

PUBLIC LAW BOARD NO. 7660  
AWARD NO. 202

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY  
(FORMER SOUTHERN PACIFIC TRANSPORTATION  
COMPANY (WESTERN LINES))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s medical withholding of Mr. R. West from service, commencing March 20, 2020 was without justification or cause (System File B-2032S-201/1739261 SPW).
2. The Carrier’s refusal to convene a Rule 32 special panel of doctors regarding Claimant R. West’s ability to return to service was arbitrary, unwarranted and in violation of the Agreement.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, the Carrier shall provide Claimant R. West ‘... all man hours of lost work, vacation credited for all time lost, loss of credit for railroad retirement months of service, and compensation for any loss of benefits made at the applicable rates of pay for the position last held.’ (Employees’ 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 working as a B&B Foreman when he fell from his truck in January, 2020, resulting in a head injury (left subdural hematoma) requiring craniotomy surgery with a drain. He experienced 3-4 episodes of dysplasia, and despite never having a seizure, he was placed on anti-seizure medication. His neurosurgeon, Dr. Moore, submitted a return to work release for Claimant without restrictions on March 20, 2020. After a review of his medical records, Carrier's HMS Department placed Claimant on "sudden incapacitation" work restrictions (e.g. no operation of company vehicles or equipment, no working near moving trains or at unprotected heights over 4', no work on a 1 or 2 man crews, etc.) on April 10, 2020, and he was informed that the Engineering Department could not accommodate these restrictions.

Claimant had his treating physician, Dr. Bigley, review the imposed restrictions, and, by letter dated May 8, 2020 he indicated that, since Claimant responded well to the medication, never lost awareness, and had no further episodes since February 1, his license was not restricted. Dr. Bigley agreed with Dr. Moore's March assessment that Claimant did not need restrictions of either driving or work. When Carrier failed to remove the restrictions, Claimant was examined by Dr. Moore's Physician Assistant, who indicated in a letter dated May 19, 2020 that there was no need to impose work restrictions on Claimant as he has no ongoing neurosurgical needs. On May 27, 2020 Claimant authorized the release of his full medical records to Carrier, who did not change its position regarding his restrictions.

The Organization filed a claim on June 9, 2020 regarding Claimant not being permitted to return to work after being fully released by two doctors and a physician assistant, and requested that a special panel of doctors be impaneled under Rule 32,

selecting Claimant's neurosurgeon Dr. Moore as his specialist. On July 20, 2020, the Carrier denied the Organization's claim noting that it conducted its normal FFD process, that Carrier is responsible for the safety of its employees and is entitled to set and enforce reasonable medical standards, and that HMS' determination of FFD is to be accepted unless it is shown to be arbitrary or capricious. The Organization's September 2, 2020 appeal specifically requests that the Rule 32 procedure be followed, noting that the only requirement is that Claimant does not agree with the restrictions. In its October 29, 2020 denial, Carrier asserts that the diagnosis (traumatic brain injury) is not in question, so there is no entitlement to a Rule 32 medical panel, and that the case is about Claimant's physical condition and not the assessed restrictions. It notes that it has the right to determine FFD.

By letter dated March 11, 2021, Carrier denied Claimant's request for reconsideration. The Organization's April 13, 2021 appeal includes a note from Claimant dated January 18, 2021 indicating that he had his DOT physical on July 1, 2020 and passed all requirements, getting his CDL and medical card with no restrictions for one year. Carrier's July 23, 2021 response includes a letter from CMO Gillis stating that she did consult with Claimant's doctor as well as a UNMC specialist, who agreed with the diagnosis and restrictions imposed. It notes that Claimant applied for, and was approved for RRB disability. Again on July 26, 2021 the Organization requested that a proper panel be selected under the agreed procedure set forth in Rule 32. Carrier's August 23, 2021 response again states that there is no disagreement over Claimant's physical condition, so no such panel is required. None was held.

