No. 22-2863

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLAN SANDERS,

Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nebraska (Case No. 4:20-cv-03023)
The Honorable Joseph F. Bataillon

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SUMMARY OF THE CASE

Allan Sanders oversaw employees at Union Pacific who inspected and repaired train cars. Union Pacific refused to let Sanders work after he suffered a cardiac arrest caused by a bleeding ulcer, basing that decision on a treadmill test that Sanders couldn't do because of a knee impairment. When Sanders asked to take a test that wouldn't burden his knees, Union Pacific refused and effectively terminated him. Every disinterested doctor disagreed with that arbitrary and discriminatory decision. Sanders's impairments didn't warrant restrictions. He wasn't a safety risk. And he could do his job with or without an accommodation.

Sanders sued under the ADA alleging disparate treatment and failure to accommodate. A jury found in his favor, and the district court properly denied Union Pacific judgment as a matter of law. "Rather than come to grips with the evidence presented at trial and evaluated by the jury," Union Pacific "asks [this Court] to reweigh evidence as if this were a jury trial." *EEOC v. Wal-Mart Stores, Inc.*, 38 F.4th 651, 656 (7th Cir. 2022). But "[a]n appeal of a jury verdict is not an opportunity for the losing party to try the case anew before three appellate judges." *Id.* This Court should affirm. Sanders requests 15 minutes of oral argument.

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INTRODUCTION

The evidence in this case—confirmed by the jury's unanimous verdict—demonstrates that Appellant Union Pacific Railroad Co. discriminated against Appellee Allan Sanders because of his disability.

In attacking that conclusion, Union Pacific would have this Court "weigh the evidence,…pass on the credibility of witnesses, [and]…substitute [its] judgment for that of the jury"—all forbidden under bedrock principles of judicial review. *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir. 1982). Worse, Union Pacific would have this Court apply Union Pacific's slanted version of the evidence to a hypothetical law bearing little resemblance to the Americans with Disabilities Act ("ADA"). In Union Pacific's telling, courts owe all but blind deference to an employer's judgment—real or contrived—about who counts as disabled, what the job requires, who can be accommodated, what motivated the employer's decision, and who poses a threat in the workplace. Juries, in Union Pacific's parallel world, apparently play no role at all.

None of this is correct. The ADA is not the rubber stamp that Union Pacific envisions. Whether an employee is disabled is a question of fact.

Fenney v. Dakota, Minn. & E. R.R., 327 F.3d 707, 716 (8th Cir. 2003). "Whether [an employee] was able to perform the essential functions of his job…is a question of fact." *Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076, 1079 (8th Cir. 2009). Whether an employer provided a "reasonable[]…accommodation is a question of fact." *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998). Whether a causal connection links the employer's adverse action to the employee's disability is a question of fact. *Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 647-48 (8th Cir. 2022). And whether someone is a direct threat is a question of fact. *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1278 (10th Cir. 2015). Contrary to Union Pacific's suggestion, "courts are not required to give deference to the employer's judgment." *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) (cleaned up).

These principles frame this dispute and illustrate why Union Pacific's request to overturn the jury's verdict must be rejected. This case isn't about second-guessing Union Pacific's decision. It's "about an employer unreasonably ignoring the unanimous medical judgment of every disinterested doctor, applying arbitrary and discriminatory restrictions on an employee because of his disability, refusing to consider

any reasonable accommodations, and justifying its actions through a flurry of ex post facto justifications that have no basis in evidence or fact." App.1431; R. Doc. 172, at 8. The jury was well within its rights to find Union Pacific liable.

Because the evidence supports the jury's verdict, the district court's judgment should be affirmed.

STATEMENT OF THE CASE

I. FACTS.

A. The Parties.

Sanders began working for Union Pacific in May 1979. App.640; R. Doc. 163, at 138. He held various positions over his four-decade tenure, eventually becoming foreman general in the car department in Parsons, Kansas. App.646-47; R. Doc. 163, at 144-45.

B. Sanders Worked as a Foreman General in Union Pacific's Car Department—a Supervisory Role Requiring Only Occasional Manual Labor.

As foreman general, Sanders oversaw the work of carmen—the employees responsible for the inspection and repair of train cars. App.603; R. Doc. 163, at 101. Sanders worked principally as a supervisor, engaging in manual labor on only rare occasions. App.604, 648; R. Doc. 163, at 102, 146.

(1) Sanders oversaw carmen, the auto mechanics for trains.

Before turning to Sanders's duties, it's important to understand the role that carmen—the employees Sanders supervised—play at Union Pacific.

Carmen are like "auto mechanic[s] for trains." App.603; R. Doc. 163, at 101. They inspect train cars to make sure they're in working order. *Id.*; Ex.102 at 1. When trains need maintenance or break down, carmen determine the necessary repairs and fix them. App.603; R. Doc. 163, at 101; Ex.102 at 1.

Carmen do most of their work in the train yard. App.616; R. Doc. 163, at 114. But on occasion trains break down in the field. *Id.* When that happens, carmen repair trains on-site. App.606-07, 616; R. Doc. 163, at 104-05, 114. Carmen do not operate trains. Ex.102.

Carmen mostly work with lighter tools—for example, wrenches, hammers, and torches. App.617; R. Doc. 163, at 115. That's reflected in Union Pacific's job description for the carman position, which lists the physical demands of the job. According to their job description, carmen must be able to lift 25 pounds "frequently." Ex.102 at 3. They must be able to lift 50 pounds—"often with assistance"—"occasionally." *Id.* And

they must be able to lift up to 86 pounds "with assistance" only "rarely." *Id.* The carman job description doesn't mention lifting more than 50 pounds without assistance. *Id.*

Union Pacific prohibits carmen from running. App.649-50; R. Doc. 163, at 147-48.

(2) As foreman general, Sanders's job was to oversee carmen.

Union Pacific *does not* maintain a job description for foremen general—Sanders's position. App.613, 1119-20; R. Doc. 163, at 198; R. Doc. 165, at 171-72. Given that absence, both parties relied on testimony at trial to establish the duties of the position. And the parties' competing witnesses gave different accounts of what foremen general do. As Sanders explained, his role was overwhelmingly managerial, with little physical work. Union Pacific's witnesses spun a counterfactual narrative—an alternative world where foremen general routinely engage in backbreaking manual labor. The jury, of course, evaluated Union Pacific's witnesses and deemed their testimony incredible.

Sanders's job was to oversee and supervise carmen. App.603-04; R. Doc. 163, at 101-02. He directed their work, conducted safety meetings, ordered and stocked parts, and ran payroll for the car department.

App.604, 649; R. Doc. 163, at 102, 147.

Foremen general like Sanders performed the duties of a carman only on an as-needed basis. App.611-12; R. Doc. 163, at 109-10. If a carman was available to perform the work, a carman would do it. App.619; R. Doc. 163, at 123; Ex.27 at 22. James Buck, a Union Pacific manager who supervised Sanders for years, admitted he couldn't recall even one example of Sanders performing carman duties. App.635; R. Doc. 163, at 133.

Although the bulk of Sanders's role involved non-manual, managerial work, Sanders performed limited duties in the train yard and the field. App.648, 715; R. Doc. 163, at 146; R. Doc. 164, at 15. Manual work in the yard was performed exclusively by carmen, not Sanders. App.648-49; R. Doc. 163, at 146-47. Sanders provided "oversight" and "inspect[ed] to make sure [carmen] did things safely." *Id.*

Sanders performed field work even more rarely still. Sanders sometimes got the first call to aid a train in distress. App.650-51; R. Doc. 163, at 148-49. Sanders wouldn't automatically call a crew of carmen, though. That's because fixing a distressed train usually required no physical labor at all. *Id.* Modern trains rely on sophisticated computer

systems and radio signals to operate. *Id.* In well over half of all cases involving distressed trains, Sanders resolved the issue by resetting or reprogramming the train's computer. *Id.* This work involved no physical labor. App.653; R. Doc. 163, at 151. Depending on the nature of the issue, Sanders occasionally carried medium-weight items in the field—for example, cables or an end-of-train radio device. App.682-83, 709; R. Doc. 163, at 180-81; R. Doc. 164, at 9. These items weighed 10 to 20 pounds. *Id.*

When more serious problems arose in the field, Sanders called the carmen he oversaw to the scene. App.650, 681; R. Doc. 163, at 148, 179. It was the carmen's job—not Sanders's—to make mechanical repairs to trains. App.648-50; R. Doc. 163, at 146-48. Sanders helped carmen make only "minor repairs" in the field—and even then, only rarely. *Id.*

Union Pacific maintains no formal (or informal) requirements for how much foremen general must be able to lift. App.613, 1119-20; R. Doc. 163, at 198; R. Doc. 165, at 171-72. Union Pacific's prohibition on running, however, extends to foremen general like Sanders. App.649-50; R. Doc. 163, at 147-48. Sanders never ran on the job. *Id.*; Ex.22 at 2. Like the carmen he supervised, Sanders never operated or drove trains.

Ex.102.

(3) Sanders assisted other workers in replacing knuckles only in extraordinarily rare circumstances.

Much of this case revolves around Union Pacific's (spurious) claim that Sanders was regularly required to lift and replace knuckles—a task Union Pacific claims (again spuriously) that Sanders could not do. Here, too, Union Pacific exaggerates Sanders's duties and mischaracterizes his abilities.

A knuckle is the steel part that connects two train cars. App.624-25; R. Doc. 163, at 122-23. A knuckle can weigh up to 86 pounds. *Id.* Like circuit breakers, knuckles are designed to break under extreme conditions to prevent more extensive damage to the train. *Id.*

Replacing knuckles is the train crew's responsibility in the first instance. Under Union Pacific's own policies, train crew members—the engineers and conductors on the train—bear the initial responsibility to replace broken knuckles. App.653, 1158-59; R. Doc. 163, at 151; R. Doc. 165, at 210-11. All Union Pacific locomotives contain spare knuckles. App.654-55; R. Doc. 163, at 152-53. Once the conductor identifies a broken knuckle, the train crew follows a standard procedure to replace it. *Id.* In "80 to 90 percent" of cases involving a broken knuckle, the train

crew completes this procedure before anyone else arrives on the scene. *Id.*

Carmen are next in line to replace knuckles. App.619; R. Doc. 163, at 123. Once on location, carmen help the train crew fix broken knuckles. App.606-07, 616; R. Doc. 163, at 104-05, 114.

