

PUBLIC LAW BOARD NO. 7660
CASE NO. 8

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
(Former Chicago & North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it withheld Claimant K. Miller from service on the basis of purported medical issues and then failed to allow him to return to service, starting February 13, 2013 and continuing thereafter (System File J-1323C-501/1581628 CNW).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must now compensate Claimant K. Miller for all hours he would have worked but for the Carrier's inappropriate continued withholding from service.”

FINDINGS:

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

As background to this dispute, Claimant entered service with Carrier on June 10, 2002. He had a seizure at work in 2007. In February, 2008 he was cleared to return to work with restrictions that could not be accommodated. He returned to work without restrictions in August, 2008, and continued working until February, 2011. In March, 2009 Claimant was denied DOT certification when he acknowledged that he had previously

suffered from a seizure. On October 27, 2009 Claimant again took the DOT certification test, did not indicate his prior seizure, and received DOT certification. On January 21, 2011 Claimant was decertified by Carrier's Medical Department, and on March 2, 2011 he was dismissed for dishonesty. The appeal of that dismissal resulted in Public Law Board No. 6302, Award 216, issued on January 14, 2013, finding Claimant's dismissal to be an excessive penalty, converting it to a long term suspension, and ordering Carrier to reinstate him within 30 days.

Claimant commenced his return to work physical on January 29, 2013, and completed the eye examination on February 11, 2013. As a result of the physical and Claimant's medical history, he was returned to work with restrictions, including that he could not work at unprotected heights over 4 feet. Those restrictions could not be accommodated, and, after consultation between the Medical Department and the Director of Track Maintenance, the restrictions were modified on March 15, 2013 to permit Claimant to work at 6 foot heights, which could be accommodated by the Department. Claimant and the Organization were notified that he could return to work on March 22, 2013. Claimant placed a bid on April 12, 2013, which was unsuccessful. He successfully bid on, and filled, a B&B Carpernter position on Gang 3645 on April 29, 2013.

The instant claim was filed on March 12, 2013 protesting Carrier's denial of Claimant's timely return to work. In its correspondence on the property, the Organization asserts that imposing these restrictions on Claimant's return to work were arbitrary, since Claimant had worked without restrictions for 3 years prior to his dismissal, there was no change in his medical condition between that time and when he was ordered returned to work, he had been seizure free for 6 years, and there was no evidence that he could not safely return to work without restrictions. The Organization contends that Carrier needs a rational basis for exercising its discretion to withhold an employee from service on medical grounds, citing Third Division Awards 25186, 31317, 31578, and notes the absence of any medical evidence to support the imposition of restrictions in this case. It

requests that Claimant be compensated for all hours he would have worked if he had not been improperly withheld from service from February 13, 2013 on, relying on Third Division Awards 39320, 41002.

Carrier argues that it began the process to return Claimant to work in a timely manner in accord with the order of Public Law Board 6302, Award 216, as it scheduled and completed his return to work physical within the 30 day period. It maintains that Claimant was returned to service at the time he was scheduled for his physical, in compliance with the Award, and that there is a difference between returning an employee to service and returning him to work. Carrier contends that it has the right to medically withhold an employee with conditions that could impact safety and set reasonable restrictions, citing Third Division Awards 28505, 31317, 31824. It points out that its determination of work restrictions was neither unreasonable nor arbitrary, and was made in good faith, as it was based on scientific evidence, derived from studies performed by a panel of medical experts of the Federal Motor Carriers Safety Administration (FMCSA), that the risks associated with seizure disorders continued for an 8 year period, during which an employee could not safely drive a commercial vehicle. Carrier asserts that there was no unreasonable delay between February 13 and March 22, 2013 when it was actively evaluating Claimant's health conditions in an effort to modify his restrictions so that they could be accommodated, relying on Public Law Board No. 6302, Awards 8 & 145. Finally, Carrier argues that the remedy is inappropriate and excessive, as any period of time after March 22, 2013 when the Organization and Claimant were informed that he could be accommodated and was cleared to return to work, is attributable to inaction on Claimant's part with respect to securing a position, and is not attributable to any action on Carrier's part.

