PUBLIC LAW BOARD NO. 7660
AWARD NO. 199

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier improperly withheld Mr. M. Homan from service beginning February 15, 2019 and continuing and refused to establish a Board of Medical Examiners as required by Rule 56 following a proper request by the Organization (System File B-1956C-201/1721239 CNW).

2. As a consequence of the violation referred to in Part (1) above, Claimant M. Homan shall be provided a Board of Medical Examiners and 'If it is concluded that the disqualification was improper, the employee shall be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification. The Claimant must be compensated for All man/hours of straight time and overtime at the applicable rates of pay, and any fringe benefit loss.' (Employes' Exhibit A-1)."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was hired by the Carrier on June 27, 2005, and was working as a Track Supervisor in the Engineering Department, when he went out on a MLOA for a serious cardiovascular condition, resulting in his having heart surgery involving aortic valve replacement and repair of an aortic aneurism, and him receiving a permanent cardiac pacemaker with lifelong medication in November, 2018. On February 15, 2019 Claimant's cardiologist, Dr. Kolbeck, released him to return to work on February 18, 2019 with a 30 pound lifting/pulling/pushing restriction until February 22, 2019, at which point he would have no restrictions. By letter dated February 27, 2019, Carrier's HMS cleared him to return with restrictions of occasional lifting/pushing/pulling up to 30 pounds, and a prohibition of working in environments with electromagnetic field exposure. It advised Claimant that these restrictions could not be accommodated by his supervisor, and gave him his options to exercise his seniority, provide updated medical information, participate in vocational counselling, or apply for disability retirement.

The Organization filed a claim on April 22, 2019 regarding Claimant not being permitted to return to work after being released by his doctor, and requested a third physician review board under Rule 56. Carrier's Chief Medical Officer (CMO), Dr. Holland, reviewed Claimant's history and medical documentation, consulted with an independent medical expert, Dr. Lowes, to consider the risk of harm for sudden incapacitation, and issued a Fitness for Duty (FFD) memo on May 10, 2019. Therein, it indicates that Dr. Lowes states that because Claimant had a complete heart block, he is considered pacemaker dependent, and would have a significant risk of loss of consciousness from syncope or cardiac arrest if the pacemaker were to malfunction, requiring permanent work restrictions for sudden incapacitation risk, as well as permanent activity restrictions (10 pound lifting restriction and no prolonged physical exertion in high heat and humidity or extreme cold conditions). As a result of the review, HMS issued permanent "sudden incapacitation" workplace restrictions including 8

different prohibitions (e.g. operating company vehicles or designated equipment, working near moving trains or from unprotected heights over 4 feet, working on a 1 or 2 man crew, 10 pound lifting restriction, etc.).

On May 31, 2019, the Carrier denied the Organization's claim noting its right to impose reasonable standards and restrictions to ensure that employees are medically and physically qualified to perform their job functions. The Organization's July 15, 2019 appeal asserts that the imposition of these additional medical restrictions constitutes a difference in medical opinion from Claimant's own doctor, bringing into play the third party review procedures agreed to in Rule 56. Carrier did not agree to undergo a third party panel review under Rule 56, and denied the claim on August 5, 2019. The Organization's January 17, 2020 appeal includes another medical note from Claimant's doctor, Dr. Kolbeck, dated November 25, 2019, stating that there was no reason for the medical restrictions and fully releasing Claimant for duty, indicating that he should avoid overly strenuous lifting. The Organization again notes the dissenting medical opinions, and claims that the restrictions imposed were arbitrary.

The Organization argues that Claimant was improperly withheld from service following 2 medical releases (February 15 and November 25, 2019), and was refused the appointment of a third party medical doctor to constitute a Board of Medical Examiners under Rule 56 despite Carrier's imposing permanent sudden incapacitation restrictions preventing Claimant from returning to work. It notes that the facts indicate a clear dispute as to Claimant's physical condition, and that the remedy set out in Rule 56 (including overtime) is appropriate in this case, citing PLB 7660, Awards 56, 97, 165, 173. The Organization asserts that the restrictions imposed on Claimant were arbitrary and improperly prevented him from returning to work.