Sanders was third in line. As foreman general, he only "very seldom[ly]"—about once a month—lifted heavy objects like knuckles. App.649, 1175; R. Doc. 163, at 147; R. Doc. 165, at 227. He never had any difficulty doing so. App.743; R. Doc. 164, at 43. And he never had to lift knuckles alone—if at all. App.1176; R. Doc. 165, at 228. Again, all trains have crews on board who are responsible for repairing broken knuckles; they would assist Sanders with lifting knuckles. App.653, 1158-59, 1175-76; R. Doc. 163, at 151; R. Doc. 165, at 210-11, 227-28. Union Pacific's own documents show that employees were expected to lift knuckles in teams. Ex.102 at 3; App.1176; R. Doc. 165, at 228.

C. Sanders Performed Exceptionally Well in His Job.

Sanders was great at his job and had a reputation as a safety-conscious employee. App.604-05, 773; R. Doc. 163, at 102-03; R. Doc. 164, at 73. Over four decades with Union Pacific, Sanders had no disciplinary

record. App.978; R. Doc. 165, at 30. Sanders "loved [his] job" and "took pride in [his] work." App.669; R. Doc. 163, at 167.

D. Sanders Also Worked As a Rancher.

Sanders also worked as a rancher in his spare time. App.639, 658; R. Doc. 163, at 137, 156. Sanders's work for Union Pacific was "quite a bit easier" than his ranching duties. App.658; R. Doc. 163, at 156. Sanders described "wrestl[ing] calves," "throw[ing] bags of feed around," and getting "kicked" by cows as examples of farm work that was far more physically taxing than his work as a foreman general. *Id.*

E. Sanders's Medical History.

Sanders is one of millions of Americans who live with disabilities. Although these disabilities limit Sanders in certain life activities, they never interfered with his ability to do his job at Union Pacific.

Sanders suffers from knee problems stemming from a torn meniscus and osteoarthritis; Sanders's knees hurt when he runs. App.666-67, 750, 770, 1009, 1012; R. Doc. 163, at 164-65; R. Doc. 164, at 50, 70; R. Doc. 165, at 61, 64; Ex.20 at 1-2, 5-6, 8; Ex.22 at 1-2; Ex.132 at 2-4, 8. For years, Sanders took Celebrex, an anti-inflammatory medication, to manage his knee pain. App.770; R. Doc. 164, at 70.

Sanders underwent knee replacement surgery in 2021. App.666; R. Doc. 163, at 164.

Sanders also suffers from hypertension—high blood pressure. Ex. 13. He takes Atenolol—beta-blocker medication—to control his blood pressure. *Id.*; App.769-70; R. Doc. 164, at 69-70.

Last, Sanders suffered a gastrointestinal bleed. App.660, 759; R. Doc. 163, at 158; R. Doc. 164, at 59. This bleeding ulcer set in motion the events that led Union Pacific to put Sanders out of a job.

F. Sanders Underwent Surgery in 2018 to Repair a Bleeding Ulcer.

In June 2018, Sanders awoke with shortness of breath and abdominal pain. App.659; R. Doc. 163, at 157. He was taken to the emergency room for what he later learned was a bleeding ulcer. App.660, 759, 909; R. Doc. 163, at 158; R. Doc. 164, at 59, 209. Sanders had lost over two-thirds of his blood. App.660, 760; R. Doc. 163, at 158; R. Doc. 164, at 60. At the hospital, Sanders suffered a cardiac arrest caused by lack of blood flow to his heart. App.660, 760, 909; R. Doc. 163, at 158; R. Doc. 164, at 60, 209. Doctors resuscitated Sanders and gave him blood. App.760; R. Doc. 164, at 60. Dr. Charles Ro successfully repaired the bleeding ulcer, and Sanders's condition stabilized. App. 660; R. Doc. 163,

at 158.

Sanders's doctors determined that Sanders's ulcer was caused by the anti-inflammatory medication Sanders had been taking for his knees. App.720, 759, 761; R. Doc. 164, at 20, 59, 61. Sanders immediately stopped taking that medication. App.720, 761; R. Doc. 164, at 20, 61. Sanders's doctors performed multiple biopsies and endoscopies in the months following Sanders's surgery. App.761, 873; R. Doc. 164, at 61, 173. These procedures confirmed that there was "no reason to suspect that [the bleeding ulcer] would recur" in the future. *Id.*

Sanders took a medical leave of absence following his hospitalization. Ex.103 at 2. Under the care of his doctors, Sanders recovered "100 percent." App.659; R. Doc. 163, at 157.

G. Union Pacific Refused to Reinstate Sanders.

Although Sanders's health improved, his problems with Union Pacific were just beginning. All four of Sanders's doctors cleared him to return to work with no restrictions. But Union Pacific refused to listen to Sanders or his doctors. Rather than engage in an honest fitness-for-duty evaluation, Union Pacific put Sanders through the wringer. Throughout the process, Union Pacific's medical personnel shifted their justifications

for restricting Sanders, moving the goalposts whenever Sanders complied with their latest demands. When Sanders finally encountered a demand he couldn't meet—running on a treadmill because of his arthritic knees—Union Pacific settled on its chosen pretext, refused to consider Sanders's plea for an accommodation, and put Sanders out of a job.

(1) Union Pacific obstructed and delayed Sanders's attempt to return to work.

Sanders asked Union Pacific to return him to work. App.663-64; R. Doc. 163, at 161-62.

These return-to-work requests are handled by Union Pacific's medical department. App.847-48; R. Doc. 164, at 147-48. In this case, Union Pacific's Associate Medical Director, Dr. John Charbonneau, was responsible for evaluating Sanders's request. App.847-48, 855, 872; R. Doc. 164, at 147-48, 155, 172.

Throughout the return-to-work process, Union Pacific made the exercise as burdensome as possible. At first, Union Pacific simply ignored Sanders. He called Union Pacific's medical personnel "countless" times, left messages, and pleaded for a response. App.663-64; R. Doc. 163, at 161-62; Ex.21.

When Union Pacific belatedly responded to Sanders in July 2018,

Union Pacific demanded that Sanders turn over myriad medical records—many of which were unrelated to Sanders's gastrointestinal bleed and cardiac event. Ex.103 at 2. After Union Pacific refused Sanders's request to sign an authorization allowing Union Pacific to obtain medical records directly from his doctors, Sanders gathered up, at great expense, thousands of pages of medical records from several different health care providers. App.664-66; R. Doc. 163, at 162-64. Sanders submitted the documents to Union Pacific's medical personnel "multiple times before they actually acknowledged" they'd received them. *Id.*

(2) Sanders's doctors cleared him to return to work without restrictions.

Sanders provided Union Pacific with notes from his doctors authorizing him to return to work without any restrictions. App.661, 663, 855-59; R. Doc. 163, at 159, 161; R. Doc. 164, at 155-59.

Dr. Ro, Sanders's gastroenterologist and surgeon, cleared Sanders to return to work "with no restrictions"—including no lifting restrictions or "environmental limitations." Ex.1; Ex.3 at 1; App.910-13; R. Doc. 164, 210-13. He encouraged Union Pacific to call him with any "questions or concerns." Ex.1.

Sanders's nephrologist also authorized Sanders to return to work, likewise approving him for "normal work" with no "restrictions." Ex.2.

(3) After Sanders gave Union Pacific all it asked for, Union Pacific demanded additional records and tests, including a Bruce Protocol treadmill test.

Sanders provided everything Union Pacific had asked for. App.664; R. Doc. 163, at 162. But rather than return Sanders to work, Union Pacific shifted the goalposts. In October 2018, Union Pacific demanded additional—and different—medical records and tests. Ex.106 at 1. Most relevant here, Union Pacific demanded, for the first time, that Sanders undergo a "Bruce Protocol" treadmill test. *Id.*; App.666; R. Doc. 163, at 164.

The Bruce Protocol is principally designed to measure a person's "cardiac status." App.766; R. Doc. 164, at 66. The test subject begins by walking at 1.7 miles an hour with the treadmill set to a 10 percent incline. App.666, 766; R. Doc. 163, at 164; R. Doc. 164, at 66. Over seven standard intervals, the test administrator increases the speed to 6 miles per hour and the incline to 22 percent. App.766, 800; R. Doc. 164, at 66, 100. Using an electrocardiogram, the test administrator checks for heart problems, such as "a lack of oxygen in certain parts of the heart" or "arrhythmias." App.666, 766; R. Doc. 163, at 164; R. Doc. 164, at 66.

Separately, the Bruce Protocol can be used to estimate a person's "maximum metabolic equivalent of tasks" or "METs." App.766; R. Doc. 164, at 66. A METs score measures a person's aerobic capacity. *Id.* One MET is equivalent to the amount of aerobic energy a person uses while resting. App.937; R. Doc. 164, at 237. A task that requires three to six METs is a moderate-intensity activity; tasks that require more than six METs are vigorous-intensity activities. App.766-67, 771; R. Doc. 164, at 66-67, 71. The information about a person's heart gathered using the electrocardiogram is not considered when determining someone's METs score. App.766; R. Doc. 164, at 66. That score is based solely on how long someone can run. *Id.*

The Bruce Protocol is physically demanding. App.773; R. Doc. 164, at 73. Almost no one can complete all seven stages. *Id.*

Union Pacific appeared to invent the requirement that Sanders take a treadmill test out of whole cloth. Union Pacific didn't mention the treadmill test in its initial return-to-work requirements. Ex.103 at 2. Nor is the test a standard company requirement for foremen general (or even carmen). Ex.102 at 3; App.613; R. Doc. 163, at 198. This was a bespoke requirement created just for Sanders—*after* he'd already met Union

Pacific's first round of requests. Ex.103 at 2.

(4) Sanders's treadmill test revealed no heart damage; Sanders halted the test due to knee fatigue.

