

**PUBLIC LAW BOARD NO. 7660**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT**

**and**

**UNION PACIFIC RAILROAD COMPANY**

**Case No: 61  
Award No: 61**

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier medically withheld Claimant D. Bullock from service beginning on March 24, 2015 (System File B-1532U-201/1631206 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Bullock ' ... must be compensated for **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.' (Emphasis in original)."

**FINDINGS:**

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employees Division – IBT (hereinafter referred to as the “Organization”) and the Union Pacific Railroad Company (hereinafter referred to as the “Carrier”). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Darryl Bullock, is employed by the Carrier as a Welder. After a medical leave of absence and surgery to remove a tumor, the Claimant presented the Carrier

with medical documentation that he could return to work on June 18, 2015. The Carrier's medical department reviewed his medical reports and issued a "sudden incapacitation" restriction that prevented the Claimant from qualifying for his job until March 2016. The Organization filed its claim on July 11, 2015 stating that the Claimant was improperly prohibited from returning to work. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final written decision on October 22, 2015. The parties addressed the dispute in conference on December 8, 2015 with no change in the parties' position. The Claimant was not permitted to resume his job function after March 2016 since the Carrier determined that his work restrictions could not be accommodated and therefore, he was unable to continue in his welding position. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

### **Relevant Contract Provisions**

#### **RULE 32 - PHYSICAL EXAMINATIONS**

(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.

(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 Company and the employee will be separately responsible for any expenses incurred by the doctor of their choice. The Company and the employee will each be responsible for one-half of the fee and expense of the third member of the panel.

(c) LIGHT DUTY, INCAPACITATED EMPLOYEES - By agreement between the Company and the General Chairman or his authorized representative, employees subject to the scope of this agreement who have been disqualified because of a physical condition from performing the full duties of their regular assignments may be used to perform such light work within their capability to handle, as is or can be made available.

The Organization contends that the Carrier arbitrarily refused to permit the Claimant to return to work after he submitted medical documentation indicating he could resume his job function without restrictions. The Organization asserts that the Carrier prevented the Claimant from returning to work without having him examined by its own medical officer.

The Organization argues that the Carrier violated Rule 32 of the Agreement when the Claimant's request to be examined by a third party doctor was ignored. The Organization maintains that instead of applying the process outlined in Rule 32, wherein an independent doctor is selected by each party's respective medical practitioner, the Carrier appointed another doctor of its own choosing to review the Claimant's medical condition. The Organization claims that based on the Carrier's doctors' review of the medical documentation submitted by the Claimant he was subjected to a "sudden incapacitation" restriction for 12 months. It maintains that the Carrier's doctors reached erroneous conclusions regarding the type of surgery performed on the Claimant and therefore incorrectly decided to prevent him from returning to work.

Further, the Organization avers that even if the Board finds that the Carrier had good cause to keep the Claimant from returning to service for one year as provided for by federal regulation, he should have been reinstated to his position on March 28, 2016. However, claims the Organization, the Carrier has not allowed the Claimant to return to work and

subsequent attempts by the Claimant to return to work have been blocked by the Carrier without justification.

The Carrier argues that its ability to implement medical standards and withhold from service employees who cannot safely perform their duties is well established in the industry and not restricted by the Agreement. It maintains that based on Federal Motor Carrier Safety Administration (“FMCSA”) guidelines the Claimant was prohibited from resuming service in March 2016 due to the “sudden incapacitation” restriction.

The Carrier contends that the Organization has not met its burden of proof that Rule 32 was violated. It argues that the Claimant never selected a physician to confer with its medical doctor and therefore, the requirement that the two physician’s confer was not met. As such, asserts the Carrier, the record does not contain any evidence that there was a disagreement between each parties’ physician. The Carrier also asserts that the Claimant rejected alternative work assignments and training.

The Board finds that the Carrier violated Rule 32 when it did not provide the Claimant with the opportunity to have the medical dispute regarding his physical disqualification submitted to a third doctor in accordance with paragraph (b) of the rule after the 12-month period. Our finding here recognizes that there is ample authority to withhold employees from service where there is evidence of a serious medical condition that can create a risk to the safety of the employee and others. The Carrier’s decision to place the Claimant in the “sudden incapacitation” restriction for 12 months was not arbitrary. Nothing in the record casts doubt that the Carrier acted in accordance with FMCSA guidelines.

However, the Carrier prohibited the Claimant from returning to his position when the 12-month period ended despite the continued efforts of the Claimant and the Organization to have his medical disqualification reversed. The Organization cited Rule 32 in its initial claim letter of July 11, 2015, wherein it made clear that it believed that there was a dispute between the finding made by the Carrier’s medical officers and the Claimant’s physicians. It continued to cite its disagreement with the conclusions made by the Carrier’s physicians

throughout the on-property handling of the dispute that continued after March 2016.

The Carrier's response, dated October 22, 2015 wherein it dismisses the Organization's claim that a violation of Rule 32 occurred is misguided. The Rule states, "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." The documentation in the record indicates that the medical documentation submitted by the Claimant contains conclusions by his physicians that he could return to work without restrictions. At no time after the 12-month period ended and after the repeated efforts by the Claimant to return to work did the Carrier make an effort to examine him or confer with his doctors.

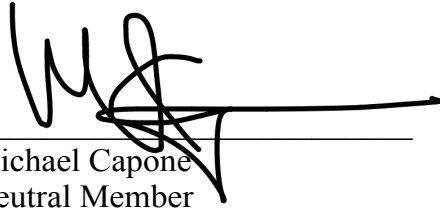
The record contains substantial documentation submitted by the Organization and the Claimant that clearly establishes that there was a disagreement between the Carrier's physicians and the Claimant's. As such, he is entitled a review of his medical condition as provided for by the Agreement between the parties since there was sufficient notice provided to the Carrier that there was a dispute and that the Organization was seeking a review by a panel of doctors as provided for by Rule 32.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Claimant is entitled to have his medical status reviewed by the panel of doctors in accordance with Rule 32. Should the determination by the panel find that the Claimant would have been physically capable to return to his job function without restrictions at the end of the 12-month "sudden incapacitation" period, the Claimant shall be made whole in accordance with the claim from the end of the 12-month period unless the panel determines that he became medically qualified at a later date, whereupon the Claimant shall be made whole from the date so specified by the panel. Where the panel concludes the Claimant is physically disqualified from his welder position the Claimant's continued employment status with the Carrier shall be governed by the applicable provisions of the Agreement.

It is so ordered.

**AWARD**

Claim sustained in part, denied in part.



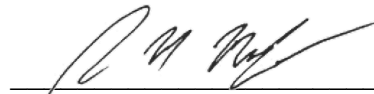
Michael Capone  
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden  
Carrier Member

Dated: 05/15/18



Andrew M. Mulford  
Labor Member

Dated: 5/15/18