

PUBLIC LAW BOARD NO. 7633

Case No.: 26/Award No.: 24

System File No.: UP: 1578545/BMWED: UP601BT 13

Claimant: B. Epson

UNION PACIFIC RAILWAY COMPANY)

-and-

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The Agreement was violated when the Carrier removed and withheld Mr. B. Epsen from his assigned foreman position on Gang 9162 beginning on December 10, 2012 and continuing.
2. As a consequence of the violation referred to in Part (1) above, the Claimant B. Epsen shall be compensated ‘*** for all time lost, including all straight time and any and all overtime worked by gang 9162 from December 10, 2012 and continuing until Mr. Epsen is returned to his position of a foreman. In addition, he should be paid for any additional expenses incurred because of this disqualification.’

Facts:

The Claimant returned from a medical leave on May 11, 2011 and was assigned as a Track System Trackman in gang 9162 when on December 10, 2012 he was again notified of medical disqualification from service as a Foreman. Permanent restrictions, which involved restrictions from operating a number of vehicles, including those requiring a CDL, resulted from neurosurgical procedures in 2005 and 2010 leaving the Claimant with a restricted field of vision. Several fitness for duty (FFD) evaluations had cleared the Claimant to return to work but with permanent restrictions. In July 2012 he attempted to recertify his CDL allegedly without disclosing his vision problems. He was cleared for operating vehicles requiring a CDL. From July 2012 until December 10, 2012, when he was disqualified because of prior restrictions, the Claimant served as Foreman for gang 9162. A subsequent request to lift the permanent restrictions to allow CDL certification was reviewed and denied by the Chief Medical Officer (CMO) resulting in the above-noted claim.

Carrier Position:

The Carrier may withhold an employee from service until existing medical concerns are cleared, thus allowing the safe performance of duties. This right, exemplifying a proactive approach to the safety of all concerned, is supported by a U.S. Supreme Court decision and previous industry awards. The Carrier's decision was fact based and necessary in the interest of safety. The Organization has not met the burden of establishing a bona fide violation of the CBA, including Scope Rules 1 and 2. The Carrier's decision in 2012 not to allow the Claimant to work as a Foreman was consistent with permanent medical restrictions. The Carrier will not allow the renewal of a CDL obtained without full disclosure of medical history to the Carrier's contract physician. The Claimant is not due a make-whole remedy as he has lost no time since his return from MLOA in May 2011. The Board should deny the claim as the Organization has failed to meet its burden of proof to show improper removal from the Foreman position and improper compensation.

Organization Position:

The Organization has shown that the Carrier arbitrarily withheld the Claimant from service as a Foreman beginning December 10, 2012. The Carrier may withhold an employee from service on medical grounds that are not arbitrary and capricious. However, the Carrier withheld the Claimant without recent medical justification after the Carrier's authorized medical doctor found the Claimant medically qualified to hold the necessary CDL. The Carrier has not provided more recent, contradictory medical evidence. The Carrier's contention that the Claimant lied to Dr. Raue is without substance or merit. The Carrier's affirmative defense comes without the required proof. Dr. Raue's findings are dispositive of the matter as the 2011 determination of the Chief Medical Officer cannot be considered controlling.

Findings:

The Board acknowledges that the Carrier has the right to withhold an employee from service where existing medical concerns may make the employee a danger to himself and others, as established by the U.S. Supreme Court, **Public Law Board No. 6302, Award No. 9** and Third Division Award 29818 (BMWED and UPRR). The Board also noted prior industry awards requiring that the decision to withhold from service may not be arbitrary and capricious. The Claimant was approved for a CDL by Dr. Raue, a trained medical professional used by the Carrier. Thereafter the Claimant served as Foreman for gang 9162 for almost five months with no indication that during this period he carried out his Foreman duties in a manner that called into question his ability to work safely. Therefore the Board finds that the Organization has made a prima facie case that the decision to override Dr. Raue's July 2012 decision that constituted the latest medical evidence was arbitrary and capricious.

The Organization's prima facie case shifts the burden of persuasion to the Carrier, an approach consistent with Third Division Award 17051, among others, which held that "...The Carrier is raising an affirmative defense and has the burden to prove such defense by competent evidence." The Carrier's assertion that the Claimant did not fully disclose his relevant medical

history to Dr. Raue is without documentary support and cannot be considered controlling. There is no evidence that allows the Board insight into what the Claimant did or did not tell Dr. Raue. Nor has the Carrier, now with the burden of persuasion, provided evidence that Dr. Raue's examination was inadequate. It is reasonable for the Board to assume that since Dr. Raue worked at a clinic used by the Carrier as part of the certification process for obtaining a CDL, the doctor, as a medical professional, was aware of the physical requirements for a CDL and thus tested the Claimant against those requirements regardless of what the Claimant said or did not say about his vision and prior surgical procedures. And, presumably, the Carrier could have required another examination by an Ophthalmologist, but there is no evidence that this was done. For all of these reasons the claim is sustained.