Sanders made every attempt to comply with Union Pacific's new demands. Sanders's cardiologist, Dr. William Nicholas, ordered the treadmill test for Sanders. App.666-67; R. Doc. 163, at 164-65. Dr. Nicholas didn't think Sanders needed a treadmill test—"he thought it was crazy"—but Sanders convinced him to order the test to placate Union Pacific. *Id.*

Sanders took the test in December 2018. App.721; R. Doc. 164, at 21. Shortly after starting the test, Sanders began to experience knee pain—particularly in his right knee that he would later have replaced. App.666; R. Doc. 163, at 164. Walking briskly up a steep incline—something Sanders never did on the job—was particularly painful for his right knee. App.746-47; R. Doc. 164, at 46-47. Eventually, the test became "too painful" on Sanders's knees, forcing him to stop after four minutes and eight seconds. App.666, 770, 803-04; R. Doc. 163, at 164; R. Doc. 164, at 70, 103-04; Ex.113 at 2. Pain in Sanders's knees was the sole reason he stopped the test; his heart felt fine. App.666-67; R. Doc. 163, at 164-65.

At the time Sanders took the treadmill test, he was taking medication—beta blockers—to control his blood pressure. App.769-70; R. Doc. 164, at 69-70. Beta blockers can interfere with the exam by artificially restricting a person's heart rate and efficiency. *Id.*; Ex.30 at 10-11.

Sanders's Bruce Protocol test nevertheless showed that Sanders's heart was healthy. App.764; R. Doc. 164, at 64; Ex.113 at 1. Dr. Nicholas interpreted the echocardiogram portion, which showed Sanders had "normal heart" function. Ex.30 at 9. Dr. Nicholas also cleared Sanders to do regular work with no restrictions. App.863-64; R. Doc. 164, at 163-64. He opined that he "wouldn't restrict [Sanders] based on any cardiac problems because there wasn't any evidence he had cardiac problems." Ex.30 at 28.

When it came to aerobic capacity, Sanders scored 4.6 METs. App.773; R. Doc. 164, at 73; Ex.113 at 2. Even taken at face value, this was a respectable score. A person with 4.6 METs ranks in the "upper end of the moderate category" when it comes to aerobic capacity. App.773; R. Doc. 164, at 73. That's more than enough aerobic capacity to "do everything [Sanders] need[ed] to in his job." *Id.* But, of course, Sanders's

METs score *could not* be taken at face value. He was taking medicine that inhibited his aerobic abilities. App.769-70; R. Doc. 164, at 69-70. And he had to end the exam prematurely because of knee pain. App.666, 770; R. Doc. 163, at 164; R. Doc. 164, at 70.

The report accompanying Sanders's treadmill test results indicated the test "was stopped due to fatigue." Ex.113 at 2. Dr. Nicholas explained that this meant the test wasn't stopped because of Sanders's heart, and that it wouldn't be reasonable to conclude otherwise. Ex.30 at 9-10. He testified:

> Q. On the report it says the test was stopped due to "fatigue." Does that mean that the test was stopped because of anything having to do with Sanders' heart?
>
> A. No.
>
> Q. What does fatigue indicate to you?
>
> A. Well, it means that he did not reach the heart rate that we would have liked to…make the test optimal. He stopped because of other reasons first.
>
> Q. Does stopping the test due to "fatigue" indicate that the test was stopped for any reason having to do with Mr. Sanders' heart?
>
> A. No.
>
> Q. Is it reasonable to conclude, as a medical professional, that the fatigue notation indicated that the test was stopped due to Sanders' heart?

A. No.

Id.

(5) Union Pacific imposed even more requirements on Sanders, demanding, for the first time, that Sanders exceed 10 METs on the Bruce Protocol treadmill test.

Once again, Sanders had done what Union Pacific had asked. And once again, Union Pacific moved the goalposts and refused to let Sanders return to work.

In February 2019, Union Pacific demanded even more—and different—medical records and tests. Ex.134 at 1-2. This third request marked the first time Union Pacific demanded that Sanders's Bruce Protocol test show that he had "maximum aerobic capacity" of "at least 10 METS." *Id.*

This 10-METs requirement was again made up from whole cloth. Union Pacific didn't mention it in its *first or second* set of return-to-work demands. Ex.103 at 2; Ex.106 at 1. Union Pacific doesn't have a general qualification standard requiring foremen general (or carmen) to be able to achieve 10 METs on a treadmill. Ex.102 at 3; App.613; R. Doc. 163, at 198. This 10-METs standard was another requirement created solely for Sanders—*after* he'd already met Union Pacific's first and second rounds

of requests.

(6) Sanders told Union Pacific he could not complete the treadmill test because of knee pain.

Sanders repeatedly pleaded with Union Pacific's medical personnel about returning to work. Ex.22 at 1-2. He told them he couldn't run on a treadmill because of his knees. Ex.20 at 5-6. But Union Pacific insisted that Sanders take the Bruce Protocol test on a treadmill. *Id.* Sanders asked for Union Pacific's doctors to speak directly to Sanders's doctors. Ex.22 at 2. They never did. *Id.*

(7) Sanders's doctors performed a chemical stress test, which showed Sanders's heart was healthy.

Desperate to return to work, Sanders asked Dr. Nicholas, his cardiologist, to order a chemical stress test. *Id.*; App.667-68; R. Doc. 163, at 165-66. This procedure tests the heart for irregular blood flow (or ischemia), arrhythmia, scarring, and other cardiovascular abnormalities. Ex.30 at 11-12; Ex.134 at 9-10; App.764; R. Doc. 164, at 64. Sanders passed with flying colors. Ex.30 at 12. Ex.134 at 9-10; App.764; R. Doc. 164, at 64. The chemical stress test confirmed that Sanders's heart functions within normal ranges. Ex.30 at 12; App.668, 764, 776-77; R. Doc. 163, at 166; R. Doc. 164, at 64, 76-77; Ex.134 at 9-10.

But Union Pacific's medical personnel flatly refused to consider the results of Sanders's chemical stress test. App.668; R. Doc. 163, at 166; Ex.22 at 2; Ex.20 at 4-5. They told Sanders that Union Pacific would only accept the Bruce Protocol treadmill test—a test they knew Sanders couldn't do because of his knees. Ex.22 at 2; Ex.20 at 4-5.

(8) Sanders's primary-care doctor examined Sanders and cleared him to work "without restrictions."

Sanders's doctors continued to clear Sanders to work. Dr. Jimmy Buller, Sanders's primary-care physician, sent Union Pacific a letter clearing Sanders to return to work "without restrictions." Ex.13 at 1; App.1008; R. Doc. 165, at 60.[1] Dr. Buller wrote that Sanders's heart function was "normal." Ex.13; App.1009; R. Doc. 165, at 61.

H. Union Pacific Went All In on the Bruce Protocol and Imposed Punishing Restrictions on Sanders.

Union Pacific, still unmoved, levied punishing restrictions on Sanders. On April 15, 2019, Union Pacific sent Sanders a letter imposing several "permanent" restrictions. Ex.16 at 1. Union Pacific prohibited Sanders from lifting "over 10 pounds frequently or 20 pounds

[1] Dr. Buller "suggest[ed]" that Sanders refrain from running and avoid lifting more than 50 pounds. Ex.13. These were meant as suggestions only. Dr. Buller cleared Sanders to work without any restrictions. *Id.*

occasionally." *Id.* Union Pacific forbade Sanders to perform "prolonged work in conditions of high heat and humidity, or excessive cold." *Id.* Union Pacific told Sanders that "**[w]e do not believe that these restrictions can be accommodated in your current position.**" *Id.* Union Pacific deemed Sanders fit for "office jobs or similar work only." *Id.*

At the time of his decision, Dr. Charbonneau told Sanders that his heart condition was the sole reason he wasn't allowed to return to work. App.742; R. Doc. 164, at 42.[2]

Throughout the entire return-to-work process, Union Pacific's doctors never spoke to Sanders. App.874; R. Doc. 164, 174. They never examined Sanders. App.878; R. Doc. 164, at 178. They never consulted with Sanders's doctors or an independent cardiologist. Ex.30 at 13;

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[2] Union Pacific tried to backpedal at trial, dredging up isolated issues in Sanders's medical records. For example, Sanders long ago suffered an episode that could have been (but wasn't proven to be) a transient ischemic attack. App.798-99; R. Doc. 164, at 98-99. Sanders was also long-ago diagnosed with an occluded carotid artery. *Id.* Pacific had long known about both issues. *Id.* Sanders received treatment for them and Union Pacific allowed him to continue working. App.742-43, 799; R. Doc. 164, at 42-43, 99. Sanders also took painkillers for back and knee pain. App.822; R. Doc. 164, at 122. Union Pacific knew this as well. *Id.* Union Pacific asked Sanders to stop taking them and Sanders obliged. Ex.134 at 6.

App.851, 863, 872-73, 1034; R. Doc. 164, at 151, 163, 172-73; R. Doc. 165, at 86. They never did a functional-capacity examination to see how much Sanders could lift or a field test to see whether Sanders could lift a knuckle. App.743; R. Doc. 164, at 43.

I. Sanders Finally Spoke to Dr. Charbonneau and Pleaded for a Reasonable Accommodation; Dr. Charbonneau Refused.

Only after Union Pacific imposed these restrictions on Sanders did Dr. Charbonneau finally—and reluctantly—agree to speak to Sanders. App.672; R. Doc. 163, at 170. The conversation did not go well. Dr. Charbonneau was rude, condescending, and dismissive. *Id.* He "didn't listen to a word [Sanders] said." *Id.* Sanders explained that he could not finish the treadmill test "due to knee pain." Ex.20 at 1; App.875; R. Doc. 164, at 175. Dr. Charbonneau effectively called Sanders a liar, telling him that "the medical records say something else:" that Sanders's treadmill test was stopped because of his heart—"not orthopedic concerns." Ex.20 at 1-2; App.742, 877-78; R. Doc. 164, at 42, 177-78. Dr. Charbonneau "had his mind made up and there was no changing it." App.729; R. Doc. 164, at 29.

