

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 96
UNION PACIFIC RAILROAD COMPANY) Award No. 83
_____)

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

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier removed, withheld and medically disqualified Mr. M. Lewis from service on July 16, 2001 (System File MW-01-192/1286455 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Lewis shall now be compensated for eight (8) hours each workday at his respective straight time rate of pay and time to be credited toward Railroad Retirement, Vacation, and Hospitalization Benefits to begin on July 16, 2001, and through and including on a continuous basis until this matter is settled.

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.

Claimant is employed by Carrier as a Trackman, with seniority dating to 1979. On December 2, 1999, Claimant went on medical leave due to an on-duty injury to his back. He returned to active duty on June 2, 2000, but re-injured his back on August 8, 2000, when he again went on medical leave. Claimant returned to service on March 26, 2001, and worked until April 10, 2001. Claimant was removed from service and participated in a back hardening program from April 11 - May 25, 2001. Claimant was compensated at his Trackman's rate of pay during this period.

On May 22, 2001, Claimant underwent a Functional Capacity Evaluation and was released by Metropolitan Physical Therapy, which was providing the back hardening program, to return to work subject to a lifting restriction of 60 pounds occasionally, 30 pounds frequently and 12 pounds regularly. Claimant returned to active service and worked on May 29, 30 and 31, 2001 and was again removed from service with pay. Carrier's payroll records reflect that Claimant was paid for participating in another back hardening program from June 1 through July 2, 2001, worked as a Trackman on July 3, 5 and 6, 2001, and was off sick with pay on July 9 and 10, 2001. On July 16, 2001, Carrier notified Claimant that his lifting restriction could not be accommodated. The letter further advised Claimant, "If updated medical information is received, the Health Services Department will be glad to review the information and issue another fitness-for-duty decision." A notation in the record of the on-property handling states that Claimant was paid for the second half of July because the determination that Claimant was not medically qualified was received too late to change the second half payroll.

On September 7, 2001, the Organization filed a claim on Claimant's behalf, contending that the lifting restriction did not disqualify Claimant from performing the essential duties of a Trackman and alleging excessive delay on Carrier's part. On October 17, 2001, Claimant underwent another Functional Capacity Evaluation and was released for full duty without restrictions, based on a finding that he could lift 100 pounds occasionally, 50 pounds frequently and 20 pounds constantly. Carrier notified Claimant to return to duty on November 14, 2001.

The Board's role in reviewing a Carrier determination of medical disqualification is a narrow one. The standards was set forth succinctly in Public Law Board 6302, Award No. 8:

[I]t is well-established that Carrier has the right to withhold employees from service for medical reasons. Carrier is charged with the responsibility for the safety of the employees and its decisions to withhold employees for medical reasons should not be second guessed by a reviewing tribunal. The Board should overrule such a decision only where it is shown to have been made in bad faith or to have been arbitrary or capricious.

Throughout handling on the property, the Organization asserted that Claimant could perform as a Trackman even with the lifting restrictions set forth in the report of the May 22, 2001 Functional Capacity Evaluation. However, Carrier identified numerous Trackman's duties which it maintained Claimant could not perform as a result of the lifting restriction. These included: lifting hydraulic spike drivers, rail drills, rail dogs, and rail saws; removing and installing rail and removing and sliding ties; driving spikes with a spike maul; pulling spikes; and unloading ballast. The Organization disagreed with Carrier's characterization of these duties, but as a body that does not take testimony and one that is confined to the record developed on the property, we are unable to resolve such factual disputes as how heavy are items a Trackman must lift. We conclude that the Organization has failed to prove that Carrier's decision that Claimant's lifting restriction disqualified him from service as a Trackman was arbitrary, capricious or in bad faith.

The issue of excessive delay potentially concerns two periods of time. The first is the


period from May 22, 2001, the date of Claimant's first Functional Capacity Evaluation, through July 16, 2001, the date Carrier notified Claimant that he was medically disqualified. The record is silent as to why it took Carrier two months to act on the results of the Functional Capacity Evaluation. Indeed, we do not know the date that Carrier received the report. In any event, the delay did not prejudice Claimant because he was paid eight hours per day at his Trackman's rate through the second half of July 2001.


The second period is from July 16, 2001 through November 14, 2001. The Organization maintains that when Carrier disqualified Claimant on July 16, 2001, it was obligated to advise him what he had to do to return to service. However, Carrier's letter of July 16, 2001, specified the lifting restriction that provided the basis for his disqualification and further advised him, "If updated medical information is received, the Health Services Department will be glad to review the information and issue another fitness-for-duty decision." Thus, it is clear that Claimant was on notice that to seek a revision of the medical disqualification, he had to submit updated medical information.

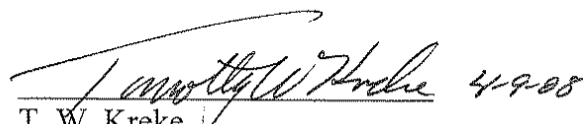
The updated medical information that Claimant ultimately submitted was the second Functional Capacity Evaluation of October 17, 2001. The record is completely barren of evidence as to when this updated information was submitted to Carrier. The copy in the record is stamped received by the Organization on November 5, 2001. There is no statement from Claimant as to what he did with the Evaluation and when he submitted it to Carrier's Health Services Department. Given that it was not received by the Organization for several weeks and given further that Claimant was notified by Carrier that he was deemed fit to return to service on November 14, 2001 but delayed exercising seniority to return to service for three weeks thereafter, we see no basis in the record for attributing any of the gap between the date of the Functional Capacity Evaluation and the date Carrier cleared Claimant to return to service to Carrier. Accordingly, the claim must be denied.

AWARD

Claim denied.


Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member 4-9-08


T. W. Kreke
Employee Member

Dated at Chicago, Illinois, March 31, 2008