Award:

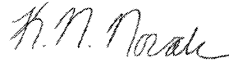
Claim sustained.

Order:

The Board, after consideration of the dispute identified above, hereby orders that the Claimant be compensated for the difference between the Trackman and the Foreman rate for all straight time and overtime actually worked from December 10, 2012 and continuing until Claimant is returned to a Foreman position. The Order does not preclude the Carrier from ordering a future fitness for duty examination by a medical professional provided with the Claimant's relevant medical history.



Andrew Mulford, Organization Member



Dissent

Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 10, 2015

PUBLIC LAW BOARD NO. 7633

Case No.: 26/Award No. 24

System File No.: UP601BT13/Carrier File 1578545

Claimant: B. Epson

Interpretation No. 1 for Award No. 24

UNION PACIFIC RAILWAY COMPANY)

-and-

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Facts:

On June 10, 2015 the Board sustained the claim of Mr. B. Epson and issued the following order:

The Board, after consideration of the dispute identified above, hereby orders that the Claimant be compensated for the difference between the Trackman and the Foreman rate for all straight time and overtime actually worked from December 10, 2012 and continuing until Claimant is returned to a Foreman position. The Order does not preclude the Carrier from ordering a future fitness for duty examination by a medical professional provided with the Claimant's relevant medical history.

The Carrier has compensated the Claimant for straight time and overtime that he worked during the relevant period. The Organization believes that the Claimant has not been made whole and that the Board's order remains unfulfilled because the Claimant has not been compensated for all of the overtime worked by the employee filling the Foreman's position during the relevant period. The disputed remedy has led to a request for the Board's interpretation of the original Order. An elaboration of each party's position is set forth below.

Carrier Position:

The Organization's claim should be denied for three reasons. First, Claimant was compensated as the Board ordered. The Order required compensation for "all straight time and overtime actually worked. . ." This was done, as the Organization has acknowledged, and a breakdown of the calculations provided along with an explanation. Second, the Organization now attempts to amend and expand the original claim, which was "for all straight time and any and all overtime worked by gang 9162 . . ." for the relevant time period. Foremen in general or

Foremen in gang 9162 were not mentioned, yet on September 15, 2015 the Organization requested hours worked by Foremen. The attempted expansion of the claim is a fatal procedural defect. The Board does not have jurisdiction to consider the expanded claim. Third, the expanded claim cannot be calculated and if sustained, would provide a windfall for the Claimant. No specific Foremen in gang 9162 were identified as a basis for comparison. There were days when the Claimant and others were paid as Foremen. The Claimant would not have been available for overtime when he was already working overtime.

Organization Position:

The Organization insists that Award No. 24 has been violated because the Claimant has been compensated only for the time he actually worked but not for the time worked by “the employee filling the Foreman’s position during the claimed period.” This is a reasonable position given the Claimant’s improper removal from the Foreman position, the requested remedy and the Board’s decision to fully sustain the award. For example, if the Claimant worked as a Trackman for five (5) hours at straight-time pay and a Foreman in gang 9162 worked eight (8) straight-time hours and five (5) overtime hours on the same day, payment to the Claimant for the time he actually worked would not make him whole. The Organization’s position is consistent with the original Statement of Claim. The Carrier did not assert during the on-property processing of the claim that the Claimant was entitled only to “the difference in pay for hours actually worked, rather than for hours worked by the position from which he was inappropriately removed.

Findings:

A reading of **PLB 7633, Case No. 26/Award No. 24**, the original award involving the Claimant, Mr. Epson, shows that the Organization requested compensation “for all time lost, including straight time and any and all overtime worked by gang 9162 . . .” for the relevant time period. The Board sustained the claim and ordered the above-noted remedy, omitting the phrase “by gang 9162.” In the context of this case, the phrase “by gang 9162” must be considered implicit in the remedy ordered, so that “actually worked” refers only to gang 9162. As the Organization contends, the Board must now interpret the meaning of “actually worked.”

The intent of the Board in Award 24 was to award the Claimant the compensation he would have received had he not been improperly removed from his position of Foreman on Gang 9162. Therefore, he is entitled to the difference in the rate of pay from his Trackman position and the Foreman position for all straight time and overtime hours as held in Award 24. Additionally, he is to receive compensation for any overtime hours worked by the Foreman in excess of overtime hours for which the Claimant was already compensated. To be clear the Claimant is not be awarded a windfall and he should not receive payment for any overtime for which he was already compensated.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
December 5, 2016