Sanders begged Dr. Charbonneau to let him take an alternative test. Sanders asked Dr. Charbonneau: "[I]s there any other way that I

can be tested where I don't have to actually have my body weight on my knees? Can I ride like, you know, a bicycle or something?" App.667; R. Doc. 163, at 165; App.1173; R. Doc. 165, at 225. Bicycle tests are a widely accepted alternative to the Bruce Protocol used to measure heart health and aerobic capacity—especially in people with knee problems or other musculoskeletal conditions. App.773-74, 815, 986; R. Doc. 164, at 73-74, 115; R. Doc. 165, at 38. Dr. Charbonneau responded unequivocally: "No, it has to be specifically this Bruce Protocol." App.667, 1173-74; R. Doc. 163, at 165; R. Doc. 165, at 225-26.

After Sanders received Union Pacific's letter imposing restrictions and spoke with Dr. Charbonneau, Sanders didn't suggest any additional accommodations. App.673; R. Doc. 163, at 171. Although Sanders believed accommodations were possible, he knew suggesting additional accommodations would be a fool's errand. App.673, 730; R. Doc. 163, at 171; R. Doc. 164, at 30. Union Pacific had already told Sanders that he couldn't take a different test or be accommodated on the job. App.729; R. Doc. 164, at 29.

J. Union Pacific's Restrictions Prevented Sanders from Working, Effectively Terminating Him.

The restrictions imposed by Union Pacific effectively put Sanders out of work. Union Pacific nominally had a manager review the restrictions to determine whether Sanders could continue working. App.1110; R. Doc. 165, at 162. But this review was little more than a rubber stamp. Abel Valdez, the manager conducting the "review," never worked with Sanders and never spoke to Sanders or anyone who'd worked with Sanders. App.1155-57; R. Doc. 165, at 207-09. Valdez concluded that Sanders could no longer do his job. Ex.116 at 1.

Union Pacific submitted documents to the Railroad Retirement Board ("RRB") labeling Sanders as permanently "disabled" and explaining that it restricted Sanders because of his impairments. Ex.15.

K. Union Pacific Acted Unreasonably in Restricting Sanders.

Union Pacific's treatment of Sanders was unfair and unreasonable. Union Pacific's doctors, in restricting Sanders, didn't listen to Sanders's doctors, didn't make an individualized assessment of Sanders, and didn't adhere to prevailing practices in occupational medicine. These repeated failures betrayed the truth: Union Pacific's process was a fig leaf for getting rid of a disabled employee.

Dr. Kevin Trangle, an occupational-medicine doctor, offered expert testimony in this case. App.753; R. Doc. 164, at 53. Dr. Trangle has served as a medical director for several large employers (including manufacturing firms, the Secret Service, and the FBI). App.753, 756-57; R. Doc. 164, at 53, 56-57. He's also served as a leader of the American College of Occupational and Environmental Medicine. App.779; R. Doc. 164, at 79. He has an extraordinary body of experience with fitness-for-duty examinations and return-to-work evaluations. App.753, 757; R. Doc. 164, at 53, 57.

Dr. Trangle's opinion about Union Pacific's treatment of Sanders was unsparing. In Dr. Trangle's judgment, the restrictions Union Pacific placed on Sanders were "not…reasonable" and "not based on any medical principles at all." App.757, 782, 840; R. Doc. 164, at 57, 82, 140.

Dr. Trangle based his opinion on several intersecting factors:

- Sanders had excellent heart health. App.758; R. Doc. 164, at 58. He had no heart issues before 2018. *Id.* Sanders's cardiac event had nothing to do with his heart condition. App.760; R. Doc. 164, at 60. It was caused by extreme blood loss stemming from Sanders's ulcer. *Id.*

- Sanders's excellent heart health was confirmed by numerous tests. Sanders's echocardiogram and Bruce Protocol revealed "no heart damage." App.763-64; R. Doc. 164, at 63-64. Sanders's chemical test similarly showed normal and healthy heart

function. App.764, 776; R. Doc. 164, at 64, 76. And Sanders's cardiac event itself was a real-world stress test demonstrating that Sanders's "heart was sound." App.760-61, 763, 793, 914; R. Doc. 164, at 60-61, 63, 93, 214.

- What's more, there was no reason to think that a similar cardiac event would reoccur. App.761; R. Doc. 164, at 61. Sanders's doctors repaired his ulcer and confirmed that it had healed. *Id.* Sanders stopped taking the anti-inflammatory medicine that caused the ulcer. *Id.* There was similarly "no evidence…whatsoever" that Sanders posed a future risk of sudden incapacitation. App.786; R. Doc. 164, at 86.

- Sanders had a four-decade record of safe work and excellent performance at Union Pacific. App.758; R. Doc. 164, at 58. He "never had any medical or physical problems at any point" before 2018. *Id.*

- Union Pacific acted unreasonably in disregarding the opinions of Sanders's four treating doctors—all of whom authorized Sanders to return to work without restrictions. App.777-79; R. Doc. 164, at 77-79.

- Dr. Charbonneau acted unreasonably in ordering a treadmill test in the first place. App.768-69; R. Doc. 164, at 68-69. Sanders, as a foreman general, performed light- to medium-duty work. *Id.* He didn't hold a position that required running or vigorous exercise. *Id.* And by the time Union Pacific requested the test, Sanders had already been subjected to multiple tests, all showing that his "heart was functioning normally." *Id.*

- Union Pacific acted unreasonably in failing to make any attempt to determine how many METs were required to do Sanders's job, which involved little to no cardiovascular exertion. App.767-68; R. Doc. 164, at 67-68. There is no medical "correlat[ion between] the[] stress test…[and Sanders's] job." *Id.*

- Dr. Charbonneau acted unreasonably by failing to recognize that the METs score Sanders received was invalid. Sanders's blood-pressure medication interfered with the test results. App.770-71; R. Doc. 164, at 70-71. And Sanders stopped the test because of knee pain—not aerobic exhaustion. *Id.* These factors meant that "it was not an accurate test." *Id.*

- Dr. Charbonneau misinterpreted the results of Sanders's treadmill test. The word "fatigue" in Sanders's test results indicates that the test "was stopped because of means unrelated to…cardiac function." App.774, 1099; R. Doc. 164, at 74; R. Doc. 165, at 151.

- Dr. Charbonneau acted unreasonably when he failed to talk to Sanders (until after the restrictions were imposed), failed to listen to Sanders, failed to follow up with Sanders's doctors, and failed to examine Sanders. App.780, 783-85; R. Doc. 164, at 80, 83-85. These are all parts of a standard fitness-for-duty evaluation. App.780, 825, 1096, 1101; R. Doc. 164, at 80, 125; R. Doc. 165, at 148, 153.

- Dr. Charbonneau acted unreasonably when he refused Sanders's request to take a bicycle test. App.781, 785; R. Doc. 164, at 81, 85. Bike tests are a widely accepted means to measure heart health and aerobic capacity. App.773-74, 1101; R. Doc. 164, at 73-74; R. Doc. 165, at 153.

- Dr. Charbonneau acted unreasonably in imposing lifting restrictions. There is no scientific basis to use a METs score to impose a lifting restriction. App.772; R. Doc. 164, at 72. "METs are not directly translatable into how much you can lift." App.772, 781; R. Doc. 164, at 72, 81.

- Conversely, Dr. Charbonneau acted unreasonably in imposing lifting restrictions without first conducting a functional-capacity evaluation or field test—tests that actually measure an employee's ability to lift. App.781-82, 839-41; R. Doc. 164, at 81-82, 139-41.

- Dr. Charbonneau acted unreasonably in imposing restrictions on working in cold or hot weather. App.782; R. Doc. 164, at 82. There was "no rationale" connecting Sanders's condition to these temperature restrictions. *Id.*

The manifest flaws in Union Pacific's treatment of Sanders revealed a deeper conclusion. In Dr. Trangle's view, Union Pacific deviated so radically from accepted medical principles that the company's ostensible fitness-for-duty review was, in reality, just a pretext to get rid of Sanders. App.779-80; R. Doc. 164, at 79-80. To Dr. Trangle's trained eye, Union Pacific "put [Sanders] through the wringer for no reason at all," "look[ing] for excuses to get [him] fired." *Id.* Union Pacific's treatment of Sanders was "flawed," "[un]reasonable," even "shameful." *Id.*

II. PROCEDURAL HISTORY.

Sanders filed this lawsuit, alleging that Union Pacific violated the ADA by discriminating against him because of his disabilities and by failing to provide a reasonable accommodation.

Sanders prevailed at trial. The jury found that Union Pacific: (1) intentionally discriminated against Sanders; (2) failed to provide a reasonable accommodation; (3) didn't make a good-faith effort to provide

an accommodation; (4) didn't prove Sanders was a direct threat; and (5) didn't prove its restrictions were consistent with business necessity. App.339; R. Doc. 114, at 1-2. The district court denied Union Pacific's motion for judgment as a matter of law. App.1424-32; R. Doc. 172, at 1-9.

SUMMARY OF ARGUMENT

The district court properly denied Union Pacific's motion.

Sufficient evidence supported Sanders's disparate-treatment claim. Sanders was disabled in each of the three ways contemplated by the ADA. He had knee, heart, and ulcer-related impairments; he had a record of these conditions; and Union Pacific regarded him as impaired. Union Pacific also imposed restrictions and refused to let Sanders work because of these disabilities. Union Pacific told Sanders and the RRB that it restricted Sanders because of his impairments. Sanders was also qualified. He could do his job. The restrictions Union Pacific imposed were groundless. And Union Pacific could have accommodated Sanders with reasonable testing or job accommodations.

The jury likewise had sufficient proof to conclude that Union Pacific failed to accommodate Sanders. Sanders asked to take a bike test instead

of a treadmill test. Union Pacific refused and explored no other accommodations. It didn't engage in an interactive process. And it would have been futile for Sanders to request additional accommodations.

