.

ORGANIZATION'S POSITION

The Organization maintains that the facts set forth above clearly show that Carrier had no justification for holding Claimant out of service past the time on April 1, 2008, when Claimant presented supervision with a medical statement releasing him to return to work, able to resume his regularly assigned duties as a Machine Operator. The Organization further maintains that since the work of unloading rail cars is work that falls outside Claimant's regularly assigned duties and is not work frequently assigned and performed by Machine Operators, Carrier could easily have accommodated Claimant's medical restriction of not performing duties that would entail working at a height of eight (8) feet and above and, by making such accommodation, Carrier could have returned Claimant to duty on the very same date of April 1, 2008. The Organization asserts that notwithstanding Carrier's referral of Claimant for a fitness-for-duty evaluation pursuant to Rule 2.5b of its Health Services Department Policy, Carrier failed to provide Claimant with such an evaluation, thus leaving it to Claimant to seek physical evaluations on two (2) separate occasions from non-Carrier doctors. The Organization submits that not only did Carrier not comply with its own Health Services Department Policy by not providing Claimant a fitness-for-duty evaluation, in not so complying, Carrier also prolonged the time Claimant was held out-of-service as it has generally been established by arbitral precedent that under identical circumstances, a fitness-for-duty evaluation will be conducted within five (5) days of a referral and based on a positive finding of the evaluation, the employee would be returned to service immediately. Here, the Organization notes, notwithstanding Carrier's Medical Department's concurrence with Dr. McLennon's finding Claimant was medically able to resume performing his regular duties as a Machine Operator as of April 7, 2008, well after the work of unloading rail cars was assigned to Claimant and other members of his gang, Carrier continued to hold Claimant out-of-service for another eleven (11) days, days presumably Claimant would have been performing his regularly assigned duties.

Based on the foregoing argument asserted, the Organization respectfully requests the claim be sustained in its entirety.

CARRIER'S POSITION

Carrier asserts that what is at issue here is whether within its managerial prerogative, it has the right to medically ascertain an employee's claim of having a medical condition which prevents an employee from performing certain specified work in an environment where it is critical the employee meets the physical criteria of the position. In the case at bar, Claimant represented to his supervisor he could no longer work safely at heights of eight (8) feet and above and, as a result, he requested to be excused from the work assignment of unloading the rail train. The Carrier maintains that given the nature of Claimant's position as a Machine Operator, a position that requires working at such heights at any given time in the future, the Supervisor, acting in accord with Company

policy required Claimant to be medically evaluated in the interest of his safety. Carrier notes it has an obligation to provide a safe working environment for its employees and, as such, under no circumstances can it have an employee, here Claimant, with health issues attempting to perform his duties to work around live railroad track where the potential for serious injury always exists until it is confident the employee meets the criteria for returning to work. Carrier cites paragraph 28, the section titled, "Instructions to Employing Officers" of the "Guide for Use of Chief Medical Officers in the Application of Medical Standard by Occupational Profile as Recommended by the Committee on Medical Standards and Approved by Committee of Direction Medical Section" supported by the Medical Section of the Association of American Railroads as the basis for its obligation to protect the health and safety of its employees but also other employees and the Public generally. In further support of this obligation to protect the health and safety of its employees, Carrier asserts the awards of minor dispute tribunals have recognized the right to withhold employees when it has reason to believe their physical condition may not permit them to perform the duties of their assignment safely, and to medically disqualify them from duty if the employee has a medical condition no fitting or meeting its medical standards. Carrier submits that at no point in the handling of this claim has the Organization been able to cite any specific agreement language which supports their position that it (Carrier) cannot medically detain an employee from performing service until it can be assured the employee has met established medical standards. As the Organization has failed to produce such support for its position, Carrier argues the Board has no recourse other than to deny the subject claim.

Additionally, Carrier submits that what the Organization is requesting the Board to do in this case is to play doctor and somehow order it to set aside its right to medically evaluate employees, here the Claimant, to ensure they (he) can perform the work. Carrier asserts that due to the safety-sensitive nature of Claimant's Machine Operator position, contravening medical guidelines and restrictions would serve to place Claimant and his fellow workers in a possible exposure to risk of substantial harm. Thus, Carrier maintains, its action of withholding Claimant from service until it could be established that Claimant was able medically to meet the physical demands of his position, was reasonable and in accordance with acceptable standards as indicated above and, therefore, there exists no basis for this Board to overturn the manner in which it treated Claimant under all the prevailing circumstances. When, upon Claimant's presentation of the second medical evaluation he was medically able to resume the duties of his Machine Operator position, Carrier noted it immediately reinstated Claimant to service having been given the assurance that he was fit for duty, thereby countering the Organization's claim it delayed Claimant's return to work beyond a specified, but inapplicable five (5) day period.

