

PUBLIC LAW BOARD NO. 7660

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT**

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 76
Award No: 76**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier's removal from service of Mr. R. Gosser on February 3, 2016 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1650U-001/1660325 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall provide Claimant R. Gosser compensation for all hours he was not allowed to work commencing February 3, 2016 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 Employees 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, Robert Gosser, was hired by the Carrier on August 1, 1995 and held the position of Steel Erection Truck Driver when he was removed from service on February 3, 2016 after another employee reported to his supervisor that the Claimant was having

difficulty breathing. On February 4, 2016, the Carrier's doctor determined that the Claimant was not fit for duty and requested an occupational medical evaluation and specialized testing, to determine his fitness for duty. The Carrier's Medical Department determined that the Claimant has Chronic Obstructive Pulmonary Disease (COPD). He was instructed to participate in a variety of tests to determine his fitness for duty and was issued the following work restrictions:

"1. Not to perform work involving more than light physical exertion (as defined by US Dept. of Labor), not to lift over 10 pounds frequently or 20 pounds occasionally. Most appropriate for office jobs or similar work only.

2. Not to perform prolonged work in conditions of high heat and humidity or excessive cold.

Duration of Work Restrictions:

1. These work restrictions are ongoing, but can be reassessed if there is adequate medical documentation of substantial improvement in the employee's health condition and/or overall fitness level.

2. If a new job assignment is considered, the HMS should review the functional job demands to determine if the employee can safely perform the essential functions of the job."

The Claimant was informed of these restrictions on April 4, 2016; on April 6, 2016, the Carrier determined that they could not accommodate the Claimant's work restrictions.

On May 20, 2016, the Organization filed its claim, which stated that the Carrier violated the Agreement when it suspended the Claimant without pay after improperly disqualifying him from his job for medical reasons. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final written decision on September 15, 2016. The parties addressed the dispute in conference on October 6, 2016 with no change in their 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 removed the Claimant from service when he could have been reassigned, as provided for in its health and medical policy. As such, the Organization maintains that the Claimant was disciplined without a fair and impartial hearing.

The Organization avers that where the Carrier is permitted to set medical standards, they must be reasonable and not result in arbitrarily withholding employees from service. It

argues that in addition to the unreasonable physical restrictions placed on the Claimant by the Carrier's medical review officer, the record does not contain evidence that the lifting restriction rendered him unfit for his job. Moreover, the Organization contends that the Carrier ignored the conclusion from the Claimant's personal physician who did not believe that lifting restrictions were necessary and that he could perform his other job functions.

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 dispute. 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 and that the Carrier violated the Agreement when it did not convene a medical board as provided for by Rule 50.

The Carrier maintains that it has the discretion to implement reasonable medical standards that ensure employees can safely perform their job function. 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 Department and the Claimant's doctor, and therefore a medical panel as provided for in Rule 50 is not applicable to the dispute here.

It is well settled that the Carrier has the discretion to determine the physical qualifications of its employees where not limited by the Agreement. Here, the Carrier disqualified the Claimant based on the findings of its Medical Department. Contrary to the Organization's valiant argument, the dispute here is not a disciplinary matter but one where the Carrier has exercised its discretion to apply physical qualifications intended to ensure workplace safety based on the Claimant's fitness for duty. We find no basis to conclude that

the Claimant was disciplined when the Carrier removed him from service as a result of the medical disqualification.

Where a dispute arises between the Claimant's personal physician and the Carrier's decision to medically disqualify him, Rule 50 provides for a review by a medical panel that includes a third neutral physician, who is a specialist in the appropriate field of medicine. Here, however, the record does not contain a "dissenting opinion" that would initiate the creation of a medical panel.

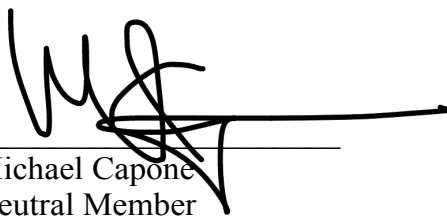
The Claimant's physician, Dr. Nathan Smith, provided medical documentation, dated February 18, 2016, indicating that his patient was able to meet the lifting requirements and fulfill the functions of his job. However, Dr. Smith makes his findings contingent upon the results of a "complete pulmonary function test . . . to evaluate for potential pulmonary issues." A review of the medical notes reveals that the examination was completed on February 19 and on March 2, 2016 it was determined that the Claimant suffered from COPD, which led to the subsequent restrictions. There is nothing in the record from the Claimant's physician, after February 19, 2016, that contradicts the Carrier's findings regarding the restrictions imposed and the disqualification, which was based on the results of the ensuing examinations. Without a "dissenting opinion" the provisions of Rule 50 do not apply.

Legions of arbitral awards have upheld the Carrier's ability to withhold employees from service where they cannot meet its applicable medical standards. The Carrier has the managerial prerogative to enforce reasonable safety standards, where not limited by the Agreement, particularly where employees in the railroad industry often perform dangerous work. Nothing in the record indicates that the physical qualifications set by the Carrier are unreasonable or that they were applied to the Claimant in an arbitrary manner.

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 Carrier did not violate the Agreement when it disqualified the Claimant from his position.

AWARD

Claim denied.



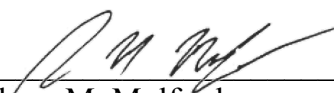
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18