The jury also had sufficient evidence to conclude that Union Pacific failed to prove its direct-threat defense. Union Pacific's decision to impose restrictions and refuse to let Sanders return to work wasn't based on an individualized assessment or the best available evidence. It was based on a faulty and inaccurate test bearing no connection to Sanders's position or the restrictions imposed. Simple modifications to the test or Sanders's job would have mitigated any alleged risk.

ARGUMENT

I. STANDARD OF REVIEW.

Motions for judgment as a matter of law must be denied if any reasonable jury could have found for the nonmoving party. *Bavlsik v. Gen. Motors, LLC*, 870 F.3d 800, 805 (8th Cir. 2017). This Court "reviews de novo the district court's denial of a motion for judgment as a matter of law." *Howard v. Mo. Bone & Joint Ctr.*, 615 F.3d 991, 995 (8th Cir. 2010). "Review is highly deferential to the jury verdict, with all reasonable inferences drawn in favor of the verdict." *Gruttemeyer*, 31 F.4th at 646 (cleaned up).

II. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT ON SANDERS'S DISPARATE-TREATMENT CLAIM.

Sanders proved his disparate-treatment claim: he was disabled, qualified, and suffered an adverse action because of his disabilities. *Walz v. Ameriprise Fin.*, 779 F.3d 842, 844 (8th Cir. 2015).

A. Sanders Was Disabled.

Sanders was actually disabled because he had "physical…impairment[s] that substantially limit[ed] one or more major life activities;" he had a record of these impairments; and Union Pacific regarded him as disabled. 42 U.S.C. § 12102(1).

(1) Sanders had an actual disability.

Sanders had several physical impairments that substantially limited major life activities.

First, Sanders's bleeding ulcer led to a cardiac arrest and other serious complications. App.904-05; R. Doc. 204-05; Ex.20 at 8; Ex.21 at 34. Major life activities include the operation of major bodily functions and individual organs. 42 U.S.C. § 12102(B); 29 C.F.R. § 1630.2(i)(1)(ii). Sanders's ulcer substantially limited various organs and bodily functions, such as his heart and gastrointestinal systems.

Second, Sanders's hypertension and other cardiovascular conditions affected his major bodily functions and organs. App.932; R. Doc. 164, at 232; Ex. 13; Ex.20 at 7-9. These are disabilities—even when controlled by medication. 29 C.F.R. § 1630.2(i)(1)(ii), (h)(1); 29 C.F.R. Pt. 1630, App. § 1630.2(j)(1)(vi)-(vii), (j)(3); *Gogos v. AMS Mech. Sys.*, 737 F.3d 1170, 1173 (7th Cir. 2013).

Third, Sanders's arthritis and torn meniscus caused knee pain that substantially limited Sanders's ability to walk and run. *Supra* at 10-11. These knee conditions are disabilities. *Harrison v. Soave Enters.*, 826 F. App'x 517, 524-25 (6th Cir. 2020).

Union Pacific doesn't seriously dispute that Sanders's impairments are disabilities. It contends instead that Sanders waived any disabilities other than his ulcer.

This waiver argument is itself waived. Union Pacific raised the point only in its Rule 50(b) reply, R. Doc. 154, at 2-3, failing to include it in its 50(a) motion or the opening brief for its 50(b) motion, App.1060-61, 1204-08; R. Doc. 165, at 112-13, 256-60; R. Doc. 125, at 4-5. That's too little too late. *McGhee v. Pottawattamie Cty.*, 547 F.3d 922, 929 (8th Cir. 2008); *Nassar v. Jackson*, 779 F.3d 547, 551 (8th Cir. 2015).

Even if this Court considers the argument, Sanders never waived any claim that he was disabled. This Court's *Gruttemeyer* decision illustrates why. There, the plaintiff argued that he had several psychological disabilities, but his "complaint identified only bipolar disorder." 31 F.4th at 645. After an adverse verdict, the defendant, like Union Pacific, relying on *EEOC v. Lee's Log Cabin*, 546 F.3d 438 (7th Cir. 2008), argued that allowing evidence of these additional disabilities was error. 31 F.4th at 645.

This Court rejected that argument, holding that the defendant had notice of these diagnoses through discovery and the employee's records. *Id.* The diagnoses were "interrelated and their inclusion was unlikely to fundamentally change the factual basis of the case." *Id.* The pre-trial order also "framed the ADA claim" broadly. *Id.* at 646 n.4.

These points apply with even greater force here. Unlike the *Gruttemeyer* defendant, Union Pacific never moved to exclude evidence of Sanders's impairments or objected to admitting evidence about them at trial. That's not surprising. Sanders's impairments are closely related; Union Pacific knew about them for years; Sanders's medical records

documented them; and Union Pacific levied its restrictions based on those records.

Union Pacific's claim that Sanders didn't contend that his heart and knee problems constituted disabilities until after trial is also easily disproven. The parties litigated these disabilities at summary judgment. App.65-67; R. Doc. 41, at 33-35; R. Doc. 42, at 12-13. Sanders asserted them in his trial brief and Rule 50(a) motion. R. Doc. 92, at 9-11; R. Doc. 105, at 4-5. If that weren't enough, Union Pacific included heart and knee disabilities in its proposed jury instructions. App.228, 230, 235; R. Doc. 84, at 24, 26, 31. And the pre-trial order placed no limitation on the nature of Sanders's disabilities. R. Doc. 52, at 3.

The jury had more than sufficient evidence to conclude that Sanders had an actual disability.

(2) Sanders had a record of disability.

Sanders's medical records documenting his impairments demonstrate that Sanders also had a record of disability. 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(k)(1). Dr. Charbonneau recognized as much, testifying that Sanders's records showed that he had "multiple

medical conditions," including "cardiovascular problems." App.923-36; R. Doc. 164, at 223-36; Ex.15; Ex.20 at 7-9.

(3) Union Pacific regarded Sanders as disabled.

The evidence was similarly sufficient to find that Union Pacific regarded Sanders as disabled. An employer regards an employee as disabled when it subjects him to an adverse action "because of an actual or perceived physical…impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). Union Pacific did that to Sanders.

Union Pacific knew Sanders had undergone surgery after suffering a bleeding ulcer and cardiac arrest, and it believed that he had cardiovascular conditions that put him at a higher risk for additional adverse cardiac events. App.904-05, 1056; R. Doc. 164, at 204-05; R. Doc. 165, at 97; Ex.20 at 1-2, 7-11. Union Pacific refused to let Sanders work because of its fears about his heart and medical condition. App. 742, 990; R. Doc. 164, at 42; 165, at 42; Ex.15; Ex.20 at 1-2, 7-11. That's a paradigm example of regarding an employee as disabled.

A recent case involving Union Pacific reinforces this point. *Brasier v. Union Pac. R.R.*, 2023 WL 129534, at *3-5 (D. Ariz. Jan. 9, 2023). In

Brasier, Union Pacific "knew that Plaintiff had undergone brain surgery," and "believed that, as a result of the surgery, Plaintiff had cognitive issues and an increased risk of seizures." *Id.* at *3. "Because of that belief, [Union Pacific] imposed work restrictions" prohibiting the plaintiff from performing his job. *Id.* Based on this evidence, "[a] reasonable jury could conclude…that Plaintiff was effectively fired 'because of' [Union Pacific's] fears about his medical condition." *Id.* "This is all that the regarded-as prong requires." *Id.*

Other cases hold the same. *See, e.g.*, *Lewis v. City of Union City*, 934 F.3d 1169, 1181-82 (11th Cir. 2019); *Neri v. Bd. of Educ. for Albuquerque Pub. Schs.*, 860 F. App'x 556, 563-65 (10th Cir. 2021); *Silk v. Bd. of Trs.*, 795 F.3d 698, 706-08 (7th Cir. 2015). So does the EEOC's interpretative guidance. 29 C.F.R. Pt. 1630, App. § 1630.2(l) (employer regards employee as disabled when it terminates him because of fears about heart condition (angina)).

Union Pacific's arguments in opposition are unavailing. Union Pacific principally claims that an employee must show that restrictions were based on myths or stereotypes to establish that his employer regarded him as disabled, and that this can't be done when restrictions

are based on a doctor's recommendation. Otherwise, Union Pacific claims, the ADA would supposedly "penalize" employers for regarding employees as disabled when it imposes restrictions after a doctor's evaluation. App. Br. at 37-38.

Union Pacific's argument contravenes the plain text of the ADA. "The phrase 'regarded as having such an impairment' is defined by both statute and regulation." *Brasier*, 2023 WL 129534, at *4 (citing 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(l)). "Neither provision mentions any myths-or-stereotypes requirement." *Id.*

Union Pacific's argument also seriously "misrepresents the framework for ADA liability." *Brasier*, 2023 WL 129534, at *4. There is no penalty for regarding an employee as disabled. Even when an employee has been regarded as disabled, he can establish liability only if he is qualified and defeats any affirmative defenses—including his employer's direct-threat and business-necessity defenses. *Id.*; 29 C.F.R. § 1630.2(l)(2)-(3); 29 C.F.R. Pt. 1630, App. § 1630.2(l).

Union Pacific's argument has another crucial flaw. It's "based on the pre-amendment version of the [ADA's] regarded-as prong" and case law interpreting it. *Brasier*, 2023 WL 129534, at *4; App. Br. at 37-39

(citing pre-amendment cases). Before Congress amended the ADA in 2008, an employer regarded his employee as disabled only if it mistakenly believed he was substantially limited by a real or perceived impairment. *Brasier*, 2023 WL 129534, at *5; *Pittari v. Am. Eagle Airlines*, 468 F.3d 1056, 1061 (8th Cir. 2006). It was a short step from there to concluding that the mistaken belief had to be based on a fear or stereotype.

But that's not the law anymore. The 2008 amendments expanded the scope of the ADA's regarded-as prong. *Brown v. City of Jacksonville*, 711 F.3d 883, 888-89 (8th Cir. 2013). It now "covers more than just those who were discriminated against based on myths or stereotypes." *Brasier*, 2023 WL 129534, at *5. When an employer bases an adverse action on a real or perceived impairment, "the employer regards the individual as disabled *whether or not myths, fears, or stereotypes about disability motivated the employer's decision*." 29 C.F.R. Pt. 1630, App. § 1630.2(l) (emphasis added). The cases on which Union Pacific relies are therefore no longer good law. *See Brown*, 711 F.3d at 888-89; *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898, 904 n.2 (8th Cir. 2010); *see also Neri*, 860 F. App'x at 564.

