

PUBLIC LAW BOARD 7660

PARTIES) UNION PACIFIC RAILROAD COMPANY [FORMER
) SOUTHERN PACIFIC TRANSPORTATION COMPANY
) (WESTERN LINES)]
)
TO) VS.
)
DISPUTE) BROTHERHOOD OF MAINTENANCE
) OF WAYEMPLOYES DIVISION –
) IBT RAIL CONFERENCE

Public Law Board 7660 consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s medical withholding of Mr. R. Lopez from service, commencing April 20, 2020, was without justification or cause and in violation of the Agreement (System File M-2032S-501/1739511 SPW).
2. The Carrier’s refusal to convene a Rule 32 special panel of doctors regarding Claimant R. Lopez’s ability to return to service was arbitrary, unsupported, unwarranted and in violation of the Agreement.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, the Claimant R. Lopez shall now ‘... be returned to service immediately and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant to be reimbursed for all losses related to personal property that he has now which may have been taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this non-voluntary removal from service. ***’ (Employees’ Exhibit ‘A-1’).”

FINDINGS:

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

The Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934. The Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Claimant established and held seniority in the Carrier's Maintenance of Way and Structures Department, was working as a Bridge and Building Assistant Foreman with twenty-three (23) years of service. On April 17, 2020, the Claimant and his Manager stumbled on a bridge. His Manager observed the Claimant struggling to walk and losing his balance, almost falling from a bridge when transitioning from a sitting to a standing position. On the same date, his Manager submitted a manager's referral for fitness for duty evaluation of the Claimant. On April 20, 2020, his Manager verbally informed the Claimant that he was removed from service. The Claimant contacted HMS, who reviewed in detail with him the manager referral form, comments, and manager referral process. The HMS notes indicate the Claimant disagreed with his Manager's statements and denied the medical condition. The Claimant reported he could perform his duties. The Claimant was examined by his physician and submitted documentation that he could return to work on April 24, 2020. The Carrier requested additional records, tests, and examinations and continued to withhold him from service.

On June 19, 2020, the Organization filed an initial claim against the Carrier, alleging violations of the parties' Agreement but not restricted to Rules 1, 10, 26, 28, and 32 when the Carrier improperly removed the Claimant from service. The Carrier, in a letter dated August 9, 2020, denied the claim, arguing their actions were justified due to the Claimant's observed inability to perform his job safely, HMS was still reviewing the records on the Claimant, and the Carrier had to determine whether the Claimant had recovered from his unexplained heat-related illness. The Organization then appealed the Carrier's decision on October 8, 2020, alleging the Claimant has followed all carrier-requested medical tests and submitted all documentation since April 24, 2020, and despite the multitude of alleged medical concerns, the Carrier has failed to provide any proof that a medical condition exists in relation to the Carrier's concerns or that would prevent the Claimant from

performing all of his assigned duties, and requested a special panel of doctors be convened to resolve the dispute. By letter dated November 30, 2020, the Carrier denied the appeal. A claims conference was conducted on May 19, 2021, without resolution. The Organization submitted a post-conference letter on August 18, 2021, and the position of the Carrier remained the same from its response. This claim is before this Board for final resolution.

A review of the Statement of Claim indicates Section 2 of the claim was filed alleging a violation of Rule 32, consistent with on-property correspondence discussion of the same. Rule 32 reads in pertinent part:

"RULE 32 - PHYSICAL EXAMINATIONS

1. (a) **HELD OUT OF SERVICE DUE TO PHYSICAL DISQUALIFICATION -**
An employee removed from service by the Company due to physical conditions will be advised in writing at the time of such action. In such cases the Company may require the employee to submit to physical examination prior to returning to service."
2. (b) **PHYSICAL DISQUALIFICATIONS -** If an employee is disqualified from service or restricted from performing service to which he is entitled by seniority on account of his physical condition, and feels that such disqualification is not warranted, the following procedure will govern.

A special panel of doctors consisting of one doctor selected by the Company specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; one doctor to be selected by the employee or his representative specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering; the two doctors to confer, and if they do not agree on the physical condition of the employee they will select a third doctor specializing in the disease, condition or physical ailment for which the employee is alleged to be suffering.

Such panel of doctors will fix a time and place for the employee to meet with them for examination. The decision of the majority of said panel of doctors of the employee's physical fitness to remain in service or have restrictions modified will be controlling on both the Company and the employee. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the employee change."

The Board has thoroughly examined the on-property record established for this dispute and considered the awards referenced by both parties to support their respective arguments. It is generally understood that the Carrier is obligated to ensure that all its employees are physically capable of carrying out their job responsibilities. Further, the Board acknowledges the Carrier's authority to oversee health standards and the industry's responsibility to ensure that employees can safely perform their assignments without being hindered by physical conditions. However, the purview of this Board is contract interpretation and application only.

The record indicates in addition to the bridge incident, the Claimant's Manager observed him having ambulation problems for a year before the incident, i.e., struggling to ascend/descend stairs, go from sitting to standing, go from kneeling to standing, walk along uneven surfaces, get in and out of the truck. His Manager also reported the Claimant has not attempted to climb a ladder or scaffolding while in her presence. The Claimant's Manager stated his coworkers have reported concerns. Thus, based on the Manager's report, the Board finds the Carrier had sufficient information to remove him from service by the Company due to physical conditions for a fitness for duty evaluation.

The record reflects his Manager gave him verbal notice contrary to the terms of Rule 32. The record demonstrates the Claimant contacted HMS the same day, and the nurse informed him of the particulars of the Manager's referral and the process. The Claimant gained sufficient knowledge to report to his physician for an evaluation. During the same conversation, the Claimant denied the allegations and affirmed that he could physically perform his duties. Thus, the Claimant first gave notice he felt the disqualification was unwarranted on April 20, 2020. The Claimant was examined by his physician on April 23, 2020, and his physician cleared him to return to work on April 24, 2020. The Carrier continued withholding the Claimant from services and requested additional documentation, tests, and examinations.

The Board finds the Carrier violated Rule 32 of the Agreement by failing to reinstate the Claimant to duty on April 24, 2020, or to invoke the special panel of doctors to determine his fitness for duty. Accordingly, the Carrier shall compensate the Claimant for his net wage loss from April 24, 2020 through the date he returned to work.

AWARD

Claim sustained in accordance with these findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Meeta A. Bass

Meeta A. Bass
Neutral Chairperson
Dated: Sept. 28, 2023

Chris Bogenreif

Chris Bogenreif
Carrier Member
Dated: September 29, 2023

John Schlismann

John Schlismann
Organization Member
Dated: September 28, 2023