PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

UNION PACIFIC RAILROAD COMPANY

Case No: 62
Award No: 62

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's medical withholding of Mr. V. Dalpiaz from service, commencing September 23, 2015, was without justification or cause (System File MK-1550U-602/1642036 UPS).

2. The Carrier's refusal to convene a Rule 50 medical board regarding Claimant V. Dalpiaz'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, the Carrier shall provide Claimant V. Dalpiaz with compensation for all hours he was not allowed to work commencing September 23, 2015 and continuing until he is returned to service, including both straight time and overtime hours."

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employes Division – IBT (hereinafter referred to as the "Organization") and the Union Pacific Railroad Company (hereinafter referred to as the "Carrier"). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Victor Dalpiaz, is employed by the Carrier in its Maintenance of Way and Structures Department. On May 8, 2015, the Claimant had surgery to remove a brain tumor and was placed on a medical leave of absence. On September 14, 2015, the Claimant presented the Carrier with medical documentation to permit him to return to work. On November 15, 2015, the Carrier's medical department, after reviewing the Claimant's medical reports, determined that permanent work restrictions were necessary which prohibited him from returning to work.

The Organization filed its claim on November 16, 2015 stating that the Claimant was improperly prohibited from returning to work. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final written decision on March 3, 2016. The parties addressed the dispute in conference on May 16, 2016 with no change in the parties' position. The Claimant was not permitted to resume his job function. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

Relevant Contract Provisions

RULE 50-PHYSICAL DISQUALIFICATION

(a) **DISQUALIFICATION** - When an employee is withheld from duty because of his physical or mental condition, the employee or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employee's physical or mental condition by a competent physician. make written request upon his employing officer for a Medical Board.

(b) **MEDICAL PANEL** - The Company and the employee will each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians will appoint a third neutral physician, who will be a specialist on the disability from which the employee is alleged to be suffering.

(c) **MEDICAL FINDINGS** - The Medical Board thus constituted will make an examination of the employee. After completion they will make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the condition of the employee will be final.

* * *

> (e) **COMPENSATION** - If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the Company doctors, the original medical findings which disclose his condition at the time disqualified will be furnished to the neutral doctor for his consideration and he will specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor will be accepted by both parties in settlement of this particular feature. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section (a) of this rule.

The Organization contends that the Carrier arbitrarily refused to permit the Claimant to return to work after he submitted medical documentation from his neurosurgeon and general practitioner that he could perform his job function without restrictions. It argues that the Carrier erroneously decided to permanently disqualify him, which gave rise to the dispute. The Organization maintains that the Carrier violated Rule 50 when it did not comply with its request to convene a medical board to resolve the disagreement over Claimant's medical fitness for duty. It claims that Rule 50 provides the Claimant a remedy for compensation since he was improperly disqualified from his position. The Organization cites arbitral precedent that supports its contention that the Carrier improperly applied its medical standards to disqualify the Claimant.

The Organization asserts that the Carrier's medical staff determined that the removal of the brain tumor created a risk of a sudden seizure that led to the Claimant's permanent work restrictions. However, the Organization maintains that the record contains no medical evidence that the Claimant ever experienced a seizure. It argues that the Claimant's doctor found him to be "clinically stable" and therefore, the permanent work restriction was not based on the actual medical documentation.

The Carrier maintains that it has the discretion to implement reasonable medical standards that ensure employees can safely perform their job functions. It cites arbitral precedent in support of its contention that the Board is not empowered to substitute its judgment for that of the Carrier when it comes to determining its medical standards where the application of its policies are not arbitrary, capricious or discriminatory.

The Carrier argues that the Organization has not met its burden of proof that the Agreement has been violated. It asserts that the medical documentation contained in the record does not indicate that a "dissenting opinion" exists between the Carrier's medical staff and the Claimant's doctor, and therefore a medical panel as provided for in Rule 50 is not applicable to the dispute here.

The Board finds that the Organization has not met its burden of proof with substantial evidence that the Carrier was arbitrary or unreasonable in its decision to medically disqualify the Claimant from returning to his position. It is well established that the Carrier has the authority to decide the physical qualifications of its employees and to disqualify those who it deems cannot meet its medical standards. The Board here is not empowered to substitute its judgment for that of the Carrier regarding the application of its medical standards where it is rationally based and reasonable. The Board must find that the Carrier acted arbitrarily, unreasonable, or in a discriminatory manner before it can set aside the Carrier's decision to medically disqualify an employee. See Third Division Award Nos. 25013, 41500, 36725, Public Law Board No. 6302, Award No. 9 and Public Law Board No. 7270, Award No. 7.

Here, the medical notes from both the Carrier's Chief Medical Officer and the Claimant's neurosurgeon, dated January 19, 2016, indicate a future risk of seizures. The decision by the Carrier's medical staff to consider such a risk, based on his specific job function, as a basis to medically disqualify him is supported by the record. There is no medical evidence in the record that insures that the Claimant will not be susceptible to seizures in the future. The conclusion that the Claimant did not have a seizure previously does not negate the possibility that he may have one in the future. His own physician asserts that there is a risk - albeit low - while on the prescribed medication. The Carrier's decision to avoid even a "low" risk cannot be considered arbitrary or unreasonable, given the safety critical position held by the Claimant.

Despite the Organization's valiant and strenuous argument, the Board does not find that the record contains a "dissenting opinion" that would trigger the procedure provided by Rule 50. The medical notes submitted by the Claimant's neurosurgeon confirm that he was

taking medication to prevent seizures and that "His chance of having a seizure is low while he is on this medicine and also because he has not had a seizure in the past." The Claimant's doctor articulates the same possibility, as does the Carrier's Chief Medical Officer regarding the risk of seizures who concludes as follows:

> There is substantial scientific evidence that individuals who have had seizures related to a brain tumor have a permanent increased risk for recurrent seiures [sic] greater than a 1% per year occurrence rate - this poses an unacceptable risk for Sudden Incapacitation for a work in a Safety Critical Position (such as Mr. Dalpiaz) and requires permanent work restrictions. In addition, brain surgery that involves penetration of the dura also poses a permanent unacceptable risk for seizures. Use of anti-epilepsy drugs does not reduce the risk of future seizures to an acceptable risk level.
>
> Therefore he needs permanent work restrictions for sudden incapacitation and for work activities where decisions or actions can affect the safety of others.

A reading of the two separate medical opinions does not constitute a "dissenting opinion" but instead indicates a concurrence that a risk of seizures exists. As such, we find that the Carrier did not violate Rule 50.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Organization has not met its burden of proof that Carrier violated the Agreement when it medically disqualified the Claimant from his position.

AWARD

Claim denied.

Michael Capone
Neutral Member

Dated: May 14, 2018

Alyssa K. Borden
Carrier Member

Dated: 05/16/18

Andrew M. Mulford
Labor Member

Dated: 5/16/18