They're also distinguishable. They concern recommendations made by third-party doctors, not, as here, the employer's own doctor and ultimate decisionmaker. *See Kozisek v. Cty. of Seward*, 539 F.3d 930, 935 (8th Cir. 2008); *Pittari*, 468 F.3d at 1063. And as the district court correctly recognized, the jury had sufficient evidence to find that Dr. Charbonneau's decision *was* based on stereotypes and false assumptions about Sanders's conditions. App.1428; R. Doc. 172, at 5.

Finally, Union Pacific argues that it didn't regard Sanders as disabled by attempting to draw an artificial line between Sanders's impairments and his aerobic capacity. No jury would be required to accept that view. Union Pacific's concerns about Sanders were inextricably connected with his heart condition and other impairments. As Union Pacific itself observes, "Dr. Charbonneau told Sanders that the primary concern was his 'cardiac arrest and that the most recent exercise tolerance testing results showed that his aerobic capacity is inadequate for his job.'" App. Br. 20 (quoting Ex.20 at 1); *see* Ex.15; App.983-84; R. Doc. 165, at 35-36. Sanders likewise testified that Union Pacific told him he was being restricted because of his heart. App.742; R. Doc. 164, at 42.

The jury had sufficient evidence to conclude that Union Pacific regarded Sanders as disabled. *Lewis*, 934 F.3d at 1182.

B. Sanders Was Qualified.

Contrary to Union Pacific's claim, a reasonable jury could find that Sanders was qualified because he could perform his position's essential functions with or without a reasonable accommodation. 42 U.S.C. § 12111(8).

(1) Sanders's essential functions.

Essential functions are a job's fundamental duties, not its marginal ones. *Canny v. Dr. Pepper/Seven-Up Bottling Grp.*, 439 F.3d 894, 900 (8th Cir. 2006).

Union Pacific argues that heavy lifting in extreme weather was essential. But this task was marginal, not fundamental. As a foreman general, Sanders's role was primarily supervisory and administrative. App.648-49, 1113; R. Doc. 163, at 146-47; R. Doc. 165, at 165. Sanders worked in the field aiding distressed trains only occasionally. App.648, 715; R. Doc. 163, at 146; R. Doc. 164, at 15. He typically did so with a computer, and often he didn't do any work at all because the train crew or carmen fixed the problem. App.650-54; R. Doc. 163, at 148-52.

Union Pacific omits this evidence, presenting a counterfactual narrative that fails to describe the record "in the light most favorable to the verdict." *Baker v. John Morrell & Co.*, 382 F.3d 816, 819 (8th Cir. 2004); *Ludlow v. BNSF Ry.*, 788 F.3d 794, 797 (8th Cir. 2015). Union Pacific cites a job description, implying it was for Sanders's foreman-general position. It wasn't; it's for the *carman* job. Ex.102 at 1. There is no job description for the foreman-general position. App.1119-20; R. Doc. 165, at 171-72. And Sanders testified he didn't do carman work. App.679-80; R. Doc. 163, at 177-78. The jury could discount the job description and conclude that while the tasks on it may be fundamental for a carman, they'd be marginal for a supervisor like Sanders. *See Wal-Mart*, 38 F.4th at 656-57 (job description not dispositive); *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 989 (8th Cir. 2007) (supervisor position didn't require strenuous lifting because position had no lifting requirement or job description).

That Sanders occasionally lifted knuckles doesn't mean doing so was an essential function. He did this rarely—no more than "once a month." App.649, 1175-76; R. Doc. 163, at 147; R. Doc. 165, at 227-28. This is consistent with Union Pacific's witnesses' testimony. They agreed

that carman work wasn't a regular feature of the foreman-general position. App.611-13, 618-19, 634-35, 1119, 1143; R. Doc. 163, at 109-11, 116-17, 132-33; R. Doc. 165, at 171, 195. When employees rarely do a task, juries can find that it isn't essential. *Wal-Mart*, 38 F.4th at 658 (task done once or twice a month not essential); 29 C.F.R. § 1630.2(n)(3)(iii).

(2) Sanders could perform his job's essential functions with or without a reasonable accommodation.

Sanders could perform the essential functions of his job with or without a reasonable accommodation, for three reasons. Union Pacific says nothing about these reasons, waiving any argument about them. *United States v. Simmons*, 964 F.2d 763, 777 (8th Cir. 1992).

First, if the jury accepted Sanders's view of the job's essential functions, then it could find that he could do them *even with* Union Pacific's restrictions with an appropriate accommodation such as "[j]ob restructuring." *Benson v. Nw. Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995); 42 U.S.C. § 12112(B)(9). "Restructuring frequently involves reallocating the marginal"—i.e., non-essential—"functions of a job." *Benson*, 62 F.3d at 1112. Sanders showed that the functions Union Pacific contends were essential were in fact marginal and that he could do them by restructuring his job so that carmen or train crew members assisted

him on the rare occasions he did heavy lifting. *Supra* at 9; App.1175-76; R. Doc. 165, at 227-28.

Next, *even if* the jury agreed with Union Pacific about Sanders's essential functions, it could conclude that Sanders could do them without an accommodation if it found that Dr. Charbonneau's restrictions were inappropriate. *See Brasier*, 2023 WL 129534, at *6-8; *Melo v. City of Somerville*, 953 F.3d 165, 171-72 (1st Cir. 2020); *Nall v. BNSF Ry.*, 917 F.3d 335, 343-47 (5th Cir. 2019). The evidence showed just that. Sanders never had any difficulty doing his job, and Union Pacific agreed Sanders could do it if the restrictions weren't in place. App.1141-43; R. Doc. 165, at 194-96. Union Pacific ignored mounds of evidence showing Sanders's heart posed no risk and required no restrictions. *Supra* at 26-30. The restrictions were groundless for other reasons, too. The Bruce Protocol's results were inaccurate because Sanders's knee problems and blood-pressure medication interfered with his ability to take the treadmill test. App.768-71; R. Doc. 164, at 68-71; Ex.30 at 10-11, 26. Union Pacific knew this but disregarded it. *Supra* at 27-30. And there was no connection (1) between Sanders's score on the Bruce test and what his job required or (2) between that score and the restrictions that Union Pacific imposed.

Supra at 26-30. The evidence was more than sufficient to conclude that Union Pacific's restrictions weren't warranted.

Union Pacific's only other argument is that Sanders wasn't qualified because his physician, Dr. Buller, supposedly imposed a 50-pound lifting restriction. That's false: Dr. Buller did *not* impose restrictions; he made "suggestions," releasing Sanders to work "without restrictions." Ex.13. Union Pacific concedes that it didn't rely on these suggestions, never wavering from its position that Dr. Charbonneau's restrictions were its exclusive reason for prohibiting Sanders from returning to work. App.391; 1141-43; R. Doc. 118, at 15; R. Doc. 165, at 194-96. Union Pacific belatedly concocted the claim—that it *would have* restricted Sanders based on Dr. Buller's suggestions—in its trial brief. *See* R. Doc. 86, at 1-2. These sorts of "*post hoc* rationalization[s]" are "prohibited." *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 568, 570 (8th Cir. 2007) (citation omitted).

Finally, the jury could have found that Sanders could have done his job with a reasonable accommodation even if it accepted Union Pacific's view of the job's essential functions. Again, Union Pacific conceded that the only thing barring Sanders from returning to work was its

restrictions. App.1141-43; R. Doc. 165, at 194-96. Union Pacific could have accommodated Sanders by permitting him to take the bicycle test that he requested or by waiving any testing requirement, which would have enabled him to show that his heart and aerobic capacity didn't warrant restrictions. *Supra* at 29.

Any way you slice it, Sanders was qualified.

C. Union Pacific Refused to Let Sanders Return to Work Because of His Disabilities.

Union Pacific took an adverse action against Sanders "on the basis of disability." 42 U.S.C. § 12112(a). Union Pacific doesn't dispute that its refusal to return Sanders to work was an adverse action. App.1202; R. Doc. 165, at 254. The only issue is whether Union Pacific did this at least in part because of Sanders's disabilities. It did.

But-for "causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020); App.394-95; R. Doc. 118, at 18-19. "Often, events have multiple but-for causes." *Bostock*, 140 S. Ct. at 1739. "So long as the plaintiff's [disability] was one but-for cause of th[e employer's] decision, that is enough to trigger the law." *Id.*

The application of this test leads to a straightforward result: but for Sanders's disabilities, Union Pacific wouldn't have refused to permit Sanders to return to work.

Case law from this Court and others shows that when, as here, the employer bases the adverse action on the employee's disability, that is direct evidence of discrimination and renders the *McDonnell Douglas* framework inapplicable. This Court recognized long ago that disability cases fall into two categories—those in which the employer acknowledges relying on the disability in reaching its decision and those in which it doesn't. *Norcross v. Sneed*, 755 F.2d 113, 116 (8th Cir. 1985). *McDonnell Douglas* applies to the latter, but not the former. *Id.* at 116-17. Other courts have reached the same conclusion. *E.g.*, *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1189 (10th Cir. 2003); *Monette v. Elec. Data Sys.*, 90 F.3d 1173, 1178-81 (6th Cir. 1996). These decisions make sense. *McDonnell Douglas* is unnecessary when the employer acts based on disability because the facts that burden shifting is meant to uncover—whether the employer based its decision on a protected characteristic—aren't in dispute. *Barth v. Gelb*, 2 F.3d 1180, 1185-87 (D.C. Cir. 1993).

