

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad Company

Case No: 165  
Award No: 165

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s medical withholding of Mr. C. Swait from service, commencing June 22, 2018 was without justification or cause (System File B-1850U-203/1708876 UPS).
2. The Carrier’s refusal to convene a Rule 50 medical board regarding Claimant C. Swait’s ability to return to service was arbitrary, unsupported, unwarranted and in violation of the Agreement.
3. The claim as presented by Vice Chairman B. Rumler, by letter dated July 19, 2018, to Carrier’s representative B. Ince shall be allowed as presented because said claim was not disallowed by the Carrier in accordance with Rule 49.
4. As a consequence of the violations referred to in Parts 1 and/or 2 and/or 3 above, the Carrier shall provide Claimant C. Swait with compensation for all hours at the straight time rate of pay and any and all hours of overtime compensation and any lost allowances that would have been worked and earned by Claimant had he not been prevented from returning to his assigned position, payment to be made at the applicable rate of pay for the position and Claimant must also be made whole, fully compensated and recover all loss of fringe benefits.”

## **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. Parties to said dispute were given due notice of hearing thereon.

Claimant was working as a System Laborer assigned to Gang 9063 on April 18, 2018. According to Claimant's Medical Comments History, Claimant lost consciousness after exiting the crew bus, fell down and did not recall what had happened. Claimant's Supervisor, Colter Davis, reported Claimant's health condition to Carrier Health & Medical Services (HMS) the evening of April 18, 2018. Claimant was seen at the local emergency room and submitted 17 pages of medical records to begin his fitness for duty evaluation.

Claimant was placed on 30 days medical leave and HMS requested a comprehensive cardiac evaluation to determine the cause of Claimant's reportable health event. Claimant was ordered to undergo a 30-day evaluation and a Holter monitor was utilized to monitor Claimant's heart.

Carrier imposed sudden incapacitation risk work restrictions upon Claimant. These work restrictions are considered permanent but can be reconsidered if Claimant's medical condition improved. Claimant's work group could not accommodate these permanent sudden incapacitation risk work restrictions and Claimant was not authorized to return to work.

On June 22, 2018, Claimant, who had completed thirty (30) days of cardiac monitoring to which he was directed by the Carrier, was returned to full duty work without restriction by his cardiologist. The Carrier was notified that the Claimant was medically cleared to return to work, yet the Carrier continued to withhold the Claimant from duty.

By letter dated July 19, 2018, the Organization filed a claim on behalf of the Claimant. The Organization challenged Carrier's: (1) failure to timely deny the original claim with the required reasons under Rule 49 of the Agreement and its failure to thereafter allow the claim as presented; (2) failure and refusal to return the Claimant to service and the enjoyment of his rights under Rules 28, 35 and 36, upon his medical release back to full, unrestricted duty on June 22, 2018; and (3) failure to comply with Rule 50 when it refused to impanel a medical board as requested by the Organization. Rule 50 states, in relevant part that:

- (a) **DISQUALIFICATION** - When an employee is withheld from

duty because of his physical or mental condition, the employee or his duly accredited representatives may, upon presentation of a dissenting opinion as to the employee's physical or mental condition by a competent physician, make written request upon his employing officer for a Medical Board.

(b) **MEDICAL PANEL** - The Company and the employee will each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians will appoint a third neutral physician, who will be a specialist on the disability from which the employee is alleged to be suffering.

(c) **MEDICAL FINDINGS** - The Medical Board thus constituted will make an examination of the employee. After completion they will make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the condition of the employee will be final.

The Carrier denied this claim by letter dated August 6, 2019. The Carrier asserted they did not violate the parties' Agreement when it imposed sudden incapacitation risk work restrictions upon Claimant following his April 18, 2018 reportable health condition. The Carrier argues they have the right and obligation to assess Claimant's ability to work safely. Carrier's Medical Rules require employees that have experienced such an event to undergo a Fitness-for-Duty evaluation by HMS prior to returning to his/her job. The list of health events includes loss of consciousness. HMS must determine whether Claimant is medically and functionally able to safely perform his/her job. HMS followed the above-mentioned process in response to Claimant's reportable health event and determined sudden incapacitation risk work restrictions were necessary under the circumstances. The Carrier maintains the right to refer employees for evaluation and withhold employees from service for medical reasons. The Carrier contends that because the Organization did not present a dissenting medical opinion, Rule 50 is inapplicable, and no medical review panel was justified. Because the parties were unable to resolve the matter on the property, the issue is now before this Board for final adjudication.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. A careful review of the record convinces the Board that the Organization provided sufficient evidence to establish a violation of the Agreement.

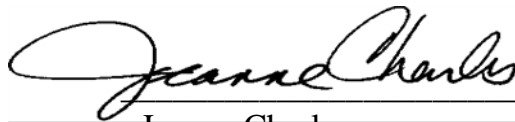
Regarding the procedural objection raised by the Organization that the Carrier's response was defective because it violated Rule 49 by not providing a reason for the denial, the Board does not find this as a basis to allow the claim. The Organization argues

that the Carrier provided a "generic" reason for the denial and departed from its practice of providing detailed reasons for the denial. While providing a generic reason does not serve the process by fostering on-property resolution of a claim, it does not violate the plain language of Rule 49. Rule 49 requires written reasons for disallowing a claim. The Carrier stated the "reason" as the Organization's failure to "provide documents or evidence in support of its allegations." (Employees' Exhibit A-2).

On the merits, there is no question that the Carrier has the right and obligation to withhold employees from service who are medically unqualified. However, this claim is also regarding the Carrier's refusal to convene a Medical Review Panel pursuant to Rule 50 where there is a dissenting medical opinion from that of the Carrier. In this case, Claimant's physician cleared him to return to work which is a dissenting view from the Carrier's permanent restriction. This circumstance falls squarely within the language of Rule 50. The Carrier's failure to convene the Medical Board was a violation of the Agreement. A Medical Board shall be convened.

### **AWARD**

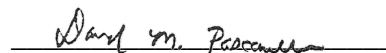
1. Claim sustained in accordance with the findings of the Medical Board.
2. A Medical Board shall be convened.
3. If the Medical Board finds that Claimant was improperly withheld from service, the Claimant will be compensated for actual loss of earnings, if any. In that case, the Claimant must be made whole from the date of the claim on July 19, 2018.
4. The Board hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Jeanne Charles  
Neutral Member



William Ince  
Carrier Member  
Dated: March 30, 2021



David M. Pascarella  
Labor Member  
Dated: March 30, 2021