The Organization argues that Claimant was improperly withheld from service following his doctors' medical releases to return to work without restrictions sent to Carrier on March 20, May 8 & 19, 2020, and was refused the appointment of a special panel of doctors under Rule 32. It notes that such panel was properly and repeatedly

requested, and that Rule 32 only necessitates that the affected employee feels that his disqualification is not warranted, which Claimant communicated to Carrier, and does not require a specific disagreement on the physical condition of the employee prior to empaneling the Rule 32 special panel of doctors, citing Third Division Award 41499. The Organization requests that the procedure agreed to in Rule 32 be ordered, and that Claimant be compensated for the delay in returning him to work and failure to undertake the Rule 32 process in a timely manner.

Carrier contends that there is no dispute as to Claimant's diagnosis, so Rule 32 is not triggered in this case. It stresses that it is Carrier's obligation to ensure employees are safe to perform work and to enforce reasonable work restrictions, citing Third Division Awards 31317, 28505. Carrier argues that it tailored Claimant's restrictions to his specific diagnosis, and that its continued withholding of Claimant 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, it is entitled to rely upon the CMO's finding that Claimant was not presently fit to return to duty, a conclusion that should not be second-guessed by a reviewing tribunal, relying on PLB 7660, Award 94. Carrier also argues that the remedy requested is excessive and speculative.

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 on April 10, 2020 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, both from the perspective of Carrier's insistence on continuing those restrictions after receiving information from Claimant's treating physician and specialists disagreeing with the necessity for such (or any) restrictions as well as the fact that the DOT physical conducted on July 1, 2020 resulted in his receipt of a medical card without restrictions and a CDL. Under these circumstances, the Organization's assertion that Carrier's refusal to agree to the procedure for a special panel of doctors under Rule 32 is violative of the Agreement, is found to have merit.

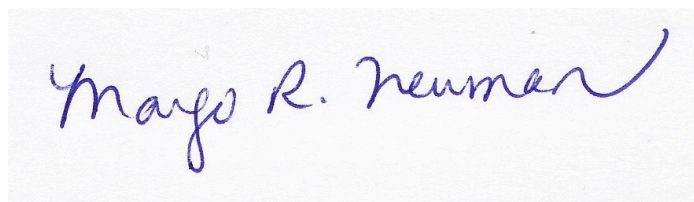
Rule 32 provides a procedure for a special panel of doctors to be empaneled - one specialist selected by Claimant and the other by the Carrier, to confer "and if they do not agree on the physical condition of the employee," to agree upon a third specialist to head a panel to meet with Claimant for examination, with the decision of the majority of the panel concerning the employee's FFD or any modification of restrictions to be controlling. Unlike Rules 50 or 56 existing in other Agreements on different properties, in order to invoke Rule 32, the disqualified or restricted employee need only "feel that such disqualification is not warranted..." The only mention of a difference of opinion between doctors occurs after the Rule 32 process has commenced, and the two designated doctors disagree. In this case, Carrier was obliged to convene the special panel of doctors requested by the Organization to determine Claimant's fitness for duty. Its failure to do so violates Rule 32.

With respect to the appropriate remedy, a direction that a Rule 32 panel of doctors be established may be insufficient in this case, as the record reflects that, due to Carrier's continued insistence on maintaining the sudden incapacitation restrictions despite

multiple physicians and the DOT's disagreement on their necessity, Claimant elected to apply for, and was granted, a RRB disability. Thus, his ability to return to work after the Rule 32 process is undertaken has been effectively nullified. It appears that the period after all of Claimant's medical specialists released him to return to work without restrictions and the DOT issued him a CDL and unrestricted medical card (July 1, 2020), until his receipt of RRB disability benefits appropriately constitutes the period for which Claimant shall be made whole by receiving compensation for lost straight time wages and benefits which he would have received during that period. Had Carrier agreed to proceed by means of the Rule 32 process requested by the Organization, rather than continually refusing and forcing Claimant into the decision to apply for RRB disability, it may well have resulted in the Board not ordering a compensatory remedy. Claimant's make whole remedy shall include credit with the RRB for months of service from July 1, 2020 until his receipt of disability.

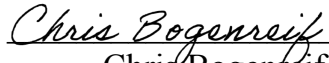
AWARD:

The claim is sustained in accordance with the Findings. The carrier is ordered to make the Award effective on or before 30 days following the date of the Award.



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Margo R. Newman  
Neutral Chairperson

  
Chris Bogenreif  
Carrier Member

  
John Schlismann  
Employee Member

Dated: January 18, 2023

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