Carrier contends that there is no meaningful dissenting opinion to the detailed medical documentation, or medical disagreement, since all doctors agree on the diagnosis and Claimant's condition, so Rule 56 is not triggered in this case. It stresses its obligation to ensure employees are safe to perform work by enforcing reasonable work restrictions, which it did in this case based on Claimant's diagnosed medical condition, citing Third Division Awards 28505, 31317; PLB 910, Award 225; SBA 1016, Award 27. Carrier argues that its imposition of "sudden incapacitation" restrictions was not arbitrary, capricious or in bad faith, and that the Organization has failed to meet its burden of proving that. It maintains that since Carrier is charged with the responsibility for the safety of its employees, its decision to withhold employees and set reasonable restrictions should not be second-guessed by a reviewing tribunal, relying on PLB 6302, Award 9.

A careful review of the record convinces the Board that the Organization has failed to meet its burden of proving that the sudden incapacitation restrictions imposed by Carrier in this case were arbitrary, capricious or in bad faith. It is well established that the Carrier has the duty and responsibility to ensure the safety of its employees and to set reasonable medical restrictions, as well as the authority to decide the physical qualification of its employees and to disqualify those who it deems cannot meet its medical standards. The Board 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. See, e.g. PLB 7660, Award 62, 94; First Division Award 28138.

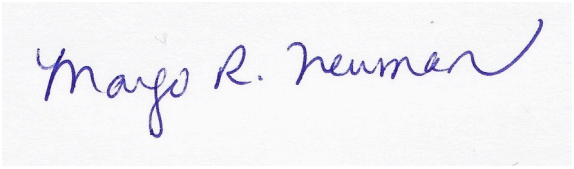
However, that does not dispose of the issue in this case, since the Organization's claim protests Carrier's refusal to convene a Medical Board of Examiners under Rule 56(B), and requests that one be established. Rule 56 provides a procedure for a third party specialist to head a Board to review the medical information and determine fitness for duty if the Claimant's doctor and Carrier's CMO "should disagree as to the physical condition of such employee…" Carrier asserts that there was no such disagreement

because both doctors agreed upon Claimant's diagnosis. In Award 173, which also dealt with sudden incapacitation restrictions, this Board held that Rule 56 applies to situations where there are conflicting opinions regarding work restrictions. An agreement on diagnosis is not the same as an agreement on "physical condition" which is the language used in Rule 56(B). In this case, Claimant's doctor imposed minimal restrictions and Carrier's CMO imposed extensive permanent restrictions which could not be accommodated in railroad work. Once it became clear - at least after Dr. Kolbeck's November 25, 2019 release with only an "overly strenuous" lifting restriction - that there were conflicting medical opinions regarding work restrictions, Carrier was obliged to convene the Medical Board requested by the Organization to determine Claimant's fitness for duty. Its failure to do so violates Rule 56. Cf. First Division Award 28138. The facts in this case, with respect to the existence of a dissenting opinion, distinguish it from PLB 7660, Award 62.

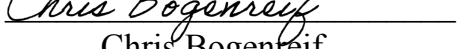
Therefore, Carrier is directed to follow the process outlined in Rule 56(B) to convene a Board of Medical Examiners to determine Claimant's fitness for duty considering complete and up-to-date medical information. Once such process is followed, Rule 56 sets forth the remedy in the event the disqualification is found to have been improper.

AWARD:

The claim is sustained, in part. The Carrier is ordered to make the Award effect on or before 30 days following the date of the Award.

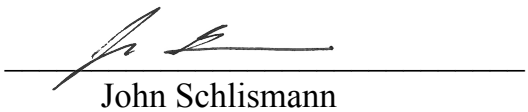


Margo R. Newman
Neutral Chairperson



Chris Bogenreif
Carrier Member

Dated: January 18, 2023



John Schlismann
Employee Member

Dated: January 18, 2023