This case falls in the first bucket. In *Chalfant*, this Court held that sufficient evidence supported finding a "specific link" between the employee's disability and the employer's adverse action. 475 F.3d at 990-91. The employer acknowledged it acted because of the employee's disability: it told him and an administrative agency that it refused to hire him because he supposedly failed a physical exam. *Id.*

Little separates this case from *Chalfant*. Union Pacific told Sanders and the RRB that Sanders couldn't work because of his heart and other physical conditions after supposedly failing a fitness-for-duty exam. App.742, 983-84; R. Doc. 164, at 42; R. Doc. 165, at 35-36; Ex.15; Ex.20 at 1. Union Pacific expressly based its decision to restrict Sanders on these impairments after learning of them through communications with Sanders and a review of his medical records. App.944-45, 983-84; R. Doc. 164, at 243-44; R. Doc. 165, at 35-36; Ex.20 at 1-14. That is direct evidence of a specific link between Sanders's disabilities and Union Pacific's action: but for the former, Union Pacific wouldn't have done the latter.

Additional evidence confirms that Union Pacific acted because of Sanders's disabilities. Union Pacific's refusal to accommodate Sanders

and engage in the interactive process shows that Union Pacific's proffered explanations are pretexts for discrimination. *See Finan*, 565 F.3d at 1079-80; *Kells v. Sinclair-Buick-GMC Truck,* 210 F.3d 827, 834 (8th Cir. 2000). Union Pacific refused Sanders's pleas to take a bike test. Union Pacific's complete disregard of Sanders's explanation that he stopped the treadmill test because of his knees, rather than his heart, likewise supports a pretext finding. When, as here, an employer ignores evidence of an employee's abilities and physical condition, juries may doubt the veracity of the employer's explanation and conclude that the employee's disability was the real reason for the employer's action. *Nall*, 917 F.3d at 346-48; *Holiday v. City of Chattanooga*, 206 F.3d 637, 646-47 (6th Cir. 2000).

Union Pacific contends it acted because of safety concerns, not Sanders's disabilities. The jury had ample reason to disagree. Union Pacific repeatedly shifted justifications and moved the goalposts. *Supra* at 13-15, 20. Its personnel ignored Sanders, dragged out the process, and made the experience as burdensome as possible. *Supra* at 13-14. It imposed requirements on Sanders that don't apply to other workers in his position. *Supra* at 16-17, 20-21. And it engaged in a fitness-for-duty

process that was so deficient—and so disconnected from Sanders's job—that it appeared like Union Pacific was "look[ing] for excuses to get [Sanders] fired." App.780; R. Doc. 164, at 80. These are all classic hallmarks of pretext. The jury could discredit Union Pacific's claim that safety was the sole reason—or any reason at all—for terminating Sanders. *See Nall*, 917 F.3d at 348.

Even assuming Union Pacific's safety concerns were real, they weren't unrelated to Sanders's impairments; they were *about* them. *See id.*; 29 C.F.R. Pt. 1630, App. § 1630.2(l) (angina example). And even if these concerns could be divorced from Sanders's impairments, it isn't enough for Union Pacific to merely identify neutral motives. It must show that Sanders's disability wasn't *even one* but-for cause. *Bostock*, 140 S. Ct. at 1739. Even if the jury agreed that Union Pacific restricted Sanders in part because of safety concerns, and even assuming that would count as a neutral explanation, the jury could have reasonably concluded that Union Pacific's decision was *also* motivated by Sanders's disabilities. *See Gruttemeyer*, 31 F.4th at 647-48.

Union Pacific argues that its decision deserves deference because its doctor made it. This is a non-sequitur. The argument is premised on

the theory that safety was Union Pacific's sole—and real—reason for restricting Sanders. The jury wasn't required to believe that. Neither was the jury compelled to find Dr. Charbonneau credible. And even if doctors' decisions were entitled to some deference, Union Pacific acknowledges that such deference would be warranted only when their decisions are reasonable and made in good faith. App. Br. at 50-51. Dr. Charbonneau's decision doesn't meet this test. *See Holiday*, 206 F.3d at 645-46. As Dr. Trangle explained, no reasonable doctor would have done what Dr. Charbonneau did. App.840; R. Doc. 164, at 140.

The record supports a finding that Union Pacific restricted Sanders because of his disabilities.

III. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT UNION PACIFIC FAILED TO ACCOMMODATE SANDERS.

The evidence also shows that Union Pacific failed to accommodate Sanders.

Failure-to-accommodate claims generally require proof of four things:

> (1) the employer knew that the employee was disabled; (2) the employee requested an accommodation; (3) the employer failed to engage in a flexible and informal interactive process with the employee about possible accommodations; and (4) the

> employee's disability could have been reasonably accommodated had the interactive process taken place.

Garrison v. Dolgencorp, LLC, 939 F.3d 937, 941 (8th Cir. 2019) (cleaned up). Employees need not prove discriminatory intent. *Withers v. Johnson*, 763 F.3d 998, 1003 (8th Cir. 2014). Nor must they request an accommodation when doing so would be futile. *Davoll v. Webb,* 194 F.3d 1116, 1132-33 (10th Cir. 1999).

A. Union Pacific Knew Sanders Was Disabled.

Sanders was disabled and Union Pacific knew about his disabling conditions. *Supra* at 33-42; *Gruttemeyer*, 31 F.4th at 647; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999).

B. Sanders Requested an Accommodation; Requesting Additional Accommodations Would Have Been Futile.

Sanders asked Dr. Charbonneau to modify the Bruce-Protocol examination by allowing him to take a test on a bicycle instead of a treadmill. App.1173; R. Doc. 165 at 671. That was a request for an accommodation. *See EEOC v. Convergys Customer Mgmt. Grp.*, 491 F.3d 790, 795 (8th Cir. 2007); *Fjellestad*, 188 F.3d at 952 n.5 (requests not required to use magic words or be in writing); 42 U.S.C. 12111(9)(B).

Union Pacific's only argument in response seems to be that Sanders waived his claim that he requested a bike test as an accommodation

because he supposedly never asserted this until trial. That misrepresents the record. Sanders requested the bike test the day after Union Pacific imposed restrictions on him. App.667; R. Doc. 163, at 165. The summary-judgment proceedings likewise included discussion about whether Union Pacific should have permitted Sanders to take a bicycle test. R. Doc. 41, at 18-19.

Requesting additional accommodations would have been futile. After Union Pacific sent Sanders a letter imposing restrictions and expressly stating that he couldn't be accommodated, Sanders asked Dr. Charbonneau to let him take a bicycle test. Ex.16; Ex.20 at 1-2; App.1173; R. Doc. 165 at 671. Dr. Charbonneau refused. App.1173; R. Doc. 165 at 671. It would have been futile for Sanders to request *additional* accommodations. *Davoll*, 194 F.3d at 1132-33. The jury received a futility instruction—an instruction Union Pacific doesn't challenge here—and the district court identified futility as an independent ground for denying Union Pacific's motion for judgment as a matter of law. App.404, 1430; R. Doc. 118, at 28; R. Doc. 172, at 8. Union Pacific says nothing about futility, waiving any argument about the issue. *Simmons*, 964 F.2d at 777.

C. Union Pacific Failed to Engage in an Interactive Process.

Employers and employees must engage in an "interactive process" to determine necessary accommodations. *Peyton v. Fred's Stores of Ark.*, 561 F.3d 900, 902 (8th Cir. 2009). Union Pacific didn't do so. Union Pacific never mentions the interactive-process requirement or argues that it engaged in any such process, waiving any argument on this issue, too. *Simmons*, 964 F.2d at 777.

Once Sanders asked for a bike test, Union Pacific had to "take some initiative and identify a reasonable accommodation." *Garrison*, 939 F.3d at 942 (citation omitted). Union Pacific didn't: it refused to permit any such test and never explored other accommodations. That is not engaging in an interactive process. *See Garrison*, 939 F.3d at 942; *Convergys*, 491 F.3d at 795; *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1061-62 (7th Cir. 2014). Union Pacific's failure also supports finding futility and bad faith. App.1430; R. Doc. 172, at 7; *Fjellestad*, 188 F.3d at 952.

D. Union Pacific Could Have Accommodated Sanders.

Finally, Union Pacific could have provided Sanders with reasonable testing accommodations or on-the-job accommodations. It didn't.

Start with the tests. Reasonable accommodations include "appropriate adjustment or modifications of examinations." 42 U.S.C. § 12111(9)(B). Tests must be given "in formats that do not require the use [an] impaired skill." 29 C.F.R. Pt. 1630, App. § 1630.11; 29 C.F.R. § 1630.11.

Modifying the Bruce test by permitting Sanders to take it on a bicycle instead of a treadmill would have been a reasonable accommodation. Both tests measure heart functioning and aerobic capacity, but only one of them—the bicycle test—could have done so without taxing Sanders's impaired knees. App.773-74, 1101; R. Doc. 164, at 73-74; Union Pacific doesn't dispute this. App.986-88; R. Doc. 165, at 38-40. Its admission that Sanders could have taken the test on a bike is powerful evidence that this accommodation was reasonable. *Id.*; *Garrison*, 939 F.3d at 942.

Union Pacific's only response is that the evidence is insufficient to show that Sanders could have "passed" a different test. That's incorrect. Extensive testing had already shown that Sanders's cardiovascular functioning was within normal range. *Supra* at 27-28. Sanders also engaged in strenuous physical activity while working on his ranch. R.

Doc. 164, at 724-25. A reasonable jury could find that Sanders could have passed a bike test. *See Chalfant*, 475 F.3d at 990.

Union Pacific also could have made changes to Sanders's job to accommodate him. App.1429; R. Doc. 172, at 7. Union Pacific says nothing about these accommodations, waiving any argument about them. *Simmons*, 964 F.2d at 777.

That's significant because the jury could have found for Sanders *even if* it accepted Union Pacific's theory that he required restrictions. These restrictions wouldn't have affected his ability to perform his job's essential functions, and small changes to his job could have been made to accommodate any restrictions. *Supra* at 42-47.

The jury had still another path to find in Sanders's favor—another path that Union Pacific says nothing about. When an employee could perform the essential functions of his position with a reasonable accommodation, and the employer's failure to engage in the interactive process prevented the identification of a reasonable accommodation, the employer may be liable for failing to provide an accommodation. *Spurling*, 739 F.3d at 1062; *Fjellestad*, 188 F.3d at 952-54. That's what happened here.

