

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 146
UNION PACIFIC RAILROAD COMPANY) Award No. 126
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: December 17, 2008

STATEMENT OF CLAIM:

1. Suspending Trackman Steve Milligan from service from October 19, 2007 through December 1, 2007 in connection with need for medical evaluation is unjust, unwarranted, and in violation of the Agreement (System File T07-32/1494455 MPR).
2. As a consequence of the violation outlined in Part (1) above, The Organization requests that Mr. Milligan be compensated for all wages lost while he was withheld from service from October 9, 2007 through December 1, 2007, with the exception of November 20, 2007, the Field Test Day of which Mr. Milligan has already been compensated. The Organization also requests that Mr. Milligan be compensated for the use of his personal vehicle in the amount of \$181.39 for mileage from Enid, Oklahoma to Inman, Kansas and back to Enid, Oklahoma. The Organization also requests that Mr. Milligan's personal record be cleared of any and all information regarding this incident.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On October 19, 2007, Claimant notified his new Track Supervisor that he was diabetic, had necropsy and that toward the end of the day he had difficulty walking without pain. The Track Supervisor withheld Claimant from service pending medical evaluation. Carrier referred

Claimant to a Carrier-selected doctor who examined Claimant on October 24, 2007, and released him to return to work without restrictions. However, the Carrier-selected physician's report was deemed deficient by Carrier's Health Services Department because it did not address Claimant's diabetes; his sleep apnea; and his metabolic, pulmonary, orthopedic and neurologic issues. Carrier referred Claimant for a sleep study which was conducted on October 30, 2007, and for a Field Safety Evaluation which was conducted on November 20, 2007. Carrier cleared Claimant to return to service and Claimant returned to service on December 1, 2007.

There is no question that Carrier has the right, indeed the responsibility, "to withhold employees when it has reason to believe their physical condition may not permit them to perform the duties of their assignment safely . . ." NRAB Third Division Award No. 36034. Such good faith medical judgments may only be overturned if they are arbitrary or capricious. It is clear that the decision on October 19, 2007, to withhold Claimant from service pending medical evaluation was a reasonable good faith judgment. Given the physically strenuous nature of a Trackman's duties, Claimant's indication that he had difficulty walking without pain and his other medical conditions certainly justified Carrier's decision to have him medically evaluated. There was no violation of the Agreement in the initial decision to withhold Claimant from service.

We further find that Carrier did not violate the Agreement when it did not return Claimant to service on October 24, 2007, even though the doctor to whom Carrier had referred Claimant released him to return to work without restrictions. The record is clear that Carrier made a reasonable medical judgment that, due to deficiencies in the doctor's examination and report, further evaluation was needed.

However, while Carrier has the right to require further medical evaluation, it has the obligation to do so with reasonable dispatch. Carrier did so with respect to the sleep study for which a report was rendered on October 30, 2007. However, the Field Safety Evaluation was not conducted until November 20, 2007, almost a month after the initial medical evaluation on October 24. Certainly, Carrier was entitled to a reasonable time to arrange for the FSE and to evaluate the results, but the record contains no explanation for the lengthy delay in the instant case. The delay is particularly troublesome in light of the fact that the deficiencies in the initial medical evaluation were deficiencies of a physician that Carrier selected, that is Claimant cannot be faulted in any way for the delays. We find it reasonable for Carrier to have a week to arrange for the FSE and a week to evaluate the results, but that any further delay requires an explanation, such as a showing that the FTE could not have been conducted earlier than it was. No such explanation appears in the record before us.

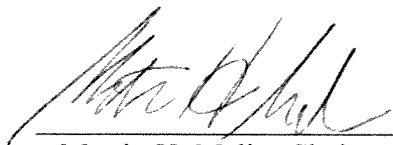
Accordingly, we shall sustain the claim to the extent that Carrier shall compensate Claimant for wages lost after November 15, 2007, except for November 20, 2007, for which he has already been compensated.

AWARD

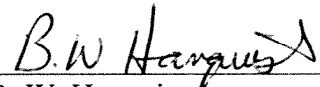
Claim sustained in accordance with the Findings.

ORDER


The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



B. W. Hanquist
Carrier Member 3-23-09



T. W. Kreke
Employee Member

Dated at Chicago, Illinois, February 26, 2009