PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

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

Case No: 80
Award No: 80

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier's disqualification of Mr. S. Bolanos on May 25, 2016 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File AE-1632S-102/1664755 SPW).

2. As a consequence of the Carrier's violations referred to in Part 1 above, Claimant S. Bolanos shall' ... be compensated all hours from May 25, 2016 until he is returned to service. Furthermore, we request that the employee be returned to service immediately and that the Carrier compensate employees (sic) for any additional expenses he incurred because of the Carrier's wrongful termination and/or removal from service in which Claimant was not accorded due process or any other rights listed within Rule 45 or Rule 32. Lastly, said compensation shall be in addition to any payment the Claimants (sic) may have already received.'"

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 Employes 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, Sergio Bolanos, is employed by the Carrier as a Track Supervisor. On May 25, 2016, the Claimant was removed from service pending medical evaluation after he approached his supervisor and stated he was having memory lapses and difficulty paying attention to detail and following procedures when performing his job as a result of a motor vehicle accident in 2003 when he was 17 years old.

The Organization filed its claim on July 6, 2016 stating that the Claimant was improperly withheld from service without written notice in violation of Rule 32(a), Physical Examinations and Rule 45, Hearings. The record indicates that the Carrier denied the appeals by the Organization and rendered its final written decision on October 27, 2016. The parties addressed the dispute in conference on January 17, 2017 with no change in the parties' 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.
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> 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.
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> (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 violated the Agreement when it failed to provide the Claimant with written notice as to the reasons he was removed and withheld from service, without any instructions as to what steps he needed to take to return to work. It argues that the Carrier's action were arbitrary and capricious.

The Organization maintains that the Claimant was removed from service without any medical evaluation. As such, it avers that the Carrier had no basis to determine that the Claimant could not perform his job safely. The Organization relies on arbitral precedent that the Carrier's decision to disqualify the Claimant must be based on a "rational basis" and on "some reasonable standard". See National Railroad Adjustment Board ("NRAB") Third Division Award No. 25186.

The Carrier asserts that the Organization has not met its burden of proof that it violated the Agreement. It acknowledges that the Claimant was not advised with written notice of his removal from service. The Carrier argues however, that such notice was not necessary since it was the Claimant who "self-reported" his concerns to his supervisor about being unable to perform his job safely. The Carrier contends that the Claimant's own

concerns were premised on his cognitive failures and previous incidents where he did not perform his job safely and caused injury to a co-worker. It maintains that by approaching his supervisor the Claimant effectively removed himself from service negating the need for written notice and relieving the Carrier from any compensatory liability for his time out of service.

The Carrier maintains that its decision to disqualify the Claimant was based on sound medical standards. It avers that the Claimant communicated with the Carrier's Medical Department throughout the medical evaluation period and requested a medical leave of absence. The Carrier argues that its ability to implement medical standards and withhold from service employees who cannot safely perform their duties from is well established in the industry and not restricted by the Agreement.

The Carrier contends that withholding the Claimant from service did not constitute discipline and therefore, he was not subject to the disciplinary procedure rules contained in the Agreement. It cites numerous awards from boards of adjudication in the industry, which conclude that disqualification for medical reasons is not a disciplinary action.

The Board finds that the Carrier did not violate Rule 32(a) in not providing the Claimant with written notice when he was removed from service. The Claimant's own statements, given to his supervisor voluntarily and without coercion of his concerns regarding his health and ability to perform his job did not require any additional notice. The Claimant is estopped from claiming he is entitled to written notice where there is nothing in the record to contradict the documentary evidence that his own statements initiated withholding him from service. See NRAB First Division Award No. 27615.

We also find that there was no violation of Rule 45 since the Claimant was not removed from service for disciplinary reasons. Absent any limitation in the Agreement, the Carrier is entitled to remove employees from service where there is a rational basis to believe the employee may be physically incapable of performing his/her job.

Despite the Organization's strenuous arguments, it has not met its burden of proof that the Carrier violated the Agreement when it removed the Claimant from service pending a medical evaluation. The Claimant's own statement to his supervisor and the Carrier's medical staff supports the conclusion that the health and safety of the Claimant and other employees was at risk. The Claimant's prior incidents, as described in the record, details how his unsafe acts created hazardous conditions and in one instance caused injury to another employee.

The Carrier has the discretion to impose reasonable physical qualifications and standards to keep an employee out of service to insure a safe work environment. The Carrier's Medical Department reviewed the Claimant's medical records on June 5, 2016 and decided he was unfit for duty where he demonstrated "progressive cognitive issues, worsening in January 2016". The Carrier's physician scheduled him for a neuropsychological evaluation for July 13, 2016. The documentary evidence indicates that the Claimant's own physician planned to schedule the Claimant for a neurological examination however; there is no such evaluation in the record. While there is also nothing in the record regarding the results of the Carrier's neuropsychological examination of July 13, the Claimant did not produce any medical diagnosis that contradicts the conclusions reached by the Carrier's physician, who after reviewing the medical documents provided by the Claimant, concluded he was not fit for duty and withheld him from service. We do not find the Carrier's actions to be arbitrary or capricious.

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 Carrier did not violate the Agreement when it withheld the Claimant from service on May 25, 2016.

AWARD

Claim denied.

Michael Capone
Neutral Member

Dated: May 14, 2018

Alyssa K. Borden
Carrier Member

Dated: 05/16/18

Andrew M. Mulford
Labor Member

Dated: 5/16/18