Sufficient evidence supports the jury's finding that Union Pacific failed to accommodate Sanders.

IV. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT SANDERS WAS NOT A DIRECT THREAT.

The jury also reasonably found that Sanders wasn't a direct threat and that any risk he posed could be reduced with a reasonable accommodation.

A. Legal Principles.

Employers may avoid liability if they prove that a disabled employee was a "direct threat." 42 U.S.C. §§ 12111(3), 12113(b). Because this "is an affirmative defense," "the employer bears the burden of proof." *Wal-Mart*, 477 F.3d at 571.

Employers must prove two things: (1) the employee poses a significant risk of substantial harm, *and* (2) the risk cannot be eliminated by reasonable accommodation. *Wal-Mart*, 477 F.3d 571-72; 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r). "The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job.'" *Chevron*

U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 (2002) (quoting 29 C.F.R. § 1630.2(r)).

Union Pacific contends that the jury decides only whether the employer's direct-threat assessment was objectively reasonable. That's wrong. In *Wal-Mart*, this Court didn't ask whether the employer's justification was objectively reasonable; it analyzed whether the employee posed a significant safety risk and whether this could be mitigated with an accommodation. 477 F.3d at 571-72. That approach accords with other circuits' direct-threat jurisprudence. *See Stragapede v. City of Evanston*, 865 F.3d 861, 866-67 (7th Cir. 2017); *Branham v. Snow*, 392 F.3d 896, 907-09 (7th Cir. 2004). More importantly, this Court's jurisprudence aligns with the text of the ADA and its regulations. *See* 29 U.S.C. § 12111(3); 29 § C.F.R. § 1630.2(r). Nothing in either supports the interpretation that the jury decides only whether the employer was objectively reasonable in making its decision.

B. Sanders Was Not a Direct Threat.

The evidence supports the jury's verdict under any standard.

Juries may find that a direct-threat assessment was neither individualized nor based on the best evidence when circumstances like

those in this case are present. They may do so, for instance, when employers apply the wrong medical standard or use the wrong tests. *See, e.g.*, *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1028-29, 1031-32 (9th Cir. 2003); *Brasier*, 2023 WL 129534, at *8-11. That's what Union Pacific did here. Dr. Trangle explained that it was unreasonable to require Sanders to take a Bruce test. App.768-69; R. Doc. 164, at 68-69. Worse yet, the treadmill test results were inaccurate and unreliable because Sanders's knee problems and blood-pressure medication negatively impacted his ability to take the test. App.769-71; R. Doc. 164, at 69-71; Ex.30 at 10-11, 26. *Even had* the test produced a valid result reflecting a heart problem, it wouldn't have justified imposing lifting or temperature restrictions. App.772, 781-82; R. Doc. 164, at 72, 81-82. Different tests, such as a field test or a functional-capacity evaluation, were necessary to reach those conclusions. *Id.* Nor did Union Pacific even attempt to determine how much aerobic capacity or METs were required to do Sanders's job, App.977-79; R. Doc. 165, at 475-77; had it done so, it would have discovered that there was no connection between its 10-METs requirement and Sanders's job. App.767-68; R. Doc. 164, at 67-68.

Juries also may reject the defense when employers intentionally disregard the best available evidence and unreasonably apply their medical judgments to the workplace. *See Nall*, 917 F.3d at 345-47; *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008); *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007). That, again, is what Union Pacific did. Every disinterested doctor and every medical test confirmed that Sanders's heart and other conditions didn't warrant restrictions. *Supra* at 27-28. Union Pacific ignored them. Worse, even though Sanders told Union Pacific that he stopped the treadmill test due to knee fatigue, Dr. Charbonneau ignored that as well and concluded that Sanders's test result unambiguously ruled out "orthopedic concerns." Ex.20 at 1-2. This was the definition of unreasonable. App.840; R. Doc. 164, at 140; Ex.30 at 9-10. Dr. Trangle, Dr. Nicholas, and Union Pacific's *own expert* all agreed that "fatigue" didn't mean the test was stopped because of Sanders's heart. App.774, 1099; R. Doc. 164, at 74; R. Doc. 165, at 151; Ex.30 at 9-10.

Dr. Charbonneau didn't talk to Sanders or examine him. *Supra* at 29. He didn't call Sanders's doctors. *Id.* He imposed lifting and environmental restrictions with no connection either to Sanders's job or

his results on the Bruce test. *Supra* at 29-30. Far from looking for the best available evidence, Dr. Charbonneau looked only for "excuses to get [Sanders] fired." App.780; R. Doc. 164, at 80.

Juries also may find for the employee when the employer doesn't consider "an employee's past work history." *Echazabal*, 336 F.3d at 1032. Union Pacific didn't do that either. Dr. Charbonneau didn't consider Sanders's work. App.977-79; R. Doc. 165, at 475-77. The Union Pacific employee who decided whether the restrictions prohibited Sanders from doing his job never met or spoke with Sanders, reviewed his work history, asked Union Pacific's medical department what the restrictions meant, or received training on what a reasonable accommodation involved. App.1146-57; R. Doc. 165, at 198-209. Given the extraordinary disconnect between the Bruce test, Sanders's job duties, and the restrictions imposed, it's no wonder that the jury found in Sanders's favor.

The remaining direct-threat factors support the jury's verdict, too. 29 C.F.R. § 1630.2(r). The jury could find that "the duration of any risk would not be significant." *Branham*, 392 F.3d at 907. Sanders showed that it would be nonexistent. The jury could also conclude that Union Pacific didn't properly assess the nature or severity of any harm because

Dr. Charbonneau applied the wrong standards and rejected what Sanders told him. *Echazabal*, 336 F.3d at 1031-32. Finally, the jury could find that no harm was likely or imminent. Sanders showed that any concerns stemming from his cardiac arrest had resolved, and that his heart posed no greater risk than before his hospitalization. *Brasier*, 2023 WL 129534, at *10; *Echazabal*, 336 F.3d at 1032.

Union Pacific contends that its assessment of Sanders was individualized because Dr. Charbonneau reviewed Sanders's medical records. The jury was not required to agree. "[A] proper evaluation of [Sanders's] risk would have taken into account numerous factors" that Union Pacific ignored and outright rejected. *Brasier*, 2023 WL 129534, at *10. The evidence showed that "Union Pacific refused to listen to Sanders, refused to listen to his doctors, refused to call his doctors, refused to examine him…, and refused to authorize an alternative to the Bruce Protocol test." App.1430; R. Doc. 172, at 7. A jury could have found that Union Pacific's assessment was neither individualized nor objectively reasonable.

Union Pacific leans on *Sutherland v. Edison Chouest Offshore, Inc.*, 2020 WL 5436654 (E.D. La. Sept. 10, 2020), but *Sutherland* is

distinguishable. There, unlike here, the employer based its determination on the employee's essential functions; those functions included "[s]ufficient exercise capacity," "constant walking[,] and medium to heavy labor;" the employee didn't contest that his heart conditions presented a safety risk; and the employer didn't disregard the employee's reason for stopping the test or bar him from taking an alternative test. *Id.* at *7-11.

In the end, Union Pacific's argument again boils down to a plea for deference. But employers receive "no special deference simply because" they rely on "health care professionals." *Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998). A company's "reliance on the advice of its own doctors" doesn't by itself constitute "a legally sufficient 'individualized assessment.'" *Echazabal*, 336 F.3d at 1028; *see Nall*, 917 F.3d at 345.

Courts consistently hold that employers may fail to prove a direct-threat defense even when they rely on medical evidence. *E.g.*, *Nall*, 917 F.3d at 343, 347; *Justice*, 527 F.3d at 1091-92; *Echazabal*, 336 F.3d at 1027-32; *Stragapede*, 865 F.3d at 867. This doesn't entail second-guessing or nitpicking employers' medical judgments, as Union Pacific contends. *Justice*, 527 F.3d at 1092 n.5. It simply requires reviewing those

judgments against the evidence—an assessment the ADA entrusts to juries. *Id.* The jury did that and properly found in Sanders's favor.

C. Union Pacific Failed to Argue or Show that Any Risk Sanders Posed Could Not Be Mitigated With a Reasonable Accommodation.

Union Pacific doesn't argue that any risk Sanders posed could not be reduced by a reasonable accommodation—one of the two elements of the direct-threat defense. *Wal-Mart*, 477 F.3d at 571-72; 42 U.S.C. 12111(3).

Union Pacific has never argued—not to the district court, App.1063, 1206; R. Doc. 165, at 561, 704; R. Doc. 125, at 21-28; or to this one, App. Br. at 52-62—that any risk Sanders posed could not be reduced by reasonable accommodation. Union Pacific has therefore waived the issue. *Nassar*, 779 F.3d at 551; *Simmons*, 964 F.2d at 777. Union Pacific cannot prevail as a matter of law where it bears the burden of proof and fails to address an essential element of its defense.

Union Pacific's arguments on Sanders's standalone failure-to-accommodate claim don't preserve an argument on this element. They don't address whether a reasonable accommodation could eliminate the alleged risks Sanders posed or address on-the-job accommodations at all.

The outcome wouldn't be different even had Union Pacific preserved the issue. The evidence shows that Union Pacific failed to provide a reasonable accommodation either in the form of an alternative test or by changing non-essential features of Sanders's job. The same evidence shows that these accommodations would have mitigated any supposed risk. *See Wal-Mart*, 477 F.3d at 571-72.

CONCLUSION

The district court's judgment should be affirmed.

Dated: April 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS, AND VIRUS-SCANNING REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i), because the brief contains 12,995 words as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: April 3, 2023

s/ Adam W. Hansen
Adam W. Hansen

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April, 2023, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's CM/ECF system, and that such electronic filing automatically generates a Notice of Docket Activity constituting service. I certify that all participants in the case are registered CM/ECF filing users and that service will be accomplished by the CM/ECF system.

I further certify that I will submit ten paper copies of the foregoing brief to the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit and one paper copy to counsel of record for Appellant, and that the paper copies of the brief will be identical to the version submitted electronically to this Court.

Dated: April 3, 2023

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