File 2-3-770
UTU 443-69

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 235

AWARD NO. 1692
CASE NO. 4118

PARTIES TO DISPUTE:
UNITED TRANSPORTATION UNION
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

STATEMENT OF CLAIM: Claim in favor of Brakeman J. G. Romeo, Missouri Division, for July 13, 1969 and subsequent dates as listed for a day's pay each date listed plus overtime lost as indicated on time slips submitted, account being held out of service without reason by the Medical Department.

FINDINGS: This Board upon the whole record and all the evidence, finds that:

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

Based on reports that Claimant had suffered injuries while on duty due to fainting spells, Carrier instructed him to report for a physical examination, including an EEG, in June, 1969. Previous examinations had been made of him in November, 1968 and February, 1969, at the time the injuries occurred. The results of the June, 1969 examination, along with their opinions and evaluations, were submitted by the examining doctors to Carrier's Medical Director. The EEG report received by the Medical Director contained the following entry under the heading "History": "Seizures (patient said he has had infrequent blackout spells as long as he can remember." The report concluded that the EEG was abnormal and "could collate with an underlying convulsive disorder." On the basis of these reports, the Medical Director concluded that Claimant was not fit for service; as a result. Claimant was removed from service on July 13, 1969.

On July 24 Claimant wrote to his General Chairman stating that he had been told by the examining doctors that he was in good health, that Carrier had refused to give him the results of the examination or send them to his personal physician, that he had never had a fainting spell, and that he intended to have a thorough physical examination at his own expense to determine the truth of the Carrier's medical reports. The General Chairman wrote to Carrier's Director

of Labor Relations under date of July 29 stating his belief that Claimant was physically fit for service and had been wrongfully disqualified.

On July 29, 1969, Claimant underwent a complete physical by his own doctor, and an EEG. On July 31, Claimant's doctor wrote a letter describing his examination, stating that Claimant's EEG had been read as normal by an identified Des Moines neurologist, and concluding that he found no evidence of seizure disorders in Claimant. The letter from Claimant's doctor also stated that Claimant said that he had had no previous episode of passing out. This letter was sent to Carrier on August 13; meanwhile, the General Chairman had requested a re-examination by Carrier's medical department.

On August 29, Carrier's Director of Labor Relations wrote the General Chairman stating that Claimant had revealed no history of blackouts at the time of hire, that the examination of June, 1969 disclosed that "he had been subject to some kind of disturbance in consciousness for some years prior to his employment on the railroad", that a person with Claimant's condition "can not be qualified for train service and we know of nothing that would be gained by requiring (him) to undergo any further examination."

In response, on September 8 and 15, the General Chairman wrote enclosing affidavits from Claimant that he never had had any blackout incidents, and also enclosing evidence that Claimant was physically qualified as an airplane pilot. On October 1, the Director of Labor Relations replied, reviewing the case to date and requesting a copy of the Des Moines neurologist's report and selected strips of the actual brain wave tracings which he took of Claimant on July 29, for further analysis by the Medical Director. After analyzing this material, the letter continued, the Medical Director "will no doubt want (Claimant) to come to Chicago to have an evaluation."

There then followed considerable correspondence in which Claimant submitted the EEG report but not the strips, which he did not have (Oct. 14), Carrier requested the strips (Nov. 14), Claimant furnished Carrier with a release, Carrier wrote to the neurologist, he referred Carrier to Claimant's personal doctor, Carrier wrote to the latter (Dec. 17), and finally, a letter from Carrier on March 27, 1970 that it seemed apparent that the strips were not obtainable through Claimant's doctors and that therefore Carrier's Medical Director would have Claimant come to Chicago for a neurologist's consultation and complete EEG study.

The examination was held on May 15, 1970 and resulted eventually in Claimant's being restored to service beginning July 9, on a trial basis, subject to careful observation for fainting spells and to annual physical examinations; the question of pay for time lost for his time out of service, for which he had filed a claim, was left to the disposition of this Board.

