PUBLIC LAW BOARD NO. 7660
CASE NO. 57

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION -IBT RAIL CONFERENCE

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY
[Former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's failure and refusal to return Mr. D. Linville to service after he was released for full duty with no restrictions by his doctor was arbitrary, unwarranted and in violation of the Agreement (System File RC-1550U-701/1630150 SPW).

2. As a consequence of the Carrier's violations referred to in Part 1 above, the Carrier shall make Claimant D. Linville whole for all lost wages, benefits and seniority rights. Such payment shall be in addition to any compensation already received."

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.

Claimant was working as a Machine Operator on a gang in the Western Region when he had what appeared to be an unprovoked seizure on May 20, 2012. He was sent for testing and, after an EEG in September, 2012, which was abnormal with epileptiform discharges consistent with a seizure disorder, he was found to be at risk for sudden incapacitation (SI) due to a seizure disorder, and placed on SI restrictions, which, at the time, could not be reviewed until May, 2020 based upon the requirement of being 8 years seizure free without medication. Since he could not be accommodated in his position on his gang, he remained off work.

The record reflects numerous medical and clinical notes concerning his treatment for various conditions, including chemical dependency treatment in 2012-2013, noting two prior head injuries in 1982 and 2004, regular prescribed drug use for chronic back pain management by Dr. Staszel, DO throughout 2013 and 2014, and evaluation and treatment by neurologist Dr. Presti since late 2013 (after treatment by a different neurologist). Dr. Presti initially based his assumptions in November, 2013 on Claimant's version of what occurred in May, 2012 as a misinterpretation by a co-worker of his conscious actions and a denial of having any seizures, until he reviewed Claimant's EEG taken in January, 2014, where he found multifocal epileptiform discharges showing his brain has a predisposition toward seizures, and questioned Claimant's original story of what occurred. Dr. Presti started Claimant on anti-epileptic medication in January, 2014. Dr. Staszel filled out a Supplemental Doctor's Statement for the Railroad Retirement Board on December 22, 2013 indicating that Claimant could not return to work without restrictions.

In the Fall of 2014, Claimant requested a review of his restrictions, submitting updated medical information including a July 30, 2014 note from Dr. Presti releasing Claimant to return to work without restrictions. In the course of making a review of his medical file, Carrier's medical staff made attempts to contact Dr. Presti to obtain clinical

documents to support the one line release, as well as gathered and assessed additional medical documentation furnished in 2015. The record confirms that 4 different medical consultants reviewed Claimant's file during the months leading up to the issuance of Dr. Holland's final determination on May 29, 2015, all agreeing that he had an unprovoked seizure, abnormal EEG readings consistent with seizure disorder, was a high risk for future seizures, and should have work restrictions. Dr. Holland set forth the basis for his conclusion that Claimant should continue to have work restrictions for SI risk, that are ongoing, but could be reassessed when he is seizure free for 5 years after anti-epilepsy drug use.

The claim was initiated by the Organization on June 19, 2015 based on Dr. Presti's July 30, 2014 release of Claimant to return to work without restrictions, and its assertion that continuing to withhold Claimant from service was unwarranted and without justification. Its appeal correspondence sets forth its contention that there is no legitimate reason for withholding Claimant after he has been released by his doctor, and that Carrier has the responsibility to work expeditiously to return to work an employee being withheld from service.

Carrier's denials maintain that the 2012 restrictions were proper since Claimant had a seizure at work, and his continued medical testing reveals abnormal EEGs and a risk for SI due to seizure disorder, and that his medical condition could have an impact on the safety of himself and his co-workers. It notes that the decision to reaffirm the restrictions was based on medical reports and updated records and an independent review from 4 medical professionals, who all agreed to Claimant's diagnosis and the need for restrictions. Carrier argues that it has the right to impose reasonable standards to ensure that employees are medically and physically qualified to perform their jobs, that this is what occurred in this case, and that the Organization failed to meet its burden of proving that the imposition of the SI restrictions were arbitrary or unreasonable. It notes that

Claimant did not have to remain off work, but could have exercised his seniority to another position that could accommodate his restrictions.

In its October 5, 2015 appeal, the Organization requested the implementation of Rule 32(b), which provides:

RULE 32 - PHYSICAL EXAMINATIONS

(b) PHYSICAL DISQUALIFICATIONS - If an employee is disqualified from service or restricted from performing service to which he is entitled by seniority on account of his physical condition, and feels that such disqualification is not warranted, the following procedure will govern.

A special panel of doctors consisting of one doctor selected by the Company specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; one doctor selected by the employee or his representative specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; the two doctors to confer, and if they do not agree on the physical condition of the employee they will select a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering.

Such panel of doctors will fix a time and place for the employee to meet with them for examination. The decision of the majority of said panel of doctors of the employee's physical fitness to remain in service or have restrictions modified will be controlling on both the Company and the employee. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the employee change.

Carrier agreed to the process and requested its HMS Department to designate a reviewing physician, and for the Organization to do so as well, sending pertinent information to enable them to confer to see if there is a disagreement about the physical condition of the employee. The Organization designated Dr. Presti and his contact information was forwarded to HMS. The record does not contain any information concerning the reason for the delay in effectuating the Rule 32(b) process. The parties conferenced the claim on February 17, 2016, and the Organization expressed dissatisfaction with the continued denial and absence of discussion,

pointing out in its May 19, 2016 addendum that a medical panel had still not been convened in this case, and it was being docketed to the NRAB.

A careful review of the record convinces the Board that the Organization has failed to meet its burden of proving that the continued imposition of sudden incapacitation work restrictions on Claimant in May, 2015 was not rationally based or supported by medical documentation. Carrier has the right to impose reasonable standards to ensure an employee's qualification to operate machinery or perform the essential functions of his position, as well as to promote a safe work environment for all employees. See, e.g. Third Division 31317. There was no argument from the Organization that imposing the specific restrictions on Claimant having to do with his ability to operate company vehicles or certain type of equipment, to work on or near moving trains unless protected by barriers, to work at unprotected heights or in 1 or 2 man gangs, for a minimum period of 5 years, when his condition can be reassessed, is unrelated to his diagnosed condition of a seizure disorder.

Unlike the situation in Award No. 56 issued by this Board, this is not a permanent medical disqualification. In fact, it was noted that Claimant was eligible to bid on new job assignments, where HMS could review the physical job requirements to determine if Claimant could safely perform the essential functions of the position. Claimant was a machine operator at the time he was initially withheld from service pending medical evaluation and issued SI restrictions. There is no evidence that he attempted to bid on any other positions or have them evaluated for accommodation. Additionally, this is not a case where Carrier refused to consider utilizing the agreed procedure in Rule 32(b) to determine if there was disagreement between medical professionals as to Claimant's condition necessitating the selection of a third doctor. While the record does not explain the delay in having the initial Rule 32(b) consultation, the Organization did not show that such delay resulted in Claimant's May 29, 2015 work restrictions being improperly

prolonged. The record shows a thorough review by Carrier of all medical documentation prior to the May 29, 2015 determination to continue Claimant's work restrictions. There is a reasonable basis for Carrier's policy that an employee with seizure disorder be required to wait a certain period of time (at least 5 years) without medication to see if his condition has improved to the point where he no longer requires job restrictions.

Under the facts and circumstances of this case, the Organization did not establish unjust and undue medical delay in returning Claimant to work, as alleged, the improper imposition of work restrictions on Claimant, or a violation of the Agreement. The claim must be denied.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Dated: 2/12/2018

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member