PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employes Division - IBT

and

Union Pacific Railroad Company
(Former Missouri Pacific Railroad Company)

Case No: 143
Award No: 143

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's refusal to allow Mr. D. Ruark to return from medical leave to his position as foreman, beginning on April 11, 2019 and continuing, in violation of (but not necessarily limited to) the Scope Rule, Rule 1; Seniority Datum and Rule 2; Seniority Rights of and was inappropriate, arbitrary and unwarranted (System File UP641BT19/1723298 MPR).

2. As a consequence of the violation referred to in Part 1 above:

'As a consequence of this violation, the claimant shall be paid 46 days of regular pay working 10 hours per day and continuing, at a rate of 32.39 per hour (Beginning April 12, 2019 and continuing until the Carrier allows him to return to work). This claim also includes any and all overtime worked by junior Foreman during this absence as well as any holidays, as well as 46 days of per diem at a rate of one hundred twenty and forty-seven cents (120.47) dollars per day for forty-six days and continuing until Mr. Ruark is allowed to properly return to work. This claim is also for the cost of any insurance premiums and medical out of pocket costs related to Mr. Ruark having to provide his own medical coverage due to the Carrier refusing to allow him to return to work. This claim is also for any additional financial hardships caused to the Claimant due to this improper act by the Carrier.' (Employes' Exhibit 'A-1')."

FINDINGS

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

Several years prior to this claim being filed Claimant was involved in an on-duty incident involving injury. In 2017 he unsuccessfully sought compensatory damages under the Federal Employees Liability Act (FELA) in the United States District Court for the Southern District of Illinois. In 2019 Claimant

expressed his intent to the Carrier to return to work in the Carrier's Engineering Department. On May 16, 2019 the Carrier determined that Claimant was unable to safely perform work duties, and denied his request to return to work.

The Organization appealed the Carrier's determination and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

It is axiomatic that Carriers have a duty of care for the safety of employes, their co-workers and the general public. It is undisputed that the Carrier can set reasonable medical standards and qualifications. It is undisputed that the Claimant bears the burden of proof in this matter.

Claimant's treating physician for approximately two (2) years, Dr. Taylor, testified in federal court on May 9, 2017, that on March 7, 2016, Claimant telephoned to request the lifting or altering of Claimant's permanent work restrictions. Dr. Taylor declined to do so. He explained to Claimant that "[Claimant's] restrictions were permanent at the medium demand level, and I was not able to change them…[b]ecause of my knowledge of his condition. I know that he has a two-level lumbar fusion. And I know that he has adjacent issues, as well as cervical stenosis or tandem stenosis. And in that setting, I would not be comfortable letting him go back to work above the medium demand level, regardless of any other test."

Claimant testified in federal court on May 11, 2017, that after being treated by Dr. Taylor for approximately two (2) years, he had not had any further operations or additional treatment, and that "My leg still hurts and my neck still hurts. My leg gives out on me and my neck still hurts like heck. I think I need to have something done with my neck. I think I need surgery done on it also.… I hurt. My legs -- my left leg still gives out on me and my neck still hurts like heck. It still hurts me to bend and lift. I deal with it and live with it the best I can… I don't think I'm ever going to quit hurting."

Claimant further testified that he called Dr. Taylor to remove the restrictions because he needed the work, not because he felt that he could safely perform his job duties at Union Pacific Railroad. Indeed, Claimant testified that he felt physically unsafe to return to work, and that his neck problems would interfere with his ability to do any physical activity as an employee of Union Pacific Railroad.

Claimant provided the Carrier with two (2) single-sentence notes from physician's assistants, not medical doctors. The first, dated April 22, 2019, states that Claimant ". . . was seen on April 11, 2019 and may return to work anytime after April 11, 2019 without any restrictions." The second, dated May 30, 2019,

states that "As of [Claimant's] medical evaluation on 05/30/19, I do not see any reason why he cannot return to work without limitations." Neither physician's assistant's note refers to Claimant's prior diagnosed permanent physical limitations, nor limitations of any kind, any prior injuries, conditions, surgeries, or treatments whatsoever. Neither note references any of Claimant's medical history whatsoever, nor the extent to which Claimant was examined on April 11 and May 30, 2019, nor by whom. In this context, "was seen" and "medical evaluation" are vague and insufficiently informative. Neither physician's assistant's note provides a basis to discount, disregard or deviate from medical doctor Taylor's federal court testimony that Claimant's "restrictions were permanent at the medium demand level".

The paucity of information in Claimant's physician's assistants' notes stand in stark contrast to the magnitude and severity of the medically-detailed federal court testimony of Claimant's medical doctor, as well as the testimony of Claimant himself. On the record produced, the Board is not persuaded Claimant's *permanent* conditions and limitations got better simply with the passage of two (2) years of time.

The Board finds that under the facts and circumstances of this record Claimant did not meet his burden of proof to establish that the Carrier's determination was unreasonable, arbitrary or excessive. Because the Claimant did not meet his burden of proof, the Board does not reach the Carrier's affirmative defense of estoppel.

AWARD

Claim denied.

Robert Grey
Neutral Member

Christopher Bogenreif
Carrier Member

John Schlismann
Organization Member

January 19, 2022
Dated