There is no more difficult problem presented to a Board of this kind than the resolution of disputes resulting from conflicting claims, buttressed by conflicting medical evidence, as to the physical fitness of an employe for railroad service. This is particularly true when, as here, the agreement between the parties provides for no procedure for dealing with the problem. The right of the Carrier to assure that its train service employes are physically fit to perform their potentially dangerous duties is obvious and vital and must be assured. On the other hand, the effect of being declared physically unfit deprives an employe of his livelihood and may be little short of a disaster to him, and he must be assured of the right to question in a meaningful way the decision of the Carrier's medical department. Mistakes can be made by doctors, laboratory technicians and equipment; different conclusions can be reached by competent doctors evaluating the same medical data.

It is obvious that this Board is not qualified to make medical judgments. What it can and must do is assure that reasonable procedures are available and followed to protect the interests of both Carrier and employe. In the absence of procedures agreed upon between the parties, the Board must apply the test of reasonableness to the facts before it in each case to determine whether any rights have been abridged or denied. It is because each case must be judged on its own facts that the facts have been set forth in such detail in these Findings.

It is clear that Carrier's Medical Director and Director of Labor Relations relied heavily upon the belief that Claimant had been subject to seizures or blackouts over a period of years in reaching the conclusion that he should be disqualified from service. The Medical Director had every reason to believe so from the reports submitted to him and cannot be faulted in his initial determination to take Claimant out of service. However, the principal evidence in the record to support that belief was the asserted statement by the Claimant himself to the examining physician. When Carrier, in addition to Claimant's own representations, was supplied with a letter from Claimant's personal physician which stated that Claimant had told him that he had never suffered from blackouts, and that on the

basis of a thorough physical examination and EEG he found no evidence of seizure disorders in Claimant, serious doubts should have been raised in the minds of the Medical Director and Director of Labor Relations, as reasonable men, as to the dependability and validity of their original conclusion about the state of Claimant's health. Instead, at that point, in possession of that letter, the Director of Labor Relations repeated his belief that Claimant had suffered from these episodes for some years prior to his employment and concluded that no purpose could be served by further examination of Claimant. In our view, this was not a reasonable position for Carrier to take at that time; the reasonable position in view of the then apparent conflicting factual and medical opinion evidence would have been to arrange for Claimant to be re-examined as soon as possible.

On October 1, Carrier did change its position; at that time Carrier decided that it would be useful for its Medical Director to see and analyze Claimant's personally obtained EEG report and strips, after which he would "no doubt want to have (Claimant) come to Chicago to have an evaluation." There then followed nearly six months of delay in the abortive attempts to obtain the EEG strips until Carrier finally decided on March 27, 1970 to have Claimant re-examined without them.

We do not question Carrier's good faith in desiring to have the complete record of Claimant's privately obtained EEG examination; however, we do question its judgment in continuing Claimant out of service and making a re-examination contingent upon obtaining that record even after it had decided that it would have Claimant re-examined after the EEG strips were obtained. Under the circumstances, since a reasonable position would have required Carrier to arrange another examination after receipt of the letter from Claimant's doctor on approximately August 15, since Carrier controlled the situation there after, and since it appears from the record that Claimant did everything he could do to make his physical condition known to Carrier, we think that claimant is entitled to receive compensation for the period he was out of service between August 15, 1969 and March 27, 1970. There is no evidence of improper delay between the latter date and the date of the examination, May 15. However, after the examination, on June 22, Carrier offered to reinstate Claimant only if he would withdraw his claim for back pay; it was not until June 30

that this condition was withdrawn, and Claimant was not actually returned to service until July 9. We think Claimant is also entitled to compensation from June 22 to July 9. In the absence of evidence justifying unusual delay by Carrier between the examination on May 15 and reaching a medical conclusion on June 22, we feel that a fifteen day period should normally be sufficient for that purpose; accordingly, Claimant should also be compensated for the period from June 1 to June 22.

In summary, we sustain the claim for the periods August 15, 1969 to March 27, 1970 and June 1, 1970 to July 9, 1970.

AWARD: Claim sustained in accordance with Findings.

G. R. Maloney, Employe Member

A. E. Myles, Carrier Member

H. Raymond Cluster
Neutral Member and Chairman

Chicago, Illinois
December 13, 1972.