Finally, Carrier asserts the Organization has simply cited myriad Agreement rules it claims have been violated associated with this subject claim but fails to provide any substantive proof of such alleged violations. That being the case, Carrier argues the Organization's asserted rules violations are but mere unsupported allegations.

Moreover, many of the rules the Organization cites as having been violated are not even germane to the claim asserted. One such example is the Organization's claim for compensation for Claimant pursuant to Rule 50(e) which has applicability to a situation where the employee makes a request to have a medical board reconcile differing medical opinions. Carrier notes, neither Claimant nor the Organization made such a request and, in any event, a request would not have been applicable under the given circumstances of this case.

Based on the foregoing argument asserted, the Carrier requests that the subject claim be denied in its entirety

FINDINGS

Public Law Board No. 6302, 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.

At the outset, the Board reaffirms the Carrier's right under any given situation involving the matter of the health and safety of its employees and its legal obligation to ensure a safe working environment for all employees such as shown was the situation in the instant case, to take any and all actions reserved to it to determine and evaluate medically an employee's physical and mental ability to perform the regular duties of their position under any and all circumstances where a question arises as to an employee's fitness for duty. In the case at bar, the question arose as to Claimant's physical ability to perform the assigned duties given to him on the incident date in question, April 1, 2008, as Claimant himself admitted to his supervisor he had a problem with his balance at the height he was expected to work that day and therefore he was concerned about his own safety. The Board finds that Supervisor Winegar acted properly after Claimant revealed he had a problem with his balance working at heights of eight (8) feet and above by immediately taking Claimant out-of-service and ordering that he be medically evaluated as Winegar, in his supervisory role has the responsibility and the obligation to ensure a safe working environment not only for Claimant but for all the other workers that day involved in performing the assigned duties of unloading the rail car.

Although the Organization claims Carrier failed in its obligation to provide Claimant with a fitness-for-duty evaluation, the Board finds this argument to be invalid given the fact that Claimant, instead of waiting to get medically evaluated by the Carrier preemptively sought to be medically evaluated immediately by a non-Carrier physician thus precluding a different medical finding by Carrier that disputed Dr. McLennon's finding that Claimant was restricted to perform work involving heights of eight (8) feet and

above but that he was able to physically perform the duties of his Machine Operator position. It is clear to the Board that Claimant's motivation for seeking an immediate medical evaluation on the very same date Winegar referred him for a fitness-for-duty evaluation and then returning to work with the medical release given him by Dr. McLennon, was not to lose any hourly compensation and to get Winegar to consent to the specified work restriction in order that he could evade the assignment of having to unload the rail car that day as well as be relieved of any such assignment in the future. The Board concedes Claimant's motivation to escape having to perform work involving heights of eight (8) feet and above may have been premised on a sincere concern on his part for his own safety and perhaps the safety of his fellow workers, nevertheless he realized that when Carrier was not about to accommodate his restriction he had put himself in the untenable position of jeopardizing his continuing employment as a Machine Operator. This realization was reinforced when Carrier's Medical Review Officer simply adopted the medical evaluation of Dr. McLennon which had the effect of keeping him from being reinstated to service. While the Organization maintains that Dr. McLennon's height restriction only limited Claimant from performing duties that were not ordinarily part of his regularly assigned duties as a Machine Operator, this medical restriction did not prevent Claimant from performing all of his other duties and therefore Carrier could easily have accommodated this medical restriction. We concede based on the record evidence that the work involving heights of eight (8) feet and above was work performed by a Machine Operator only infrequently, nevertheless we find Carrier did not act improperly by not accommodating Claimant's work restriction as any time he would be at work, there would always be the possibility of his being given the same type of work assignment as that of unloading a rail car and Carrier would find itself faced with the same health and safety issues. Thus, the only circumstance under which Carrier could reinstate Claimant without concern regarding his health and safety at work was a medical release that provided the assurance he was medically able and physically fit to perform all the duties of his Machine Operator position. Obviously, Claimant came to this same understanding which impelled him to seek a second medical evaluation, again with a non-Carrier physician who would release him to return to work without any restrictions. Claimant was successful in securing such a medical release from Dr. Marier and when he presented this medical release it had the effect sought by the Carrier of assurance that Claimant was physically fit for duty and could perform all assignments of his Machine Operator position. However, the Board takes judicial notice of the fact that within just a period of fifteen (15) days, Claimant could be found from a second medical evaluation to have shed his condition of imbalance so as to allow him to safely perform work involving heights of eight (8) or higher.

Based on the findings set forth above, we further find it unnecessary to address the remaining other arguments advanced by the Organization in behalf of Claimant. Accordingly, we rule to deny the subject claim in its entirety.

AWARD

CLAIM DENIED

George Edward Larney
Neutral Member & Chairman

D. A. Ring
Carrier Member

T. W. Kreke
Employee Member

Chicago, Illinois
Date: 5-25-2010