A careful review of the record convinces the Board that the Organization has failed to meet its burden of proving that Carrier's imposition of restrictions on Claimant's return to work in February, 2013, and action in withholding Claimant until March 22, 2013 when it modified his restrictions to permit accommodation, were arbitrary or not

rationally based. As precedent has established, Carrier has the right to set reasonable restrictions and to medically withhold an employee with conditions that could impact safety, the Board should not substitute its judgment for the decisions of Carrier's Medical Department which are based on reasonable standards, and the Organization bears the burden of proving that such decisions were arbitrary. See, e.g. Third Division Awards 28505, 31317, 31824, 40288.

In this case, the Organization asserts that Carrier's imposition of restrictions based upon the fact that Claimant had a seizure six years previous, worked successfully without restrictions for a period of 3 years, and had no change in medical condition in the interim, is arbitrary and unjustifiable. While it relies upon precedent finding that disqualifications based upon a condition known previously, and not proven to be disqualifying at that time, are not rationally or reasonably medically based, see Third Division Awards 31317 and 31578, we find this case distinguishable based upon the actions and explanations of Carrier during the time it was evaluating Claimant's fitness to return to work.

The record reflects that Carrier initially imposed 5 restrictions on Claimant, including that he was not to operate company vehicles, work on or near moving trains, operate machinery where sudden incapacitation would present risk of harm to self or others, work on 1 or 2 man crews, as well as that he was not to work at unprotected heights over 4 feet above the work surface (but could work on the bed of trucks or occupy bridges). It appears that only this final restriction could not be accommodated by Carrier, and was eventually changed to permit working up to 6 feet above ground on step ladders and scaffolding protected by railings, so as to be able to accommodate Claimant's safe return to work. While the Organization initially took the position that no restrictions were reasonable, in its filing of the claim, it acknowledged that Claimant understood that he could not get his CDL and wanted to work as a carpenter. Thus, there appears to be no challenge to the fact that Carrier could rightfully impose restrictions on Claimant relating to his operation of certain vehicles.

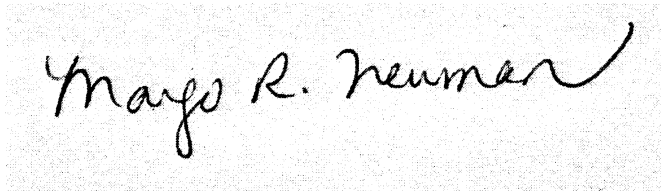
In denying the claim, Carrier explained why it chose to impose these restrictions on Claimant. In this regard Carrier stated:

“... There is a scientific basis for determining work restrictions for persons with a seizure disorder. In placing work restrictions on an employee in a safety sensitive job, we assess the risks for sudden incapacitation or severe impairment that pose safety concerns, based on the best scientific evidence about such risks. For individuals with seizures, reports of the Medical Expert Panels of the Federal Motor Carriers Safety Administration (FMCSA), provide good evidence-based assessments of safety risks related to specific health conditions. The FMCSA Medical Expert Panel on Seizure Disorders (2007) states that a person with a seizure disorder should be restricted from driving commercial vehicles until seizure free for eight years. These recommendations are consistent with studies on risk for seizure recurrence in the medical literature. Since the FMCSA expert panel report provides good evidence-based recommendations, the Carrier applies similar restrictions to other work activities where sudden incapacitation from a seizure would pose significant safety risks to the employee or others...”

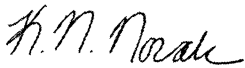
The Board cannot say that Carrier's determination that working from an excessive height in whatever capacity might pose a safety risk from sudden incapacitation due to a seizure is arbitrary or not rationally based, or that it was unreasonable to utilize the 8 year period for recurrence of seizure disorders in analyzing Claimant's fitness to return to work in February, 2013. In the circumstances of this case, where Carrier made an adjustment to the height restriction when it learned that Claimant could not be accommodated at 4 feet, but could at 6 feet, we cannot find that its imposition of these restrictions were arbitrary or unreasonable, or made in bad faith. We also are unable to find that the time it took for Carrier's medical assessment and adjustment to the restrictions to enable Claimant to return to duty (approximately 5 weeks) was excessive or constituted undue delay. Correspondence between the Medical and Track Maintenance Departments were ongoing during this period. As noted by Carrier, the fact that Claimant did not return to duty between March 22 and April 29, 2013, was not due to any action or inaction on its part.

AWARD:

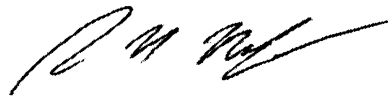
The claim is denied.



Margo R. Newman
Neutral Chairperson



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member

Dated: 09/01/2015

Dated: 09/01/15