

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad Company (former
Chicago and North Western Transportation Company)

Case No: 173
Award No: 173

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier's medical withholding of Mr. D. DeWitt from service, commencing December 18, 2018 and continuing, was without justification or cause (System File RI-1956C-802/1717811 CNW).
2. The Carrier's refusal to convene a Rule 56 Medical Board regarding Claimant D. DeWitt's ability to return to service was arbitrary, unsupported, unwarranted and in violation of the Agreement.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimant D. DeWitt must be compensated for all the days and hours worked both straight time and overtime by Gang 3136, beginning on December 18, 2018 and continuing, at the applicable rates of pay."

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. Parties to said dispute were given due notice of hearing thereon.

Claimant was working as a General Track Foreman assigned to Gang 3136 when in July 2018 he began to experience numbness, tingling and weakness in his extremities

as well as episodes of confusion. These episodes continued and Claimant requested a medical leave of absence beginning October 23, 2018. According to a letter dated March 1, 2019, by Claimant's neurologist, Claimant was cleared of an epilepsy diagnosis on or about October 29, 2018. Claimant was diagnosed with possible conversion syndrome and anxiety. It was recommended that he begin supportive counseling, learn stress management techniques. On December 17, 2018, Dr. Matthew Hughes from the Carrier's Health & Medical Services (HMS) reviewed Claimant's medical files and placed Claimant on sudden incapacitation restriction subject to review in twelve months. The following permanent work restrictions were imposed:

1. Not to operate company vehicles, on-track or mobile equipment, or fork-lifts.
2. Not to work on or near moving trains, freight cars or locomotives, unless protected by barriers. (Clarification: This means remaining between the rails or to the field side of the track where there are adjacent tracks with less than 19-foot track centers).
3. Not to operate cranes, hoists, or machinery, if these activities might create a risk of harm to others or a risk of catastrophic injury to the employee.
4. Not to work at unprotected heights, over 4 feet above the ground. (Clarification: Employee can work on the beds of trucks; and employee can occupy bridges following normal safety practices).
5. Must not work on 1-man or 2-man gangs (i.e., switch oiler, inspector, welder or helper job, 2-man section gang). Must have at least two additional employees on gang or at work area to accommodate the provisions of Train Approach Warning regulations (Lookout) or Train Approach Warning provisions may not be used.
6. Not to perform work where decisions or actions can affect the safety of others (not to work as a Train Dispatcher or similar safety sensitive positions).

Dr. Hughes noted that Claimant was undergoing neuropsychological evaluations and his neurologist limited Claimant to office clerical work. On January 6, 2019, Dr. Hughes reviewed additional results from Claimant's neurologist stating, "seizure and organic neurologic disorders have been ruled out, with current working diagnosis of conversion disorder, with ongoing symptoms mostly related to anxiety."¹ Dr. Hughes noted "There is no current release that I found. NO change in work restrictions from review in December." The Carrier determined that Claimant's work unit could not accommodate the office clerical work restriction. After re-evaluation, Claimant was later returned to service on December 23, 2019, as a Ballast Regulator Operator assigned to Gang 3119.

¹ Carrier Exhibit A at 2.

By letter dated February 12, 2019, the Organization filed a claim on behalf of the Claimant. The Organization challenged Carrier's: (1) disqualification of Claimant from service and (2) failure to comply with Rule 56 when it refused to impanel a medical board as requested by the Organization.

The Carrier denied this claim by letter dated March 29, 2019. The Carrier asserted that it has the right to set and enforce medical standards; its actions were not arbitrary, unreasonable or discriminatory; the Organization failed to provide evidence of a contract violation; and Rule 56 is inapplicable because the Carrier did not disqualify Claimant. Because the parties were unable to resolve the matter on the property, the issue is now before this Board for final adjudication.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. A careful review of the record convinces the Board that, under the circumstances of this case, there is sufficient evidence to support the Organization's position, in part.

First, based on the evidence available to Dr. Hughes on December 17, 2018, the Carrier was within its right to impose restrictions on Claimant by removing him from his General Track Foreman position. There is no competent evidence in the record that the Carrier had the letter dated December 18, 2018 from Claimant's physician releasing him to work his regular duties. According to the record, this letter was provided to the Carrier for the first time as an attachment to the appeal dated May 17, 2019. Specifically, on January 6, 2019, Dr. Hughes had stated there was "no current release that I found" in his Medical History note.² Therefore, the Carrier had not improperly withheld Claimant based on what was known to the Carrier up to the time the release letter was supplied by the Organization on May 17, 2019. It was at this point that conflicting medical opinions existed.

Second, the Carrier contends that Claimant was not disqualified and, therefore, Rule 56 is inapplicable. This Board disagrees. The Carrier's physician, Dr. Hughes placed Claimant on permanent restriction on December 17, 2018 based on the information available to him at the time. This restriction could not be accommodated according to the Carrier. Thus, Claimant was effectively disqualified from service. The failure on the Carrier's part was to not convene a Rule 56 Board of Medical Examiners once it became aware of the conflicting opinions regarding the work restrictions on May 17, 2019. At that point, Dr. Hughes could have re-evaluated Claimant's case and perhaps lifted the work restriction. Alternatively, the restriction would have remained in effect which would trigger the Rule 56 medical review. However, the Carrier took no action and Claimant remained out of service. This violated Rule 56 which is reasonably interpreted


² Employee's Exhibit A-2, Att. 1.

to be the intended vehicle to obtain a final decision regarding an employee's qualifications to work where differing medical opinions exist.

It is concluded that because the Carrier ignored Rule 56 and Claimant was ultimately returned to service, the Claimant shall be compensated for actual loss of earnings, if any, from the date of disqualification until Claimant was returned to service on December 23, 2019. Back pay shall be for straight time only since overtime pay is speculative and unsupported by the record.

AWARD


1. Claim sustained in accordance with the Findings above.
2. Claimant shall be compensated for actual loss of earnings, if any, from the date of disqualification until Claimant was returned to service on December 23, 2019. No overtime is awarded in this case.
3. The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Jeanne Charles
Neutral Member



William Ince
Carrier Member
Dated: March 30, 2021



David M. Pascarella
Labor Member
Dated: March 30, 2021